

YEARBOOK

Volume XLIII: 2012



UNITED NATIONS

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW

YEARBOOK

Volume XLIII: 2012



UNITED NATIONS
New York, 2015

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.

A/CN.9/SER.A/2012

UNITED NATIONS PUBLICATION

Sales No. E.15.V.5

ISBN 978-92-1-133840-9

eISBN 978-92-1-057484-6

ISSN 0251-4265

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Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

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INTRODUCTION

This is the forty-third volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).¹

The present volume consists of three parts. Part one contains the Commission's report on the work of its forty-fifth session, which was held in New York, from 25 June-6 July 2012, 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-fifth 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-fifth 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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¹ 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

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No. or document symbol</i>
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
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

Part One

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

THE FORTY-FIFTH SESSION (2012)

A. Report of the United Nations Commission on International Trade Law on its forty-fifth session (New York, 25 June-6 July 2012) (A/67/17)

[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-fifth session of the Commission, held in New York from 25 June to 6 July 2012.

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-fifth session of the Commission was opened by the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, Patricia O’Brien, on 25 June 2012.

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 Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 22 May 2007, on 3 November 2009 and on 15 April 2010, 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:¹ Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Bahrain (2013), Benin (2013), Bolivia (Plurinational State of) (2013), Botswana (2016), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Croatia (2016), Czech Republic (2013), Egypt (2013), El Salvador (2013), Fiji (2016), France (2013), Gabon (2016), Georgia (2015), Germany (2013), Greece (2013), Honduras (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Jordan (2016), Kenya (2016), Latvia (2013), Malaysia (2013), Malta (2013), Mauritius (2016), Mexico (2013), Morocco (2013), Namibia (2013), Nigeria (2016), Norway (2013), Pakistan (2016), Paraguay (2016), Philippines (2016), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

5. With the exception of Australia, Bahrain, Bolivia (Plurinational State of), Botswana, Bulgaria, Egypt, Gabon, Greece, Jordan, Latvia, Malaysia, Malta, Mauritius, Namibia, Paraguay, South Africa, Sri Lanka, Ukraine and the United Kingdom, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Belarus, Comoros, Cuba, Cyprus, Ecuador, Finland, Guatemala, Indonesia, Kuwait, Netherlands, Panama, Poland, Qatar, Romania, Sweden and Switzerland.

7. The session was also attended by observers from the Holy See and the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Development Programme (UNDP) and the World Bank;

(b) *Intergovernmental organizations*: Central American Court of Justice, International Development Law Organization (IDLO), International Institute for the Unification of Private Law (Unidroit) and the World Customs Organization;

¹ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 30 were elected by the Assembly on 22 May 2007 (decision 61/417), 28 were elected by the Assembly on 3 November 2009, and two were elected by the Assembly on 15 April 2010. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election. The following six States members elected by the Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

(c) *Invited non-governmental organizations*: American Bar Association (ABA), Association droit et méditerranée (Jurimed), Centre for International Legal Studies, Commercial Finance Association, Corporate Counsel International Arbitration Group, European Law Students' Association, Forum for International Conciliation and Arbitration, International Bar Association, International Chamber of Commerce (ICC), International Insolvency Institute, International Law Institute (ILI), Milan Club of Arbitrators, Moot Alumni Association, New York City Bar Association, New York State Bar Association and Vale Columbia Centre on Sustainable International Investment.

9. The Commission welcomed the participation of international non-governmental organizations with expertise in the topics comprising 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*: Hrvoje Sikirić (Croatia)
- Vice-Chairs*: Rosario Elena A. Laborte-Cuevas (Philippines)
Jorge Roberto Maradiaga M. (Honduras)
Tore Wiwen-Nilsson (Sweden) (elected in his personal capacity)
- Rapporteur*: Agasha Mugasha (Uganda)

D. Agenda

11. The agenda of the session, as adopted by the Commission at its 943rd meeting, on 25 June 2012, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement.
5. Finalization and adoption of the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010.
6. Arbitration and conciliation: progress report of Working Group II.
7. Online dispute resolution: progress report of Working Group III.
8. Electronic commerce: progress report of Working Group IV.
9. Insolvency law: progress report of Working Group V.

10. Security interests: progress report of Working Group VI.
11. Possible future work in the area of public procurement and related areas.
12. Possible future work in the area of microfinance.
13. Possible future work by UNCITRAL in the area of international contract law.
14. Preparation of a guide on the New York Convention.
15. Endorsement of texts of other organizations.
16. Technical assistance to law reform.
17. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts.
18. Status and promotion of UNCITRAL legal texts.
19. Coordination and cooperation:
 - (a) General;
 - (b) Coordination 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.
20. UNCITRAL regional presence.
21. Role of UNCITRAL in promoting the rule of law at the national and international levels.
22. Strategic planning.
23. International commercial arbitration moot competitions.
24. Relevant General Assembly resolutions.
25. Other business.
26. Date and place of future meetings.
27. Adoption of the report of the Commission.

E. Adoption of the report

12. At its 948th and 949th meetings, on 27 and 28 June 2012, and at its 956th and 957th meetings, on 6 July 2012, the Commission adopted the present report by consensus.

III. Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement

13. The Commission had before it at the current session: (a) the report of Working Group I (Procurement) on the work of its twenty-first session (A/CN.9/745); (b) a note by the Secretariat introducing a proposal for a chapter in a draft Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/754 and Add.1-3); and (c) a note by the Secretariat introducing a proposal for a Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.79 and Add.1-19).

A. Consideration of proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement

14. The Commission first took up those parts of the draft Guide to Enactment of the UNCITRAL Model Law on Public Procurement which Working Group I (Procurement) had not considered in detail at its twenty-first session, held in New York from 16 to 20 April 2012: chapter II of document A/CN.9/WG.I/WP.79; documents A/CN.9/WG.I/WP.79/Add.1 and 2; sections A-C of document A/CN.9/WG.I/WP.79/Add.7; paragraphs 1 to 5 of document A/CN.9/WG.I/WP.79/Add.8; section A of documents A/CN.9/WG.I/WP.79/Add.9, 10, 13 and 15; and documents A/CN.9/754 and Add.1-3 and A/CN.9/WG.I/WP.79/Add.18.

15. The Commission requested the Secretariat to ensure consistent references to “suppliers or contractors” throughout the Guide.

16. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79 as amended by the Working Group at its twenty-first session (A/CN.9/745, para. 14).

17. The Commission agreed to add a discussion of collusion in document A/CN.9/WG.I/WP.79/Add.2, either in or after paragraph 19 or in subsection 5, on promoting the integrity of, and fairness and public confidence in, the procurement process (i.e. objective (e) in the preamble to the 2011 UNCITRAL Model Law on Public Procurement).² The understanding was that, regardless of where the discussion of collusion appeared in the final text, cross-references would be included throughout the Guide to make it clear that the problem of collusion was relevant to not only competition in, but also the integrity of, the procurement process. It was agreed that the discussion of collusion should include the following elements: (a) collusion occurs where two or more suppliers or contractors, or one or more supplier(s) or contractor(s) and the procuring entity, work in tandem to manipulate the market in a way detrimental to obtaining an optimal outcome in the given procurement; (b) the manipulation might affect the price, keeping it artificially high, or other elements of a submission (such as the quality offered); alternatively, it could involve an agreement to share the market by artificially inflating prices or artificially distorting other elements of a submission, or an

² *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), annex I.*

agreement not to present submissions or otherwise to distort fair competition; (c) collusion would probably violate the law of the State; (d) collusion involved the intention of the parties concerned to collude; and (e) the complicity of representatives of the procuring entity in collusion was not uncommon. In the text, it would also be noted that, although the absence of real competition was a consequence of collusion, the absence of competition could also result from other reasons, e.g. the absence of expertise on the suppliers' side or the ignorance of suppliers about procurement opportunities, and that an apparently competitive procedure might have involved limited collusion between some participants. Thus, it was concluded, there was no automatic link between the extent of competition and collusion.

18. It was recalled that the Working Group had decided not to include a glossary as part of the Guide (A/CN.9/745, para. 36). It was therefore understood that references to the glossary as an annex to the Guide would be deleted.

19. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.2 as amended by the Commission at the present session (see paras. 17 and 18 above) and by the Working Group at its twenty-first session (A/CN.9/745, para. 16).

20. The Commission considered the amendment proposed by the Working Group to paragraph 11 of document A/CN.9/WG.I/WP.79/Add.10 (A/CN.9/745, para. 24 (a)). Objection was raised to adding text to the draft Guide that referred to reluctance to participate in request for proposals with dialogue proceedings because of elevated risks of corruption. In response to suggestions to refer in that paragraph instead to difficulties with the use of that method in situations in which the procuring entity lacked experience and expertise to handle competitive negotiations, it was argued that experience and expertise could not be gained unless that method was used (and that new procurement methods had indeed been implemented with positive results). The Commission agreed to leave paragraph 11 unchanged and to replace in paragraph 12 the phrase "capacity to negotiate" with the phrase "capability or skills to negotiate." The Commission also agreed that the term "capacity" should be reviewed where it was used in a similar context elsewhere in the draft Guide.

21. With reference to paragraph 18 of document A/CN.9/WG.I/WP.79/Add.10 as amended by the Working Group at its twenty-first session (A/CN.9/745, para. 24 (c)), the Commission agreed that the term "probity officers" should not appear in the text of the Guide.

22. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.10 as amended by the Commission at the present session (see paras. 20 and 21 above) and by the Working Group at its twenty-first session (A/CN.9/745, para. 24 (b) and (c)).

23. With reference to paragraph 18 of document A/CN.9/WG.I/WP.79/Add.13, the Commission agreed that a better balance of the benefits and disadvantages of involving third-party agencies in setting up and administering electronic reverse auctions was required. Accordingly, a consideration of the potential benefits of using third parties in electronic reverse auctions would be included, analogous to the discussion in subparagraph (4) (a) of document A/CN.9/WG.I/WP.79/Add.15 of the potential advantages of administrative efficiency and the discussion in

subparagraphs (4) (g) and (i) of that document of using centralized purchasing agencies to operate framework agreements. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.13 as amended by the Commission at the present session and by the Working Group at its twenty-first session (A/CN.9/745, para. 27).

24. With reference to paragraph 6 of document A/CN.9/WG.I/WP.79/Add.15, the Commission agreed to include a discussion of possible additional barriers to access to the public procurement market by small and medium enterprises, particularly where framework agreements were used in combination with electronic tools. The Secretariat was requested to avoid repetition with paragraph 18 of document A/CN.9/WG.I/WP.79/Add.15 in that regard and to ensure that the elements of the discussion were appropriately located in the commentary on enactment policy issues and in the commentary on issues of implementation and use. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.15 as amended by the Commission at the present session and by the Working Group at its twenty-first session (A/CN.9/745, para. 29).

25. The Commission agreed to replace the word “thereafter” in paragraph 23 of document A/CN.9/WG.I/WP.79/Add.18 with the phrase “after contract formation”, and to replace the phrase “where there is a possibility that corrective action might mean undoing steps taken and wasting costs” in paragraph 30 of the same document with a reference to risking wasting time and probably costs, along the lines set out in paragraph 32 of that document. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.18 as amended by the Commission at the present session and by the Working Group at its twenty-first session (A/CN.9/745, para. 32).

26. With reference to document A/CN.9/754, the Commission requested the Secretariat: to reflect in paragraph 16 the discussion in the Working Group at its twenty-first session of the use of the terms “available” and “accessible” (A/CN.9/745, para. 17 (b)); to make clear in the third sentence of paragraph 35 that the relevant part of the record would not be available to suppliers or contractors that had been disqualified as a result of pre-qualification proceedings; to align paragraph 57 with paragraph 24 of document A/CN.9/754/Add.1; and to rephrase footnote 2 and that part of the draft Guide contained in document A/CN.9/754 and Add.1-3 to use the past tense to refer to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services³ and the present tense to refer to the 2011 Model Law and reflect the content of footnote 2 in the text of the Guide.

27. With reference to paragraph 5 of document A/CN.9/754/Add.2, the Commission agreed to reflect, in the commentary to articles 34 and 46 of the 2011 Model Law, that there might be a risk of inadequate or distorted competition if the procuring entity did not select the suppliers or contractors from which to request quotations appropriately, for example if it requested quotations from suppliers or contractors belonging to a corporate group or that were otherwise under some form of common financial or managerial control.

³ Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

28. The Commission instructed the Secretariat to ensure consistency in the discussion of similar issues and to ensure that their relative emphasis also remained consistent throughout part III of the Guide. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/754 and Add.1-3, as amended by the Commission at the present session (see paras. 26-28 above).

29. The Commission then considered the parts of the draft Guide that the Working Group had discussed at its twenty-first session: documents A/CN.9/WG.I/WP.79/Add.3-6; section D of document A/CN.9/WG.I/WP.79/Add.7; paragraphs 6-46 of document A/CN.9/WG.I/WP.79/Add.8; section B of documents A/CN.9/WG.I/WP.79/Add.9 and 10, A/CN.9/WG.I/WP.79/Add.13 and A/CN.9/WG.I/WP.79/Add.15; and documents A/CN.9/WG.I/WP.79/Add.11 and 12, A/CN.9/WG.I/WP.79/Add.14, A/CN.9/WG.I/WP.79/Add.16 and 17 and A/CN.9/WG.I/WP.79/Add.19.

30. With reference to document A/CN.9/WG.I/WP.79/Add.3, the Commission agreed:

- (a) To move the reference to Security Council measures and regimes from paragraph 9 to the commentary to article 3 and ensure that the obligations under such measures and regimes were also noted in the commentary to article 8;
- (b) To add a reference to international agreements in the last sentence of paragraph 15;
- (c) To delete the second sentence in paragraph 24;
- (d) To avoid the use of the word “author” when amending paragraph 29 in accordance with the instructions of the Working Group (A/CN.9/745, para. 17 (b));
- (e) To delete the reference to “lobbying” in paragraph 39;
- (f) To delete the words “such as tender securities” from the last sentence of paragraph 42.

31. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.3 as amended by the Commission at the present session (see para. 30 above) and by the Working Group at its twenty-first session (A/CN.9/745, para. 17). The Commission also confirmed the importance of the Guide’s discussion on adapting the 2011 Model Law to suit local circumstances.

32. With reference to document A/CN.9/WG.I/WP.79/Add.4, the Commission agreed:

- (a) To rephrase paragraph 9 along the following lines: “The purpose of article 8 is to provide for the full, unrestricted and international participation in public procurement. The article also sets out the limited situations in which the procuring entity may restrict the participation of certain categories of suppliers or contractors in procurement proceedings, including [cross-refer to the relevant commentary addressing sanctions or anti-terrorism measures under article 3, and implementation of socioeconomic policies]. Any such restriction of participation of suppliers or contractors in procurement proceedings risks violating free-trade commitments by States under relevant international instruments, such as the World Trade Organization’s Agreement on Government Procurement. Paragraphs (3) to (5) of the article provide procedural safeguards when any such restriction is imposed.”;

(b) To explain at the end of paragraph 17 that unnecessary requirements should not be imposed with a view to distorting or restricting international participation, and to include examples, such as (i) local requirements for foreign entities to establish a local presence as a precondition for participation in procurement proceedings, or (ii) unnecessary tax requirements;

(c) To ensure consistency in the discussion of the concepts of “misrepresentation” and “materiality” throughout the Guide.

33. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.4 as amended by the Commission at the present session (see para. 32 above) and by the Working Group at its twenty-first session (A/CN.9/745, para. 18).

34. With reference to paragraph 30 of document A/CN.9/WG.I/WP.79/Add.5 and paragraph 19 (j) of the report of the Working Group on the work of its twenty-first session (A/CN.9/745), the Commission agreed to, when implementing the recommendations of the Working Group, provide a balanced commentary on the use of tender securities and not to refer to small and medium-sized enterprises specifically. Instead, the Guide would state clearly that requiring a tender security should not be considered the norm and that the procuring entity should consider all the implications of requiring tender securities (positive and negative) “on a case-by-case basis” prior to deciding whether to impose such a requirement. It was emphasized that the Guide should make it clear that the reference to on a case-by-case basis indicated differences in situations, rather than in practices among jurisdictions. It was further emphasized that one of the purposes of a tender security — to relieve concerns of the procuring entity as regards the qualifications and capacities of suppliers or contractors in the procurement proceedings — should not be overlooked in the commentary to article 17 of the 2011 Model Law.

35. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.5 as amended by the Commission at the present session (see para. 34 above) and by the Working Group at its twenty-first session (A/CN.9/745, para. 19).

36. With reference to the commentary to article 20 in document A/CN.9/WG.I/WP.79/Add.6, concerns were expressed as regards the use of the phrases “justify the price submitted” and “justification procedure”. The suggestion was made to replace paragraph 6 of that document with the following text: “First, a written request for clarification must be made to the supplier or contractor concerned. The request should ask the supplier or contractor to clarify the basis upon which the price was determined and confirm such additional elements in this respect, to allow the procuring entity to conclude whether the supplier or contractor will be able to perform the procurement contract for the price submitted.” Concerns were expressed that the suggested wording might indicate that the information sought could include information on costs, contrary to the thrust of the subsequent paragraphs of the draft Guide as amended by the Working Group at its twenty-first session (A/CN.9/745, para. 20). The Commission instructed the Secretariat to revise the commentary to article 20 to include the principles of the suggested addition, but without implying that information on costs could be sought.

37. The Commission agreed to replace the words “provide an exhaustive list of grounds” with the words “provide the grounds under the Model Law” in

paragraph 14 of document A/CN.9/WG.I/WP.79/Add.6 and to delete the cross-reference to the World Bank debarment system in paragraph 48 of the same document.

38. The Commission agreed to revise paragraph 18 of document A/CN.9/WG.I/WP.79/Add.6 to state expressly that there was no requirement under the 2011 Model Law to have definitions of conflicts of interest or unfair competitive advantage; if, however, the State considered defining those concepts, it might wish to take into consideration the issues raised in paragraph 20 (h) of document A/CN.9/745. It was also pointed out that the Guide should state that what constituted unfair competitive advantage might need to be determined by competent authorities of the State on a case-by-case basis.

39. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.6 as amended by the Commission at the present session (see paras. 36-38 above) and by the Working Group at its twenty-first session (A/CN.9/745, para. 20).

40. With reference to document A/CN.9/WG.I/WP.79/Add.8, the Commission agreed:

(a) To amend the heading before paragraph 6 to reflect the content of the paragraph more clearly, to highlight to the reader the scope of the commentary it contained, and to reorder the sentences in the paragraph;

(b) To replace at the end of paragraph 11 the phrase “will not be able to obtain” with the words “will not be entitled under article 38 to obtain”;

(c) To clarify in the penultimate sentence of paragraph 24 that the sentence was intended to address a situation in which there was a system failure prior to the receipt of a tender by the procuring entity.

41. The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.8 as amended by the Commission at the present session (see para. 40 above) and by the Working Group at its twenty-first session (A/CN.9/745, para. 22).

42. With reference to document A/CN.9/WG.I/WP.79/Add.13, a query was raised as regards the reference to “services and construction” in paragraph 21. In response, it was clarified that, although the term “the subject matter of the procurement” was used consistently throughout the 2011 Model Law instead of specific references to “goods, construction and services”, those latter terms were still used in the draft Guide, where appropriate and necessary. It was also noted that paragraph 4 of the commentary to article 2 in document A/CN.9/WG.I/WP.79/Add.3, in discussing the definition of the subject matter of procurement, contained descriptions of those three terms which drew on their respective definitions of the 1994 Model Law.

43. With reference to document A/CN.9/WG.I/WP.79/Add.14, the concern was raised that the Chinese version used the terms “electronic reverse auctions” and “auctions” interchangeably, which would lead to confusion in China, where those two terms had distinct meanings. It was noted that the text of the Guide in Chinese and other languages should be verified against the English version.

44. As regards document A/CN.9/WG.I/WP.79/Add.16, the Commission confirmed the agreement reached in the Working Group, as reflected in document A/CN.9/745, paragraph 30 (d).

45. The Commission approved the remaining parts of the draft Guide, as amended by the Working Group at its twenty-first session (A/CN.9/745). It was agreed that references in the Guide to the provisions of the 2011 Model Law should be made more user-friendly, by referring to specific articles, and not only to chapters, throughout the Guide.

B. Adoption of the Guide to Enactment of the UNCITRAL Model Law on Public Procurement

46. The Commission, after consideration of the text of the draft Guide, adopted the following decision at its 949th meeting, on 28 June 2012:

“The United Nations Commission on International Trade Law,

“Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 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, and in particular those of developing countries, in the extensive development of international trade,

“Noting that procurement constitutes a significant portion of public expenditure in most States,

“Recalling the adoption of its Model Law on Public Procurement at its forty-fourth session, in 2011,⁴

“Expressing appreciation to the Working Group I (Procurement) for having prepared the draft Guide to Enactment of the UNCITRAL Model Law on Public Procurement,

“Noting that the draft Guide was the subject of due deliberation and extensive consultations with Governments and interested international organizations, and thus it can be expected that the Guide would greatly facilitate the understanding, enactment, interpretation and application of the Model Law and thus contribute significantly to the establishment of a harmonized and modern legal framework for public procurement,

“Expressing appreciation to Tore Wiwen-Nilsson, the Chair of Working Group I (Procurement), for his able leadership in the work of UNICTRAL on the Model Law and the Guide,

“1. Adopts the Guide to Enactment of the UNCITRAL Model Law on Public Procurement, as contained in document A/CN.9/WG.I/WP.79 and Add.1-19, as amended by Working Group I (Procurement) at its twenty-first session and further amended by the Commission during its forty-fifth session, and in document A/CN.9/754 and Add.1-3, as amended by the Commission during its forty-fifth session, and authorizes the Secretariat

⁴ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 192.

to edit and finalize the text of the Guide in the light of the report of Working Group I (Procurement) on the work of its twenty-first session and the deliberations of the Commission at its forty-fifth session as recorded in the report of the Commission on that session;

“2. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Public Procurement with its Guide to Enactment, including electronically, and disseminate it broadly to Governments and other interested bodies;

“3. *Reiterates its recommendation* that all States use the UNCITRAL Model Law on Public Procurement in assessing their public procurement legal regime and give favourable consideration to the Model Law when they enact or revise their laws;

“4. *Recommends* that the Guide to Enactment be given due consideration by States when they assess their needs in public procurement law reform or enact or revise their public procurement laws, and by other stakeholders involved in public procurement proceedings;

“5. *Endorses* efforts by the Commission secretariat to monitor practices and disseminate information with regard to the use of the Model Law and the Guide, including by bringing to the attention of the Commission issues arising as a result that could indicate that further work of UNCITRAL in the area of public procurement may be appropriate;

“6. *Reiterates*, in this context, the importance of coordination among the various procurement reform agencies and of other mechanisms to promote effective implementation and uniform interpretation of the Model Law and endorses the efforts and initiatives of the Commission secretariat aimed at achieving closer coordination and cooperation among the Commission and other international organs and organizations, including regional organizations, active in the field of procurement law reform, in order to avoid undesirable duplication of efforts and inconsistent, incoherent or conflicting results in the modernization and harmonization of public procurement law;

“7. *Also reiterates* its request to all States to support the promotion and implementation of the UNCITRAL Model Law on Public Procurement.”

IV. Finalization and adoption of the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010

47. The Commission recalled that, at its fifteenth session, in 1982, it had adopted “Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules”.⁵ The preparation of the 1982 recommendations had been undertaken by the Commission

⁵ Ibid., *Thirty-seventh Session, Supplement No. 17* and corrigenda (A/37/17 and Corr.1 and 2), paras. 74-85 and annex I.

to facilitate the use of the UNCITRAL Arbitration Rules (1976)⁶ in administered arbitration and to deal with instances when the Rules were adopted as institutional rules of an arbitral body or when the arbitral body was acting as appointing authority or provided administrative services in ad hoc arbitration under the Rules.⁷ The Commission further recalled that, at its forty-third session, in 2010, it had entrusted the Secretariat with the preparation of similar recommendations with respect to the UNCITRAL Arbitration Rules, as revised in 2010⁸ in view of the extended role granted to appointing authorities, for consideration by the Commission at a future session. At that session, it had been said that the recommendations would promote the use of the Rules and that arbitral institutions in all parts of the world would be more inclined to accept acting as appointing authorities if they had the benefit of such guidelines. The Commission also recalled its agreement that the recommendations on the 2010 Rules should follow the same pattern as the 1982 recommendations.⁹

48. At its forty-fourth session, in 2011, the Commission was informed that the recommendations were under preparation in accordance with the decision of the Commission at its forty-third session, in 2010 (see para. 47 above). At its forty-fourth session, the Commission requested the Secretariat to prepare draft recommendations for consideration by the Commission at a future session, preferably as early as 2012.¹⁰

49. At its current session, the Commission had before it: (a) draft recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010 (A/CN.9/746 and Add.1); and (b) a compilation of comments by Governments on the draft recommendations (A/CN.9/747 and Add.1).

50. The Commission heard an oral presentation on the draft recommendations. The Commission was informed that the draft recommendations had been prepared by the Secretariat after consultation with arbitral institutions, including the circulation to arbitral institutions in various parts of the world of a questionnaire, prepared in cooperation with the International Federation of Commercial Arbitration Institutions, on the use of the UNCITRAL Arbitration Rules. The Commission was also informed that footnote 4 of document A/CN.9/746 contained a list of the institutions that had been involved in the overall consultation process. The Commission was further informed that the Qatar International Center for Conciliation and Arbitration should be added to that list. The Secretariat informed the Commission that an additional footnote should be inserted in paragraph 17 of document A/CN.9/746 after the words “the provisions of article 40 (f) would not apply”. The footnote would read as follows:

“An arbitral institution may, however, retain article 40 (f) for cases in which the arbitral institution would not act as appointing authority. For example, the Qatar International Center for Conciliation and Arbitration states in article 43, paragraph (2) (h), of its Rules of Arbitration 2012 (effective

⁶ Ibid., *Thirty-first Session, Supplement No. 17* (A/31/17), para. 57.

⁷ Ibid., *Thirty-sixth Session, Supplement No. 17* (A/36/17), paras. 50-59.

⁸ Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

⁹ Ibid., para. 189.

¹⁰ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 204.

from 1 May 2012), which are based on the UNCITRAL Arbitration Rules as revised in 2010: ‘Any fees and expenses of the appointing authority in case the Center is not designated as the appointing authority.’”

51. The Commission requested the Secretariat to continue to monitor the application of the 2010 UNCITRAL Arbitration Rules by arbitral institutions and other bodies.

A. Consideration of the draft recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010

52. The Commission expressed its appreciation for the draft Recommendations and emphasized their usefulness for arbitral institutions and other interested bodies in arbitral proceedings.

Appeal to leave the substance of the UNCITRAL Arbitration Rules unchanged

53. A comment was made with regard to the appeal in paragraphs 7 and 8 of document A/CN.9/746 to leave the substance of the UNCITRAL Arbitration Rules unchanged. It was said that it could not be excluded that some arbitral institutions might use the UNCITRAL Arbitration Rules as a basis for their own rules in substance, but without faithfully following the text. In response, it was said that the draft recommendations followed, pursuant to the mandate given to the Secretariat (see para. 47 above), the same pattern as the 1982 recommendations, which contained the same appeal. It was also pointed out that the draft recommendations, like the UNCITRAL Arbitration Rules themselves, were flexible and that the appeal to follow closely the substance of the UNCITRAL Arbitration Rules did not mean to exclude the possibility that particular needs resulting from local circumstances could be taken into account where necessary.

Presentation of modifications

54. A comment was made that arbitration rules were subject to national law and that therefore an arbitral institution might need to tailor the rules according to the arbitration law of the applicable jurisdiction. It was proposed to evaluate whether the list of modifications contained in paragraphs 9-17 of document A/CN.9/746 should also contain a reference in that regard. In response, it was said that the draft Recommendations were subject to the applicable law and not meant to interfere with it.

Effective date

55. Paragraph 11 of document A/CN.9/746 stated that article 1, paragraph (2), of the 2010 UNCITRAL Arbitration Rules defined an effective date for the Rules. The view was expressed that that statement might cause confusion, as article 1, paragraph (2), of the 2010 Rules contained a presumption as to the Rules in effect on the date of commencement of the arbitration. In that light, one delegation proposed to modify the wording of paragraph 11 in order to avoid confusion, but that proposal was not adopted.

Appointment of a sole arbitrator

56. Paragraph 40 of document A/CN.9/746/Add.1 explained the power of the appointing authority under article 7, paragraph (2), of the 2010 UNCITRAL Arbitration Rules to appoint a sole arbitrator when no other parties had responded to a party's proposal to appoint a sole arbitrator and the party or parties concerned had failed to appoint a second arbitrator. It was agreed to replace the words "is requested to" in the fifth sentence of paragraph 40 by the words "will, in any event, have to".

Appointment of a three-member arbitral tribunal

57. Paragraph 44 of document A/CN.9/746/Add.1 referred to factors that an appointing authority might take into consideration when appointing the presiding arbitrator pursuant to article 9, paragraph (3), of the 2010 Rules. In order to follow more closely the wording used in article 6, paragraph (7), of the 2010 Rules, which made reference to the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties, it was agreed to replace the words "to take into consideration" by the words "that might be taken into consideration". It was also agreed to align the wording "which is recommended to be different from that of the parties", as well as similar wording used in paragraph 38 ("recommends the appointment of an arbitrator of a nationality other than the nationalities of the parties"), with the wording in article 6, paragraph (7), of the 2010 Rules, along the lines of "take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties".

Replacement of an arbitrator

58. It was pointed out that the last sentence of paragraph 53 of document A/CN.9/746/Add.1 was intended to provide examples of exceptional circumstances where a party would be deprived of its right to appoint an arbitrator. In view of the fact that the 2010 Rules refrained from providing criteria for determining such circumstances, it was agreed to delete the last sentence of paragraph 53.

59. In paragraph 54 of document A/CN.9/746/Add.1, in order to clarify that an appointing authority would authorize a truncated tribunal to proceed with the arbitration only after the closure of the hearings, it was agreed to replace the word "If" at the beginning of the second sentence by the words "Bearing in mind that".

60. Paragraph 54 mentioned the applicable law as another factor to be taken into consideration by the appointing authority in determining whether to permit a truncated tribunal to proceed with arbitration under article 14, paragraph (2) (b), of the 2010 Rules. In response to a question, it was clarified that the words "applicable law" were intended to refer to the law applicable to the arbitration proceedings or to the law of the seat of arbitration, and also to the law where enforcement was sought. It was decided to replace the words "relevant applicable law" by the words "relevant laws".

Review mechanism

61. In order to follow more closely the wording of article 41, paragraph (4) (b), of the 2010 Rules, it was agreed to include at the beginning of the penultimate

sentence of paragraph 58 of document A/CN.9/746/Add.1 the words “If no appointing authority has been agreed upon or designated, or”.

62. The Commission agreed to replace the words “in its review” with the words “if adjustment of fees and expenses is necessary” in the second sentence of paragraph 60 of document A/CN.9/746/Add.1.

63. In view of the importance of the recommendations, the Commission emphasized the need to have them available in both printed and electronic form.

B. Adoption of the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010

64. The Commission, after considering the text of the draft recommendations, adopted the following decision at its 952nd meeting, on 2 July 2012:

“The United Nations Commission on International Trade Law,

“Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, in which the Assembly established the United Nations Commission on International Trade Law (UNCITRAL) with the object of promoting the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

“Recalling also General Assembly resolutions 31/98 of 15 December 1976 and 65/22 of 6 December 2010 recommending the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations,

“Recognizing the value of arbitration as a method of settling such disputes,

“Noting that the UNCITRAL Arbitration Rules are recognized as very successful texts and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions, in all parts of the world,

“Recognizing the value of the 1982 recommendations,

“Recognizing also the need for issuing recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010,

“Believing that recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010 will significantly enhance the efficiency of arbitration under the Rules,

“Noting that the preparation of the draft recommendations was the subject of due deliberation and consultations with Governments, arbitral institutions and interested bodies,

“Expressing its appreciation to the Secretariat for formulating the draft recommendations,

“Convinced that the draft recommendations as amended by the Commission at its forty-fifth session are acceptable to arbitral institutions and other interested bodies in countries with different legal, social and economic systems and can significantly contribute to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes and to the development of harmonious international economic relations,

“1. Adopts the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010;¹¹

“2. Recommends the use of the recommendations in the settlement of disputes arising in the context of international commercial relations;

“3. Requests the Secretary-General to transmit the recommendations broadly to Governments with the request that they be made available to arbitral institutions and other interested bodies so that the recommendations become widely known and available;

“4. Also requests the Secretary-General to publish the recommendations, including electronically, and to make every effort to ensure that they become generally known and available.”

V. Arbitration and conciliation

A. Progress report of Working Group II

65. In accordance with a decision of the Commission at its forty-third session,¹² in 2010, Working Group II (Arbitration and Conciliation) commenced its work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration at its fifty-third session, held in Vienna from 4 to 8 October 2010, and continued it at its fifty-fourth session, held in New York from 7 to 11 February 2011; its fifty-fifth session, held in Vienna from 3 to 7 October 2011; and its fifty-sixth session, held in New York from 6 to 10 February 2012.

66. At its current session, the Commission had before it the reports of the Working Group on its fifty-fifth and fifty-sixth sessions (A/CN.9/736 and A/CN.9/741, respectively). The Commission noted that the Working Group, at its fifty-fifth session, had completed its first reading of the draft legal standard on transparency in treaty-based investor-State arbitration, on the basis of notes prepared by the Secretariat (A/CN.9/WG.II/WP.166 and Add.1 and A/CN.9/WG.II/WP.167). The Commission also noted, that, at its fifty-sixth session, the Working Group had commenced its second reading of the draft legal standard, on the basis of notes prepared by the Secretariat (A/CN.9/WG.II/WP.169 and Add.1 and A/CN.9/WG.II/WP.170 and Add.1).

¹¹ Ibid., *Sixty-seventh session, Supplement No. 17* (A/67/17), annex I.

¹² Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 190-191.

67. The Commission commended the Secretariat for the quality of the documentation prepared for the Working Group. Concerns were voiced about the progress of the Working Group because discussions at its fifty-sixth session on article 1 of the draft rules had focused mainly on the scope of application of the rules on transparency, which some delegations described as merely a matter of form (see A/CN.9/741, paras. 13-102). Some delegations asked that the Working Group should be requested to finish its work for consideration by the Commission at its forty-sixth session. In response, it was said that the decision on the scope of application was a very complex and delicate issue and not merely a matter of form, as it would have an impact on the content of the rules. The complexity of the matter could be ascertained by reading paragraph 59 of the report of the Working Group on its fifty-sixth session. It was said that bridging the gap between the different opinions in the Working Group on the scope of applicability would require creative solutions and that the Working Group should not be rushed unnecessarily.

68. It was pointed out that the matter of applicability of the rules on transparency under existing and future investment treaties were complex and delicate issues and should be carefully considered. Those were matters of treaty interpretation, and it was re-emphasized that, when creating delegations to the Working Group sessions devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.¹³

69. The Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration, as highlighted at its forty-first session, in 2008, and at its forty-fourth session, in 2011,¹⁴ and urged the Working Group to pursue its efforts and to complete its work on the rules on transparency for consideration by the Commission, preferably at its forty-sixth session.

B. Future work in the field of settlement of commercial disputes

70. The Commission recalled its agreement at its forty-fourth session, in 2011, that the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings¹⁵ needed to be updated pursuant to the adoption of the 2010 UNCITRAL Arbitration Rules.¹⁶ At its current session, it was suggested that the Working Group should receive a mandate to that end. After discussion, the Commission confirmed that the Secretariat should undertake the revision of the Notes as its next task in the field of dispute settlement, as previously decided by the Commission. The Commission agreed to decide at a future session whether the draft revised Notes should be first examined by the Working Group before being considered by the Commission.

¹³ Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314; and *ibid.*, *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 290.

¹⁴ Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314; and *ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

¹⁵ Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), chap. II.

¹⁶ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 207.

VI. Online dispute resolution: progress report of Working Group III

71. The Commission recalled its previous discussions of online dispute resolution¹⁷ and expressed its appreciation for the progress made by its Working Group III (Online Dispute Resolution), as reflected in the reports of the Working Group on its twenty-fourth and twenty-fifth sessions (A/CN.9/739 and A/CN.9/744, respectively). The Commission commended the Secretariat for the working papers and reports prepared for those sessions.

72. The Commission recalled that, at its forty-fourth session, in 2011, it had reaffirmed the mandate of the Working Group relating to cross-border business-to-business and business-to-consumer electronic transactions. At that session, the Commission had decided 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.¹⁸

73. At its current session, the Commission noted the progress that had been made in respect of the Working Group's continued deliberations on the draft procedural rules on dispute resolution for cross-border electronic transactions. The Commission took note of the Working Group's decision to restructure the commencement provisions of article 4 of the draft rules and to reconsider those provisions at a future meeting. The Commission further noted that the Working Group intended, upon completing its initial review of the draft rules, to consider the principles that ought to apply to online dispute resolution providers and neutrals.

74. In response to the Commission's request that the Working Group report on the impact of its deliberations on consumer protection, the Commission took note of the Working Group's mindfulness of consumer protection issues throughout its deliberations, as well as the perceived benefits of online dispute resolution in promoting interaction and economic growth within and between regions, including in post-conflict situations and in developing countries. Views were expressed that the Working Group had not yet fully reported to the Commission on the effects on consumer protection, especially when the consumer was the respondent in a dispute. Views were also expressed that the report of the Working Group to the Commission was sufficient in that regard.

75. It was pointed out that it was important to build confidence for consumers and vendors in developing and developed countries and in post-conflict situations and that small businesses would not be able to seek redress in their own States against foreign consumers.

¹⁷ Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 338 and 341-343; *ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 252-257; and *ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 213-218.

¹⁸ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

76. Views were expressed that a global system for online dispute resolution must provide for final and binding decisions by way of arbitration and that such a system would be of great benefit to 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 disadvantage when dealing with more commercially sophisticated parties in other countries that had access to greater legal and judicial resources.

77. The following views were also expressed:

(a) As regards business-to-consumer disputes, a system involving binding decisions, to the extent it removed a party's access to national courts, would detract from the rights of consumers;

(b) If the online dispute resolution rules provided for arbitration for business-to-consumer disputes, problems would arise at the stage of recognition and enforcement of online dispute resolution decisions in that the process did not provide for the requisites for enforcement by way of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹⁹ done at New York on 10 June 1958;

(c) A suitable approach could be to make decisions binding upon only companies or sellers and not upon consumers.

78. Other suggestions were that consideration should be given to fixing a range of maximum values for disputed transactions dealt with by online dispute resolution, based on the type or category of transaction at issue (airfares were given as an example of a higher-cost purchase) and that the Rules should offer parties a choice of forum.

79. After discussion, the Commission decided that:

(a) 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;

(b) 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, including in cases where the consumer was the respondent party in an online dispute resolution process;

¹⁹ United Nations, *Treaty Series*, vol. 330, No. 4739.

(c) The Working Group should continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration;

(d) The mandate of the Working Group on online dispute resolution in respect of low-value, high-volume cross-border electronic transactions was reaffirmed, and the Working Group was encouraged to continue to conduct its work in the most efficient manner possible.

VII. Electronic commerce: progress report of Working Group IV

80. 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. It was further recalled that the Commission had noted that such work might include certain aspects of other topics, such as identity management, the use of mobile devices in electronic commerce and electronic single window facilities.²⁰

81. At its current session, the Commission noted that the Working Group had commenced its work in the field of electronic transferable records at its forty-fifth session, held in Vienna from 10 to 14 October 2011. It was also noted that the forty-sixth session of the Working Group, which had been scheduled to take place either in New York from 13 to 17 February 2012 or in Vienna from 9 to 13 January 2012, had had to be cancelled to allow the Secretariat to gather the information needed for the preparation of the necessary working documents, as well as owing to the uncertainty that had existed until the end of 2011 regarding the retention of the alternating pattern of UNCITRAL meetings.

82. The Commission expressed its appreciation to the Working Group for the progress made, as reflected in the report on its forty-fifth session (A/CN.9/737) and commended the Secretariat for its work.

83. While it was noted that consultations had evidenced no business demand for electronic transferable records in one State, owing partly to the perceived risks of abuse, it was also noted that consultations were ongoing in other States. There was general support for the Working Group continuing its work on electronic transferable records. In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was urged. The need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.

84. The Commission was informed that, for the forty-sixth session of the Working Group, the Governments of Colombia, Spain and the United States had transmitted a paper setting out the current practices on electronic transferable records and related business needs.

85. The Commission took note of other developments in the field of electronic commerce. It welcomed Economic and Social Commission for Asia and the Pacific (ESCAP) resolution 68/3, on enabling paperless trade and the cross-border

²⁰ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 235 and 238.

recognition of electronic data and documents for inclusive and sustainable intraregional trade facilitation, adopted by ESCAP at its sixty-eighth session, held in Bangkok from 17 to 23 May 2012.²¹ The Commission noted that, in that resolution, ESCAP encouraged all members and associate members of ESCAP to take into account, and whenever possible adopt, available international standards prepared by relevant United Nations bodies, such as UNCITRAL and other international organizations, to facilitate the interoperability of such systems. UNCITRAL requested the Secretariat to work closely with ESCAP, including through the UNCITRAL Regional Centre for Asia and the Pacific.

86. With respect to legal issues relating to electronic single window facilities, the Commission welcomed the ongoing cooperation between its secretariat and other organizations. In particular, the Commission welcomed “Electronic single window legal issues: a capacity-building guide”, prepared jointly by the United Nations Network of Experts for Paperless Trade in Asia and the Pacific (UNNEXt), ESCAP and the Economic Commission for Europe (ECE), with substantive contribution from the UNCITRAL secretariat.

87. The Commission took note of a statement by the secretariat of the World Customs Organization in which it noted the growing importance of single window facilities for trade facilitation, including at the cross-border level and with respect to business-to-business exchanges and welcomed the contribution of the Commission in establishing related legal standards. In its statement, the secretariat also noted the progress of the work of the Working Group on electronic transferable records and stressed the importance of the availability of those records in order to increase the quality of the data submitted to single window facilities, and therefore of a uniform predictable legal framework to facilitate that submission. Finally, the secretariat welcomed the role of the Commission in coordinating the various bodies active in the field of legal standards for electronic commerce, thus preparing a harmonized legal framework able to complement similar efforts taking place at the technical level.

88. The Commission was informed about recent developments regarding cooperation between UNCITRAL and the United Nations Centre for Trade Facilitation and Electronic Business (CEFACT), with particular regard to CEFACT draft recommendation No. 37 on Signed Digital Document Interoperability. In that regard, the Commission took note of the decision by CEFACT at its eighteenth session, held in Geneva from 15 to 17 February 2012, to initiate work to establish a framework for the ongoing governance of digital signature interoperability in coordination with UNCITRAL, the International Organization for Standardization (ISO) and other relevant organizations. The Commission requested the Secretariat to take appropriate steps to cooperate with CEFACT, possibly involving the Working Group.

89. With respect to legal issues relating to identity management, the Commission was informed that ABA had submitted a paper for possible discussion at the forty-sixth session of the Working Group in which it provided an overview of identity management, its role in electronic commerce and relevant legal issues, as well as barriers.

²¹ *Official Records of the Economic and Social Council, 2012, Supplement No. 19 (E/2012/39).*

90. 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.

VIII. Insolvency law: progress report of Working Group V

91. The Commission recalled that, at its forty-third session, in 2010, it had endorsed the recommendation by its Working Group V (Insolvency Law) contained in document A/CN.9/691, paragraph 104, that activity be initiated on two topics, both of which were of current importance and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability. Those topics were: (a) guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency²² relating to centre of main interests and possible development of a model law or provisions on insolvency law addressing selected international issues, such as jurisdictions, access and recognition, in a manner that would not preclude the development of a convention; and (b) responsibility of directors of an enterprise in the period approaching insolvency.²³

92. The Working Group commenced its work on both topics at its thirty-ninth session, held in Vienna from 6 to 10 December 2010, and continued its deliberations at its fortieth session, held in Vienna from 31 October to 4 November 2011, and forty-first session, held in New York from 30 April to 4 May 2012. The Commission had before it the reports of the Working Group on the work of its fortieth and forty-first sessions (A/CN.9/738 and A/CN.9/742, respectively).

93. At its current session, the Commission noted the progress that had been made with respect to both topics mentioned in paragraph 91 above and that the work on topic (a) was well advanced and might be completed in time for consideration and adoption by the Commission at its forty-sixth session, in 2013. The Commission also noted that, while that work would take the form of revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency,²⁴ it would not change the text of the Model Law itself, but rather provide guidance on its use and interpretation.

94. The Commission further noted that, while the Working Group had considered the possibility of adding material on enterprise groups to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, notwithstanding that the Model Law did not apply to enterprise groups as such, it had been agreed that references could be included to part three of the UNCITRAL Legislative Guide on Insolvency Law,²⁵ which specifically addressed the treatment of enterprise groups.

95. The Commission expressed its appreciation for the progress made by the Working Group, as reflected in the reports on its fortieth and forty-first sessions, and

²² *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*, annex I.

²³ *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259.

²⁴ United Nations publication, Sales No. E.99.V.3.

²⁵ Available from www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html.

commended the Secretariat for the excellent working papers and reports prepared for those sessions.

96. The Commission further considered an issue relating to the draft text on topic (a) in paragraph 91 above that had been discussed by the Working Group at its forty-first session (A/CN.9/742, paras. 12-72). That text drew upon material contained in the UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective,²⁶ adopted by the Commission at its forty-fourth session,²⁷ in 2011. To the extent that the text currently being developed by the Working Group built upon and revised material included in the Judicial Perspective, in particular with respect to the interpretation and application of “centre of main interests”, the Commission agreed that the Judicial Perspective should be revised in parallel with the current work of the Working Group to ensure consistency and, if possible, should be submitted to the Commission for adoption at the same time as the new text on topic (a) in paragraph 91 above.

IX. Security interests: progress report of Working Group VI

97. The Commission recalled its previous discussions on the preparation of a text on the registration of security rights in movable assets.²⁸ At its current session, the Commission had before it the reports of Working Group VI (Security Interests) on the work of its twentieth session, held in Vienna from 12 to 16 December 2011, and its twenty-first session, held in New York from 14 to 18 May 2012 (A/CN.9/740 and A/CN.9/743, respectively).

98. The Commission noted that, at its twentieth session, the Working Group had agreed that the text being prepared should take the form of a guide (the draft Registry Guide), with commentary and recommendations along the lines of the UNCITRAL Legislative Guide on Secured Transactions²⁹ and, where the draft Registry Guide offered options, provide examples of model regulations in an annex (A/CN.9/740, para. 18). It was also noted that the Working Group had agreed that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive text that would be consistent with the Secured Transactions Guide.

99. The Commission further noted that the Working Group, at its twenty-first session, had approved the substance of the recommendations of the draft Registry Guide, as well as examples of registration forms. It was noted that the Working Group had agreed that the draft Registry Guide should be finalized and submitted to the Commission for adoption at its forty-sixth session, in 2013 (A/CN.9/743, para. 73).

100. The Commission expressed its appreciation to the Working Group for the considerable progress achieved in its work and to the Secretariat for its efficient support. The Commission requested the Working Group to proceed with its work expeditiously and to complete its work so that the draft Registry Guide

²⁶ Available from www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html.

²⁷ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 198.

²⁸ *Ibid.*, paras. 223-226.

²⁹ United Nations publication, Sales No.E.09.V.12.

would be submitted to the Commission for final approval and adoption at its forty-sixth session, in 2013.

101. As to future work, the Commission noted that the Working Group, at its twenty-first session, had agreed to propose to the Commission that the Working Group should develop a model law on secured transactions based on the general recommendations of the Secured Transactions Guide and consistent with all the texts prepared by UNCITRAL on secured transactions. It was also noted that the Working Group had agreed to propose to the Commission that the topic of security rights in non-intermediated securities should be retained on its work agenda and be considered at a future session (A/CN.9/743, para. 76).

102. The Commission recalled that, at its forty-third session, in 2010, it had agreed that the topics mentioned above should be retained in the programme of the Working Group for further consideration by the Commission at a future session.³⁰ In that context, the Commission considered the proposals by the Working Group.

103. It was widely felt that a simple, short and concise model law on secured transactions could usefully complement the Secured Transactions Guide and would be extremely useful in addressing the needs of States and in promoting implementation of the Secured Transactions Guide. While a concern was expressed that a model law might limit the flexibility of States to address the local needs of their legal traditions, it was generally viewed that a model law could be drafted in a sufficiently flexible manner to adapt to various legal traditions. Moreover, there was support for the idea that a model law could greatly assist States in addressing urgent issues relating to access to credit and financial inclusion, in particular for small and medium-sized enterprises.

104. As to the topic of security rights in non-intermediated securities, it was widely felt that the topic merited further consideration. The Commission noted that non-intermediated securities, in the sense of securities other than those credited to a securities account, were used as security for credit in commercial financing transactions yet were excluded from the scope of the Secured Transactions Guide (see recommendation 4, subparas. (c)-(e) of the Guide), the 2009 Unidroit Convention on Substantive Rules for Intermediated Securities³¹ and the 2006 Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.

105. After discussion, the Commission agreed that, upon its completion of the draft 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 Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions. It was also agreed that, consistent with the Commission's decision at its forty-third session, in 2010 (see para. 102 above), 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

³⁰ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 267 and 268.

³¹ Available from www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm.

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.

X. Possible future work in the area of public procurement and related areas

106. The Commission had before it a note by the Secretariat on possible future work in the areas of procurement and infrastructure development (A/CN.9/755). The Commission also heard a statement of the observer for the Vale Columbia Centre on Sustainable International Investment about the work of the Centre, in particular its empirical research into infrastructure development and public-private partnerships, which could be made available to the Commission.

107. The understanding was that the final decision on the agenda item should be taken after the Commission had considered a note by the Secretariat on a strategic direction for UNCITRAL (A/CN.9/752; see paras. 228-232 below) and agenda items on possible future work in other areas of work (microfinance and international contract law) (see paras. 124-132 below). The general view was that UNCITRAL should focus on areas in which the preparation of law (treaties or model laws) would be justified.

108. As regards the topics relating to possible future work in public procurement listed in document A/CN.9/755, the general view was that some of the topics identified did not lend themselves to treatment in a model law or other legal text; other topics might be appropriate for legislative development, but it would not be practical to reopen procurement-related issues at this time, given that the work on the 2011 Model Law and its Guide to Enactment had just been completed (see para. 46 above). The view was expressed that the 2011 Model Law was in many respects ahead of existing procurement practices and legislation in a number of countries; it was therefore important for procurement practices and legislation to develop first to allow for the assessment of the 2011 Model Law and the need to amend it.

109. Specifically, the Commission was of the view that:

(a) Contract administration was an important area, but one in which providing information on best practices and capacity-building was more appropriate than the development of legal texts. The question was raised whether the work of UNCITRAL in that area would be of added value, given the text that had already been issued by UNCITRAL on industrial contracts³² and the texts of other organizations, such as the International Federation of Consulting Engineers;

(b) Many issues with regard to procurement planning raised questions of public law (e.g. the budget law and regulations of a given State) that were outside the purview of UNCITRAL. The interest of some countries in an international model addressing procurement planning and the importance of proper procurement planning for the proper handling and outcome of the entire procurement process were, however, noted;

³² *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*, United Nations publication (Sales No. E.87.V.10).

(c) Although issues of suspension and debarment were important legal matters that UNCITRAL could address, they were examples of issues that would not be appropriate to address through legislative work at this stage;

(d) Corporate compliance was not considered to be an issue that lent itself to work by UNCITRAL; it was considered to be an issue of good behaviour and best practice;

(e) Sufficiently flexible mechanisms were built into the 2011 Model Law to accommodate sustainability and environmental protection through public procurement, with the Guide providing guidance on how those mechanisms could be used. Generally, the preparation of further legal texts on those issues would not be justifiable; more detailed guidance on how the available mechanisms were to be used in practice might be necessary. The importance of building the required capacity to use such mechanisms was noted.

110. To accommodate the interest of States in some of the above topics, the Commission agreed to explore the possibility of issuing guidance papers (as opposed to any further legislative texts) on such topics as: (a) procurement planning; (b) measures that could be used by the public and private sectors to promote maximum competition in public procurement (e.g. mitigating risks of collusion and addressing issues of centralized procurement and difficulties with the access of small and medium-sized enterprises to public procurement, including those arising from the introduction of e-procurement); (c) specific recommendations to ensure harmonization between the 2011 Model Law and other branches of law (e.g. on corporations and environmental protection); (d) cost-benefit analyses and other considerations, such as infrastructure and capacity needed, in the use of procurement methods and techniques under the Model Law (poor results in the use of framework agreements in particular were reported); and (e) sustainability and environmental issues in public procurement.

111. The dissemination of and increasing the understanding of the 2011 Model Law and its Guide to Enactment were considered to be of utmost importance in order to achieve proper implementation, interpretation and use of the 2011 Model Law. The examples suggested of possible ways to do that included the publication of documents on the UNCITRAL website and the use of blogs and interactive online forums. The use of a network of national correspondents, as existed for the system for collecting and disseminating information on court decisions and arbitral awards relating to UNCITRAL texts (the CLOUT system), was mentioned as a further relevant tool. Further, establishing partnerships with organizations and experts familiar with the 2011 Model Law and capable of assisting the UNCITRAL secretariat with online and in-person training, teaching and technical assistance activities, as well as collection and dissemination of information about the use of the text, was considered essential in the light of the limited resources available in the UNCITRAL secretariat. Such activities would also allow the evaluation of the procurement systems of various jurisdictions; results of such evaluation would be used in the assessment of the need to make improvements to, for example, the Guide, and any suggestions for improvements would be brought to the attention of the Commission. In the light of experiences showing the difficulties that officials had encountered in seeking to implement the 1994 Model Law and to ensure that its provisions were appropriately followed in practice, the Commission was urged to

support the effective implementation and use of the 2011 Model Law through such measures.

112. Establishing a mechanism for sharing experiences and best practices was considered to be a part of work on monitoring the use of the 2011 Model Law. An example of sharing best practices regarding harnessing the potential benefits of e-procurement described in document A/CN.9/WG.I/WP.79/Add.1, paragraphs 28-30, was provided to the Commission: in partnership with the United Nations Office on Drugs and Crime (the custodian of the United Nations Convention against Corruption),³³ the Government of Nigeria had engaged in the development of an e-procurement system to reduce the possibility of corruption and abuse by removing human contact and enhancing transparency.

113. After discussion, the Commission decided that it would not be possible to assess the need for guidance papers or decide the best manner of encouraging enactment of the 2011 Model Law and ensuring its optimum implementation, interpretation and use without a more in-depth understanding of the relevant activities and publications of other international and regional organizations, and individual States, in public procurement.

114. The Commission therefore instructed the Secretariat to undertake a study of (a) existing resources and publications of other bodies that might be made available to support the implementation, interpretation and use of the 2011 Model Law; (b) how to arrange ongoing collaboration with such other bodies; (c) topics that were not yet adequately covered and that might warrant guidance papers as suggested in paragraph 110 above; and (d) options for publishing and publicizing the various resources and papers themselves. The understanding was that such a study would be made available to the Commission at its forty-sixth session, in 2013, and that the study would also consider the extent to which such activities would be feasible and the extent to which additional resources would be necessary, given the need to review information received on the implementation, interpretation and use of the 2011 Model Law, translate necessary information and ensure consistency among any external resources referred to and the 2011 Model Law and its Guide. The Commission was of the view that, after considering such a study, it would be in a position to assess the need for further work on any discrete topic.

115. As regards possible future work in the area of public-private partnerships, it was suggested that developing a model law on public-private partnerships at the international level might be desirable in the light of the importance of the subject to developing countries; that the work in that area might in particular be justified in the light of the conclusions reached by States at the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, from 20 to 22 June 2012, that encouraged the use of public-private partnerships as a tool for economic development;³⁴ and that UNCITRAL could benefit from the work in the same area being undertaken at the regional level, such as a proposal from the European

³³ United Nations, *Treaty Series*, vol. 2349, No. 42146.

³⁴ See the outcome document of the Conference, entitled "The future we want" (General Assembly resolution 66/288, annex), paras. 46, 71, 217 and 280 (d).

Commission for a directive of the European Parliament and of the Council on the award of concession contracts.³⁵

116. The Commission agreed that the development of any future texts in the area of public-private partnerships should be undertaken through a working group and the Commission so as to ensure inclusivity and transparency and hence the universal applicability of any such texts.

117. The Commission agreed that further consideration of the following topics related to public-private partnerships listed in document A/CN.9/755 might be warranted: (a) oversight mechanisms (in both the selection phase and the contract management phase) and the promotion of domestic dispute prevention and resolution mechanisms in the context of public-private partnerships; and (b) the possible expansion of the scope of the UNCITRAL instruments on privately financed infrastructure projects³⁶ to include forms of private financing and related transactions not currently covered in those instruments.

118. As regards oversight and domestic dispute settlement, it was emphasized that those topics should be considered together, consistent with the approach to them taken at the 2007 UNCITRAL congress entitled “Modern Law for Global Commerce”, that developing local capacity to handle disputes arising from public-private partnerships should be considered, that the development of a model law on those subjects could contribute significantly to the development of such capacity and that the topics should include dispute preventive mechanisms and, in that regard, should be aimed at developing regulations that were responsive to the needs of the private sector by providing an opportunity to investors to comment on the development of rules and regulations that were applicable to them.

119. The Commission noted that other issues not currently addressed in the UNCITRAL instruments on privately financed infrastructure projects might also be appropriately included in any future work on public-private partnerships, together with other issues, such as preventing a contractor from selling the subject of a concession to another entity without the consent of the Government.

120. Noting that further consideration of whether future work in public-private partnerships would be warranted would require additional research and a detailed study by the Secretariat, the Commission agreed that holding a colloquium to identify the scope of possible work and primary issues to be addressed would be helpful. It emphasized the importance of defining the scope of the colloquium in advance, using the provisions of the UNCITRAL instruments on privately financed infrastructure projects to identify needs for possible additional work. In preparation for a colloquium, the Secretariat would therefore need to define the possible topics for discussion at the colloquium itself, drawing on the resources of other bodies, including those that had offered to assist in that regard, and based on the deliberations at the current session. The results of the colloquium would thereafter be presented to the Commission for its consideration. In that regard, it was also

³⁵ Available from http://ec.europa.eu/commission_2010-2014/barnier/headlines/news/2011/12/20111220_en.htm.

³⁶ UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, annex I); and UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (United Nations publication, Sales No. E.01.V.4).

agreed that it would be essential for there to be a clear mandate for any future work in that area.

121. It was agreed that, although UNCITRAL might not therefore commence any work on public-private partnerships in the near future, the Commission should signal to the international community its interest in involvement in further work in that area. The importance of coordination and cooperation between relevant bodies on ongoing work in that area was emphasized, including as regards the proper scheduling of any work by UNCITRAL.

122. As regards the suggestions in document A/CN.9/755 that the UNCITRAL instruments on privately financed infrastructure projects should be consolidated and that the procurement-related provisions in those instruments should be conformed with the provisions regulating relevant procurement methods in the 2011 Model Law, it was agreed that those tasks should be undertaken, but not as separate projects by a UNCITRAL working group, given their limited scope and the mechanical nature of some parts of the work concerned. A decision on whether to undertake them would therefore be taken following the colloquium (see para. 120 above), which would define the scope of the other aspects of work on public-private partnerships.

123. It was agreed that the implication of the above approach was that there would be no need for Working Group I to meet before the forty-sixth session of the Commission, in 2013, and that a colloquium should not be held before the second quarter of 2013.

XI. Possible future work in the area of microfinance

124. The Commission recalled its previous discussions on possible work in the area of microfinance,³⁷ in particular the decision taken at its forty-fourth session, in 2011, to include microfinance as an item for the future work of UNCITRAL and to further consider the matter at its forty-fifth session, in 2012.³⁸ At its forty-fourth session, the Commission, in order to define the areas where work was needed, requested the Secretariat to circulate to all States a short questionnaire regarding their experiences with the establishment of a legislative and regulatory framework for microfinance, including any obstacles they might have encountered in that regard. Further, the Commission agreed that the Secretariat should, resources permitting, undertake research on the following items: (a) overcollateralization and the use of collateral with no economic value; (b) electronic money, including its status as savings, whether its “issuers” were engaged in banking (and hence what type of regulation they were subject to) and the coverage of such funds by deposit insurance schemes; (c) provision for fair, rapid, transparent and inexpensive processes for the resolution of disputes arising from microfinance transactions; and

³⁷ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 432 and 433; *ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 275-276 and 280; and *ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 241-246.

³⁸ *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 246.

(d) facilitating the use of, and ensuring transparency in, secured lending to microenterprises and small and medium-sized enterprises.³⁹

125. At its current session, the Commission had before it a note by the Secretariat (A/CN.9/756) containing a short summary of the state of the matter in each of the four topics identified by the Commission at its forty-fourth session (see para. 124 above) and suggestions for possible future work of UNCITRAL on each of those topics. The Commission noted that a report analysing the responses received from States to the questionnaire that had been circulated by the Secretariat to States pursuant to the request of the Commission at its forty-fourth session would be submitted to the Commission at its forty-sixth session, in 2013.

126. The Commission voiced strong support for a suggestion to further explore, including by means of a colloquium, particular issues relevant to, inter alia, facilitating access to credit for micro-businesses and small businesses, particularly in developing economies. After discussion, it was unanimously agreed that one or more colloquiums on microfinance and related matters would be held, possibly in different regions, with a focus on: facilitating simplified business incorporation and registration; access to credit for micro-businesses and small and medium-sized enterprises; dispute resolution applicable to microfinance transactions; and other topics related to creating an enabling legal environment for micro-businesses and small and medium-sized enterprises. The Commission agreed that the holding of such a colloquium should rank as a first priority for UNCITRAL in the coming year.

XII. Possible future work by UNCITRAL in the area of international contract law

127. The Commission considered the desirability of work in the area of international contract law on the basis of a proposal by Switzerland on possible future work in the area of international contract law (A/CN.9/758).

128. That proposal recognized the Commission's contributions to harmonization in that field. In particular, it stressed that the United Nations Convention on Contracts for the International Sale of Goods (1980),⁴⁰ with 78 States parties, had a global impact in unifying the law on contracts for the sale of goods. The proposal noted, however, that many areas relating to contracts for sale of goods, as well as to general contract law, were still left to domestic law and that that created an obstacle to international trade by multiplying the number of potentially applicable legal regimes and associated transaction costs. Moreover, it was explained, the need to access legal materials on foreign laws in different languages or to get expert advice from a foreign jurisdiction created additional challenges and expenses. Those expenses, it was added, were particularly onerous on small and medium-sized enterprises.

129. For those reasons, it was suggested that, with a view to allowing the Commission to make an informed decision on possible future work for further harmonization of contract law, the Secretariat could organize colloquiums and other meetings, as appropriate and within available resources, and report on the

³⁹ Ibid.

⁴⁰ United Nations, *Treaty Series*, vol. 1489, No. 25567.

desirability and feasibility of such possible future work at a future session of the Commission. It was emphasized that such exploratory activities should not only take into account but also build on existing instruments, such as the United Nations Sales Convention and the Unidroit Principles of International Commercial Contracts.⁴¹ It was further indicated that such work could usefully complement ongoing efforts with respect to contract law modernization at the regional and national levels.

130. In reply, it was said that it was not evident that existing instruments were inadequate in actual practice, that the proposal seemed unclear and overly ambitious and that it could potentially overlap with existing texts, such as the Unidroit Principles of International Commercial Contracts. It was added that lacunae in existing texts, such as the United Nations Sales Convention, were a result of the impossibility of finding an agreed compromise solution and that there were significant doubts that that could be overcome in the near future. Concerns were also expressed about the implications of such a vast project on the human and financial resources available to the Commission and to States. For those reasons, it was urged that the proposed work should not be undertaken, at least not at the present time. It was added that the Commission might reconsider the matter at a future date in the light of possible developments.

131. In response to a concern that had been expressed regarding possible duplication of effort with respect to the work of Unidroit, it was indicated by the Secretariat and the observer for Unidroit that such a project, should the Commission decide to consider it further, could be dealt with in a collaborative manner, involving the two organizations, as well as additional relevant external contributors.

132. After discussion, it was determined that there was a prevailing view in support of requesting the Secretariat to organize symposiums and other meetings, including at the regional level and within available resources, maintaining close cooperation with Unidroit, with a view to compiling further information to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law at a future session. Many delegates, however, urged that priority should be given to other work of the Commission, in particular in the area of microfinance. A number of delegates expressed clear opposition and strong reservations with regard to further work in the field of general contract law. In addition, several delegates, noting the significant opposition to the proposal by Switzerland, objected to the characterization of the debate on that topic as reflecting a prevailing majority view in favour of additional work.

XIII. Preparation of a guide on the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards

133. The Commission recalled its previous discussions on monitoring implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.⁴² The Commission further

⁴¹ Available from www.unidroit.org.

⁴² *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 401-404; and *ibid.*, *Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, paras. 355 and 356.

recalled that it had been informed, at its forty-fourth session, in 2011, that the Secretariat was carrying out two complementary projects in that regard.⁴³

134. One project related to the publication on the UNCITRAL website of information contributed by States on their legislative implementation of the 1958 New York Convention. The Commission reiterated its appreciation to States that had already contributed information and urged all States to continue providing the Secretariat with accurate information to ensure that the data published on the UNCITRAL website remained up to date.

135. The other project related to the preparation of a guide on the 1958 New York Convention. That project was currently being carried out by the Secretariat, in close cooperation with G. Bermann (Columbia University School of Law) and E. Gaillard (Paris XII), who had established research teams to work on the project. The Commission was informed that Mr. Gaillard, with his research team, in conjunction with Mr. Bermann and his research team, and with the support of the Secretariat, had established a website (www.newyorkconvention1958.org) in order to make the information gathered in preparation of the guide on the New York Convention publicly available. The Commission was informed that 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 was also informed that the UNCITRAL secretariat planned to maintain close connection between the cases collected in the CLOUT system and the cases available on the website dedicated to the preparation of the guide on the New York Convention.

136. The Commission expressed its appreciation for the establishment of the website and the work done by the Secretariat, as well as by the professors and their research teams, and requested the Secretariat to pursue efforts regarding the preparation of the guide on the 1958 New York Convention.

XIV. Endorsement of texts of other organizations

A. Unidroit Principles of International Commercial Contracts 2010

137. Unidroit requested the Commission to consider possible endorsement of the Unidroit Principles of International Commercial Contracts 2010.⁴⁴

138. The Commission noted that the 2010 edition of the Unidroit Principles was its third edition; the Unidroit Principles were initially published in 1994 and then again in 2004. It was recalled that the Commission had endorsed the Unidroit Principles 2004 at its fortieth session, in 2007.⁴⁵

139. It was further noted that the main objective of the Unidroit Principles 2010 was to address additional topics of interest to the international business and legal communities and that, as such, they included 26 new articles dealing with restitution in case of failed contracts, illegality, conditions, and plurality of obligors and obligees. Overall, general support was expressed for recognizing that the Unidroit

⁴³ Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 250-252.

⁴⁴ Available from www.unidroit.org.

⁴⁵ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, paras. 209-213.

Principles 2010 set forth a comprehensive set of rules for international commercial contracts, complementing a number of international trade law instruments, including the United Nations Sales Convention.

140. Taking note of the amendments made in the Unidroit Principles 2010 and their usefulness in facilitating international trade, the Commission, at its 955th meeting, on 3 July 2012, adopted the following decision:

“The United Nations Commission on International Trade Law,

“Expressing its appreciation to the International Institute for the Unification of Private Law (Unidroit) for transmitting to it the text of the 2010 edition of the Unidroit Principles of International Commercial Contracts,

“Taking note that the Unidroit Principles 2010 complement a number of international trade law instruments, including the United Nations Convention on Contracts for the International Sale of Goods,⁴⁶

“Noting that the preamble of the Unidroit Principles 2010 states that:

‘These Principles set forth general rules for international commercial contracts,

‘They shall be applied when the parties have agreed that their contract be governed by them,

*‘They may be applied when parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like,*

‘They may be applied when the parties have not chosen any law to govern their contract,

‘They may be used to interpret or supplement international uniform law instruments,

‘They may be used to interpret or supplement domestic law,

‘They may serve as a model for national and international legislators,’

“Congratulating Unidroit on having made a further contribution to the facilitation of international trade by preparing general rules for international commercial contracts,

“Commends the use of the 2010 edition of the Unidroit Principles of International Commercial Contracts, as appropriate, for their intended purposes.”

B. Incoterms 2010

141. ICC requested the Commission to consider possible endorsement of Incoterms 2010, which had entered into force on 1 January 2011.

142. It was noted that the Incoterms rules, the ICC rules on the use of domestic and international trade terms, generally facilitated the conduct of global trade by providing trade terms that clearly defined the respective obligations of parties and

⁴⁶ United Nations, *Treaty Series*, vol. 1489, No. 25567.

reduced the risk of legal complications. Created by ICC in 1936, Incoterms had been regularly updated to keep pace with the development of international trade, with Incoterms 2010 being the most recent update. It was recalled that the Commission had endorsed Incoterms 1990 at its twenty-fifth session, in 1992,⁴⁷ and Incoterms 2000 at its thirty-third session, in 2000.⁴⁸

143. The Commission was informed that Incoterms 2010 updated and consolidated the “delivered” rules, reducing the total number of rules from 13 to 11. It was further suggested that Incoterms 2010 offered a simpler and clearer presentation of all the rules, taking account of the continued spread of customs-free zones, the increased use of electronic communications in business transactions, heightened concerns about security in the movement of goods and changes in transport practices.

144. Taking note of the usefulness of Incoterms 2010 in facilitating international trade, the Commission, at its 955th meeting, on 3 July 2012, adopted the following decision:

“The United Nations Commission on International Trade Law,

“Expressing its appreciation to the International Chamber of Commerce for transmitting to it the revised text of Incoterms 2010, which entered into force on 1 January 2011,

“Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by making Incoterms 2010 simpler and clearer, reflecting recent developments in international trade,

“Noting that Incoterms 2010 constitute a valuable contribution to facilitating the conduct of global trade,

“Commends the use of the Incoterms 2010, as appropriate, in international sales transactions.”

XV. Technical assistance: law reform

145. The Commission had before it a note by the Secretariat (A/CN.9/753) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its forty-fourth session, in 2011 (A/CN.9/724).⁴⁹ The Commission stressed the importance of such technical cooperation and assistance and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/753.

146. 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

⁴⁷ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, para. 161.

⁴⁸ *Ibid.*, *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 434.

⁴⁹ *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 253.

Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were quite 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.

147. 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 Indonesia for contributing to the Trust Fund since the forty-fourth session of the Commission and to organizations that had contributed to the programme by providing funds or by hosting seminars.

148. The Commission appealed to the 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 were members of the Commission. The Commission expressed its appreciation to Austria for contributing to that trust fund since the forty-fourth session of the Commission, thereby enabling travel assistance to be granted to developing countries that were members of UNCITRAL.

XVI. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

149. The Commission considered document A/CN.9/748 on the promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts, which provided information on the current status of the CLOUT system and on the work undertaken by the Secretariat to finalize the digests of case law relating to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration.⁵⁰

150. The Commission noted with appreciation the continuing work of the Secretariat under the CLOUT system. As at 20 April 2012, 116 issues of compiled case-law abstracts had been prepared, dealing with 1,134 cases. The cases related mostly to the United Nations Sales Convention and the UNCITRAL Model Arbitration Law. Cases relating to the UNCITRAL Model Law on Electronic Commerce,⁵¹ the 1958 New York Convention, the Cross-Border Insolvency Model

⁵⁰ Ibid., *Fortieth Session, Supplement No. 17* (A/40/17), annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

⁵¹ Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I.

Law, the Convention on the Limitation Period in the International Sale of Goods,⁵² the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit⁵³ and the United Nations Convention on the Carriage of Goods by Sea, 1978⁵⁴ were also published. With reference to the five regional groups of States represented within the Commission, the Commission took note of the fact that, while the majority of the abstracts published referred to Western European and other States, a small decrease in the number of abstracts attributable to that regional group and a parallel modest increase in the number of abstracts from Asian States and Eastern European States had been recorded, compared with the figures indicated in the note (A/CN.9/726) submitted to the Commission at its forty-fourth session.⁵⁵

151. The Commission recalled that the network of national correspondents, composed of 95 appointees, had terminated its mandate in 2012 pursuant to a decision of the Commission at its forty-second session, in 2009. At that session, the Commission, acknowledging the need for a collection system that would be sustainable over time and could respond to changing circumstances, agreed that States that had appointed national correspondents should be requested to reconfirm that appointment every five years. In order to facilitate implementation of that provision, the Commission further agreed that the term of the previous national correspondents would expire in 2012 and that States would be asked to reconfirm the appointment of their national correspondents at that time and every five years thereafter.⁵⁶

152. At its current session, in order to streamline the procedures for appointment of the new correspondents, the Commission expressed its support for the Secretariat's procedure of having the new appointments be effective as at the first day of its forty-fifth session (i.e. 25 June 2012). The Commission also expressed its support for the Secretariat's proposal that any appointment made afterwards would be effective as from the first day of the forty-fifth session of the Commission and would expire five years from that date. In the light of the increasing volume of case law available on several UNCITRAL texts, the Commission endorsed the Secretariat's appeal to member States to appoint more than one national correspondent and entrust each of them with responsibility for a specific UNCITRAL text. Finally, the Commission expressed its appreciation to the national correspondents who had completed their mandate and welcomed those newly appointed, or reappointed, wishing them a fruitful collaboration with the Secretariat.

153. The Commission noted with appreciation that the third revision of the *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods: 2012 Edition* had been issued and was available in English on the UNCITRAL website⁵⁷ and that the Secretariat would proceed with its translation into the other five official languages of the United Nations. The

⁵² *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I.

⁵³ United Nations, *Treaty Series*, vol. 2169, No. 38030.

⁵⁴ *Ibid.*, vol. 1695, No. 29215.

⁵⁵ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 271-272.

⁵⁶ *Ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 370.

⁵⁷ Available from www.uncitral.org/uncitral/en/case_law/digests.html.

Commission was informed that the Secretariat would focus on effectively promoting the Digest and bringing it to the attention of a large segment of the legal and judicial community.

154. The Commission was also informed that the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* had been published in June 2012 in English and made available on the UNCITRAL website.⁵⁸ Pursuant to the mandate given by the Commission,⁵⁹ the *Digest* identified trends in the interpretation of the UNCITRAL Model Arbitration Law and was designed to enable judges, arbitrators, lawyers, parties to commercial transactions, academics and students to better understand, interpret and apply the UNCITRAL Model Arbitration Law. It was noted that the current version of the Digest was based on 725 cases from 37 States.

155. The Commission was further informed that a one-day launch event for the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, organized by the Ministry of Law of Singapore in cooperation with the UNCITRAL secretariat, had been held in Singapore on 9 June 2012. The main contributors to the Digest from different geographical regions discussed the Digest and the UNCITRAL Model Arbitration Law, in particular the scope of application, the international interpretation pursuant to article 2 A, review of jurisdiction and articles 34-36 of the UNCITRAL Model Arbitration Law. During their interventions, participants underlined the importance of disseminating information on the interpretation and application of the UNCITRAL Model Arbitration Law and the particular usefulness of the Digest in that regard. The Commission expressed its appreciation to the contributors to the Digest and to the Secretariat for their work.

156. The Commission considered the desirability of commencing the preparation of a digest of case law on the Model Law on Cross-Border Insolvency, an issue that had been raised at the forty-first session of Working Group V (Insolvency Law) (A/CN.9/742, para. 38). It was noted that such a digest would provide wider and more ready access to the case law referred to in UNCITRAL texts relating to insolvency and draw attention to emerging trends in the interpretation of the Model Law on Cross-Border Insolvency. The Commission agreed that such a digest should be prepared, subject to the availability of resources in the Secretariat and encouraged the Secretariat to explore the possibility of collaborating with national correspondents and other experts to facilitate the preparation of the necessary analysis and case information.

157. The Commission expressed its continuing belief that the CLOUT system and the digests were an important aspect of the work undertaken by UNCITRAL for promoting awareness, harmonization and uniform interpretation of the law relating to UNCITRAL texts. The Commission recognized the resource-intensive nature of the CLOUT system and the need for further resources to sustain it. The Commission recalled that at its forty-second session, in 2009, it had appealed to all States to assist the Secretariat in the search for available funding at the national level to

⁵⁸ Available from www.uncitral.org/uncitral/en/case_law/digests.html.

⁵⁹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 87-91.

ensure coordination and expansion of the CLOUT system.⁶⁰ Since that appeal, there had been no increase in the resources available for the maintenance and improvement of the system. The Commission thus noted with interest that the Secretariat had refined a project proposal aimed at finding resources for the system and that such a proposal had already been discussed with one UNCITRAL member State. The Commission also noted that the Secretariat was seeking assistance from other States and donors, either in-kind (e.g. non-reimbursable loans of personnel) or through budget contributions, which could also include the pooling of resources from various sources. The Commission thanked the Secretariat for its work and fully endorsed a call for increased resources to maintain and enlarge the work of the Secretariat in that area.

158. The Commission encouraged the Secretariat to explore the possibility of cooperation with the Global Legal Information Network (see www.glin.gov), with a view to enhancing awareness, and uniform interpretation and application, of UNCITRAL texts.

XVII. Status and promotion of UNCITRAL texts

159. The Commission considered the status of the conventions and model laws emanating from its work and the status of the 1958 New York Convention, on the basis of a note by the Secretariat (A/CN.9/751) and information obtained by the Secretariat subsequent to the submission of that note. The Commission noted with appreciation the information on the following treaty actions and legislative enactments received since its forty-fourth session, in 2011, regarding the following instruments:

(a) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958;⁶¹ accession by Liechtenstein (146 States parties);

(b) Convention on the Limitation Period in the International Sale of Goods;⁶² accession by Benin (29 States parties);

(c) United Nations Convention on Contracts for the International Sale of Goods;⁶³ accessions by Benin and San Marino and withdrawal of declarations by Denmark, Finland and Sweden (78 States parties);

(d) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea;⁶⁴ signature by Sweden (one State party);

(e) UNCITRAL Model Law on International Commercial Arbitration (1985), as amended in 2006;⁶⁵ legislation based on the Model Law as amended in 2006 had

⁶⁰ Ibid., *Sixty-fourth session, Supplement No. 17* (A/64/17), para. 372.

⁶¹ United Nations, *Treaty Series*, vol. 330, No. 4739.

⁶² Ibid., vol. 1511, No. 26119.

⁶³ Ibid., vol. 1489, No. 25567.

⁶⁴ General Assembly resolution 63/122, annex. The Convention has not yet entered into force; it requires 20 States parties for entry into force.

⁶⁵ *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.

been adopted in Australia, in New South Wales (2010), the Northern Territory (2011), South Australia (2011), Tasmania (2011) and Victoria (2011);

(f) UNCITRAL Model Law on Electronic Commerce (1996):⁶⁶ legislation based on the Model Law had been adopted in Australia (2011), in the Australian Capital Territory (2012), New South Wales (2010), Northern Territory (2011), South Australia (2011), Tasmania (2010), Victoria (2011) and Western Australia (2011); Belize (2003); Canada, in the Northwest Territories (2011); Barbados (2001); Saint Lucia (2011); and Saint Vincent and the Grenadines (2007); legislation influenced by the principles on which the Model Law was based had been adopted in China, in Macao, China (2005);

(g) UNCITRAL Model Law on Electronic Signatures (2001):⁶⁷ legislation based on the Model Law had been adopted in Barbados (2001), Saint Lucia (2011), Saint Vincent and the Grenadines (2007), Saudi Arabia (2007) and Trinidad and Tobago (2011);

(h) UNCITRAL Model Law on International Commercial Conciliation (2002):⁶⁸ legislation based on the Model Law had been adopted in the former Yugoslav Republic of Macedonia (2009).

160. The Commission noted, in line with the letter from the Secretary-General to Heads of States and Government dated 9 May 2012,⁶⁹ the importance of universal participation and implementation of treaties. The Commission joined the Secretary-General's appeal by calling on States to deposit instruments of ratification or accession to trade law treaties, in particular to those treaties nearing universal participation, namely the 1958 New York Convention (146 States parties), and those nearing entry into force, namely the United Nations Convention on the Use of Electronic Communications in International Contracts⁷⁰ (which required one additional action for entry into force) and the United Nations Convention on the Assignment of Receivables in International Trade⁷¹ (which required four additional actions for entry into force).

161. The Commission took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/750) and noted with appreciation the influence of UNCITRAL legislative guides, practice guides and contractual texts.

XVIII. Coordination and cooperation

162. The Commission had before it a note by the Secretariat (A/CN.9/749) providing information on the activities of international organizations active in the field of international trade law in which the UNCITRAL secretariat had participated

⁶⁶ Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I.

⁶⁷ Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II.

⁶⁸ Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I.

⁶⁹ Available from

http://treaties.un.org/Pages/TreatyEvents.aspx?path=treaty=Treaty/Focus/Page1_en.xml.

⁷⁰ General Assembly resolution 60/21, annex.

⁷¹ General Assembly resolution 56/81, annex.

since the last note to the Commission (A/CN.9/725).⁷² The note had been prepared in response to General Assembly resolution 34/142 and in accordance with the mandate of UNCITRAL. In that resolution, the Assembly requested the Secretary-General to place before the Commission, at each of its sessions, 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 that field.

163. The Commission noted with appreciation the engagement of its secretariat in activities with a number of organizations both within and outside the United Nations system, including ESCAP, the European Union, the Hague Conference on Private International Law, the Organization for Economic Cooperation and Development, ECE, Unidroit, the United Nations Conference on Trade and Development, the United Nations Inter-Agency Cluster on Trade and Productive Capacity of the United Nations System Chief Executives Board for Coordination, and the World Bank.

164. The Commission noted that the coordination activity of its secretariat concerned all of the current working groups of UNCITRAL and that the secretariat participated in expert groups, working groups and plenary meetings of other bodies with the purpose of sharing information and expertise, as well as avoiding duplication of work in the relevant fields. The Commission noted that such activity often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of the coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and expressed support for the use of travel funds for that purpose.

A. Coordination and cooperation in the field of security interests

165. The Commission recalled that, at its forty-fourth session, in 2011, it had approved a paper jointly prepared by the Permanent Bureau of the Hague Conference and the secretariats of UNCITRAL and Unidroit entitled “Comparison and analysis of major features of international instruments relating to secured transactions” (A/CN.9/720) and requested that it be given the widest possible dissemination.⁷³

166. The Commission noted that the paper had been published as a United Nations publication entitled “UNCITRAL, Hague Conference and Unidroit texts on security interests”,⁷⁴ with proper recognition of the contribution of the Permanent Bureau of the Hague Conference and the secretariat of Unidroit. The Commission welcomed that publication and expressed its appreciation to the Secretariat, as well as to the Permanent Bureau of the Hague Conference and the secretariat of Unidroit. It was widely felt that the excellent coordination and cooperation among the three organizations in the field of security interests and the resulting publication was a good example of the kind of coordination and cooperation that the Commission

⁷² *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 277.

⁷³ *Ibid.*, paras. 280-283.

⁷⁴ Available from www.uncitral.org/uncitral/en/uncitral_texts/payments/2011UNCITRAL_HCCH_Unidroit_texts.html.

had been supporting for years. It was generally believed that that publication could pave the way for possible future collaboration among the three organizations, with a view to explaining the interrelationship of their texts and thus facilitating the adoption of those texts by States.

167. In addition, the Commission recalled that, at its forty-fourth session, in 2011, it had requested the Secretariat to proceed with the preparation of a joint set of principles on effective secured transactions regimes in cooperation with the World Bank and outside experts.⁷⁵ The Commission noted with appreciation that the Secretariat had prepared a first draft summarizing the basic principles and recommendations of the Secured Transactions Guide and was in the process of discussing it with the World Bank.

168. Moreover, the Commission recalled that, at its forty-fourth session, in 2011, it had also requested the Secretariat to cooperate closely with the European Commission with a view to ensuring a coordinated approach to the law applicable to the third-party effects of assignments of receivables, taking into account the approach followed in the United Nations Convention on the Assignment of Receivables in International Trade and the Secured Transactions Guide.⁷⁶ The Commission noted that its request had been communicated by the Secretariat to the European Commission and was advised that: (a) the British Institute of International and Comparative Law had completed a study commissioned by the European Commission on that topic;⁷⁷ (b) the European Commission was currently analysing that study and had not yet taken a position on the matter; (c) the European Commission report on proprietary aspects of the assignments of claims would be completed in 2013; and (d) the European Commission welcomed the possibility of establishing a coordinated approach with UNCITRAL. The Commission expressed its appreciation to the Secretariat for its efforts and to the European Commission for its positive response. It was widely felt that a coordinated approach would be in the interest of all involved so as to avoid the application of different laws to the third-party effectiveness and priority of the rights of assignees of receivables, depending on the forum in which the issue arose. After discussion, the Commission requested the Secretariat to continue its coordination effort.

B. Reports of other international organizations

169. The Commission took note of statements made on behalf of the following international organizations.

International Institute for the Unification of Private Law (Unidroit)

170. The Commission heard a statement made on behalf of Unidroit. Unidroit welcomed the current coordination and cooperation with UNCITRAL and reaffirmed its commitment to cooperating closely with the Commission with a view to ensuring consistency, avoiding overlap and duplication in the work of the

⁷⁵ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 228.

⁷⁶ *Ibid.*, paras. 229-231.

⁷⁷ The final report is available from http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf.

two organizations and making the best use of the resources made available by the respective member States.

171. Unidroit reported that:

(a) Following the adoption of the Unidroit Principles 2010, the Unidroit Governing Council, at its ninety-first session, held in Rome from 7 to 9 May 2012, had given its secretariat a mandate to develop model clauses to assist parties in incorporating the Unidroit Principles 2010 (see para. 137 above) into the terms of their contract, or in choosing them as the rules of law governing their contract;

(b) The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets⁷⁸ had been adopted at the diplomatic Conference for the adoption of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets, held in Berlin from 27 February to 9 March 2012. Among other important resolutions, the diplomatic Conference had invited the governing bodies of the International Telecommunications Union (ITU) to consider the matter of ITU becoming the supervisory authority of the international registry to be set up under the Protocol;

(c) It was noted that the negotiations on the establishment of the registry under the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock were well advanced and should be concluded shortly. The Unidroit Governing Council had given its secretariat a mandate to examine the potential economic benefit of developing a fourth protocol to the Convention on International Interests in Mobile Equipment on matters specific to agricultural, mining and construction equipment;

(d) The Unidroit Governing Council had authorized the convening of a committee of governmental experts to consider and finalize the draft principles on the enforceability of close-out netting provisions that had been developed by a Unidroit study group in 2010 and 2011.⁷⁹ The Committee was to hold its first session in Rome from 1 to 5 October 2012;

(e) Following the publication of the Official Commentary to the 2009 Unidroit Convention on Substantive Rules for Intermediated Securities, the Committee on Emerging Markets Issues, Follow-Up and Implementation had met in Rio de Janeiro, Brazil, in March 2012. The Unidroit Governing Council welcomed the Committee's proposal to develop a legislative guide to advise States wishing to ratify the Convention,⁸⁰ stressing that the guide should set out the options available for regulating those areas of the law which, although related to the Convention, were not directly or wholly addressed by that instrument;

(f) The committee to follow up the application of the 1995 Convention on Stolen or Illegally Exported Cultural Objects⁸¹ had met in Paris on 19 June 2012. The United Nations Educational, Scientific and Cultural Organization-Unidroit

⁷⁸ The Convention and its Protocols are available from www.unidroit.org/english/conventions/mobile-equipment/main.htm.

⁷⁹ Available from www.unidroit.org/english/studies/study78c/main.htm.

⁸⁰ Available from www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm.

⁸¹ United Nations, *Treaty Series*, vol. 2421, No. 43718.

Model Provisions on State Ownership of Undiscovered Cultural Objects,⁸² completed in 2011, would soon be published;

(g) In the light of the discussion at a colloquium on the private law aspects of promoting investment in agricultural production, organized by Unidroit in Rome from 8 to 10 November 2011,⁸³ and consultations between Unidroit and the Rome-based United Nations agencies specializing in agriculture, food aid and rural development, the Unidroit Governing Council had authorized its secretariat to establish a study group for the preparation of an international guidance document for contract farming arrangements and to invite the Food and Agriculture Organization of the United Nations, the International Fund for Agricultural Development and other interested international organizations to participate in its work. The Unidroit Governing Council had also authorized its secretariat to pursue its consultations with a view to the possible preparation of an international guidance document on land investment contracts.

World Bank

172. The Commission heard a statement made on behalf of the World Bank, in which appreciation was expressed to UNCITRAL and its secretariat for the continuing cooperation with the World Bank. It was noted that over the previous years the work of the World Bank in supporting the modernization of the legal enabling environment for economic growth and trade had been significantly enhanced by the work of UNCITRAL and its working groups. In particular, the work being done by the two organizations in establishing uniform legal frameworks in the field of public procurement, arbitration and conciliation, insolvency and secured transactions was highlighted.

173. The World Bank invited UNCITRAL to participate in the Global Forum on Law, Justice and Development (www.globalforumljd.org), a project of the World Bank which aimed at providing an innovative and dynamic forum for knowledge-sharing so as to promote a better understanding of the role of law and justice. In response, the Commission had given the Secretariat a mandate to participate in the Global Forum project.

C. International governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups

174. 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.⁸⁴ In paragraph 9 of the summary, the Commission had decided to draw up and update as necessary a list of international organizations and of non-governmental organizations with which UNCITRAL had a long-standing cooperation and which had been invited to sessions of the Commission.

⁸² Available from www.unidroit.org/english/documents/2012/study70a/s-70a-main-e.pdf.

⁸³ Information about, and materials from, the colloquium are available from www.unidroit.org/english/studies/study80/main.htm.

⁸⁴ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, annex III.

175. The Commission also recalled that, at its forty-fourth session, in 2011, it had requested the Secretariat to make adjustments to the online presentation of information concerning intergovernmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups and to the modality of communicating such information to States.⁸⁵

176. The Commission heard an oral report by the Secretariat on the implementation of that request by the Commission. It was noted that the Secretariat maintained an online list of intergovernmental and non-governmental organizations that was organized so that States could identify organizations that were being invited to each active working group of UNCITRAL and organizations that had been invited to past working groups of UNCITRAL. It was noted that all organizations on that list were invited to annual sessions of the Commission.

177. The Commission also noted that the Secretariat constantly updated the list to provide up-to-date information. In that context, the Commission noted that since its forty-fourth session, in 2011, the following organizations had been added to the list of non-governmental organizations invited to sessions of UNCITRAL and its working groups: Business Recovery and Insolvency Practitioners Association of Nigeria; European Intermodal Association; European Multi-channel and Online Trade Association; Miami International Arbitration Society; Pakistan Business Council; and International Union of Judicial Officers.

178. As regards the modality of communicating the relevant information to States, the Commission noted that the links to the web pages where the most updated list could be found continued to be included in invitations to sessions of the Commission and its working groups. The Commission expressed its appreciation to the Secretariat for implementing its request in an efficient manner.

D. Enhancing cooperation with academia

179. The Commission recalled that at its forty-fourth session, in 2011, the Commission decided that the Secretariat should investigate the possibility of inviting a small number of prominent specialized law reviews to attend sessions of the Commission or its working groups as observers, on the understanding that those reviews would then disseminate information about new projects and existing standards, with a view to increasing awareness of the standard-setting and technical assistance work of the Commission.⁸⁶

180. The Secretariat brought to the attention of the Commission the fact that since its forty-fourth session, in 2011, the Secretariat had received requests from various institutions to participate as observers at sessions of UNCITRAL. The Secretariat had had to turn down a number of requests when the eligibility criteria had not been met, in particular when the institution was not international in focus and in membership, when there were doubts regarding the ability of the institution to bring an original and meaningful contribution to the deliberations at the session or when legal or commercial experience to be reported upon by the institution was already

⁸⁵ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 288-298.

⁸⁶ Ibid., para. 298. At that session, the Commission also expressed its support for exploring means to more broadly disseminate UNCITRAL instruments (ibid., para. 319).

sufficiently represented in the session. The Commission encouraged the Secretariat to strictly apply the eligibility criteria to academic institutions.

181. The Commission recalled that, in the founding resolution of UNCITRAL, the General Assembly had authorized the Commission to consult with or request the services of any international or national organization, scientific institution and individual expert, on any subject entrusted to it, if it considered such consultation or services might assist it in the performance of its functions.⁸⁷ The Commission therefore considered it appropriate for the Secretariat to invite representatives of academia in their personal capacity to address the Commission or its working group from time to time when such an arrangement would assist in the performance of its functions. The Commission reaffirmed its belief about the importance of furthering cooperation with academia and stimulating research related to the work of UNCITRAL.

XIX. UNCITRAL regional presence

A. Establishment of the UNCITRAL Regional Centre for Asia and the Pacific: progress report

182. The Commission recalled that at its forty-fourth session, in 2011, broad support had been expressed for the establishment of UNCITRAL regional centres, which was considered a novel yet important step for UNCITRAL in reaching out and providing technical assistance to developing countries.⁸⁸ In particular, at that session, the Commission had approved the establishment of the UNCITRAL Regional Centre for Asia and the Pacific in Incheon, Republic of Korea.⁸⁹ The General Assembly, in its resolution 66/94, had welcomed that decision and expressed its appreciation to the Government of the Republic of Korea for its generous contribution to that pilot project.

183. The Regional Centre was officially opened on 10 January 2012 by the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, who emphasized the importance of the principle of the rule of law and the role of the Regional Centre in promoting international trade and development in the Asia-Pacific region. The launch event of the Regional Centre was followed by a regional workshop in which panellists discussed the role of the Regional Centre and the significance of UNCITRAL texts for the region.⁹⁰

184. The Commission heard an oral report by the head of the Regional Centre on the progress made since the establishment of the Regional Centre. It was informed that the Regional Centre was currently fully staffed with a head and a team assistant, funded by the project budget contributed by the Government of the Republic of Korea, and a legal expert provided by the Government of the Republic of Korea on a non-reimbursable basis. It was noted that the activities of the Regional Centre had

⁸⁷ General Assembly resolution 2205 (XXI), para. 11.

⁸⁸ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 264.

⁸⁹ *Ibid.*, paras. 267 and 269.

⁹⁰ More information about the Regional Centre and the launch event is available from www.uncitral.org/uncitral/en/tac/rcap.html.

focused on assessing needs and mapping existing projects relating to trade law reform, with a view to increasing coordination among them. It was emphasized that particular importance was given to coordination with other regional entities, especially ESCAP. The establishment of effective contacts with States that already had the resources and the capacity for trade law reform was also a priority.

185. States were invited to consider contributing to the activities of the Regional Centre by providing financial or human resources, in-kind contributions or as otherwise appropriate. It was added that not only States already involved in trade law reform in the region as donors or partners, but also States that considered increased commercial interaction with the region strategic, and therefore valued increased legal predictability for those commercial exchanges, could potentially be interested in closer cooperation with the Regional Centre.

186. It was also added that, from an operational standpoint, the Regional Centre had identified East Asia and the Pacific as areas of priority for its work, in the light of requests as well as existing initiatives, and that currently its main areas of work included alternative dispute resolution, sale of goods and electronic commerce.

B. Regional presence in other parts of the world

187. The Commission took note of statements by member States expressing an interest in establishing UNCITRAL regional centres.

188. In particular, the representative of Singapore stated that, further to its previous expression of interest in hosting an UNCITRAL centre, the Government of Singapore had been communicating with the Secretariat on that issue and that objectives and a basic structure for the establishment of such a centre had been tentatively identified. Hence, the Government proposed that an UNCITRAL centre should be established in Singapore, operating under the supervision of the Secretary of UNCITRAL and collaborating, as appropriate, with the UNCITRAL Regional Centre for Asia and the Pacific.

189. It was also stated that the activities proposed for the UNCITRAL centre in Singapore could include: training on UNCITRAL and other relevant international trade law texts, thus contributing to increasing the understanding of international trade law; promotion of the adoption of UNCITRAL texts, especially in the context of regional cooperation; and the organization of substantive meetings in support of the work of UNCITRAL on the preparation of legislative standards. It was indicated that the centre would report on its activities at the annual session of the Commission.

190. It was also indicated that the Government of Singapore offered support, including an initial level of funding, to the proposed centre, and that the Government would make every effort to further mobilize existing resources to support the activities of that centre.

191. The representative of Singapore expressed confidence that the proposed centre, together with other regional, subregional or country centres of UNCITRAL that had already been or were going to be established, would provide an important contribution to the efforts of UNCITRAL and to global peace and development.

192. The representative of Kenya confirmed the interest of the Government of Kenya in hosting an UNCITRAL regional centre in Nairobi, and stressed that the proposed location was very suitable because of the existing international presence and excellent facilities. Several other delegates emphasized the importance of establishing an UNCITRAL presence in Africa.

193. The Commission welcomed the offers from the Governments of Kenya and Singapore, requested the Secretariat to further pursue administrative arrangements for the establishment of those centres and noted the importance of maintaining close coordination and cooperation between regional centres.

194. The Secretariat was requested to keep the Commission informed of developments regarding the operation of the Regional Centre for Asia and the Pacific and the establishment of other UNCITRAL regional centres, in particular their funding and budget situations.

XX. Role of UNCITRAL in promoting the rule of law at the national and international levels

195. The Commission recalled that an item on the role of UNCITRAL in promoting the rule of law at the national and international levels had been on its agenda since 2008, in response to the invitation of the General Assembly to the Commission to comment, in its report to the Assembly, on its current role in promoting the rule of law.⁹¹ The Commission recalled that it had transmitted its comments, as requested, in its annual reports to the Assembly,⁹² expressing in particular 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 supported by the Rule of Law Unit in the Executive Office of the Secretary-General. The Commission noted with satisfaction that that view had repeatedly been endorsed by the Assembly.⁹³

196. The Commission took note of General Assembly resolution 66/102 on the rule of law at the national and international levels. The Commission in particular noted that, in paragraph 12 of that resolution, the Assembly had invited the Commission (and the International Court of Justice and the International Law Commission) to continue to comment, in its reports to the Assembly, on its current role in promoting the rule of law. The Commission also took note of paragraphs 15-18 of that resolution, concerning the high-level meeting of the General Assembly on the topic of the rule of law to be held on 24 September 2012, and paragraph 20, by which the Assembly had invited Member States and the Secretary-General to suggest possible subtopics for future Sixth Committee debates.

⁹¹ General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; and 66/102, para. 12.

⁹² *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. 415-419; *ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 313-336; and *ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 299-321.

⁹³ Resolutions 63/120, para. 11, 64/111, para. 14, 65/21, paras. 12 to 14, and 66/94, paras. 15-17.

197. The Commission recalled that at its forty-third session, in 2010, it had indicated that it considered it essential to keep 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 the 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 two years, when sessions of the Commission were held in New York.⁹⁴

198. Pursuant to that request, the rule of law briefing was held during the session, which was put in the context of the high-level meeting. During the first part of the briefing, UNCITRAL was informed about preparations for the high-level meeting. During the second part of the briefing, representatives of States and organizations suggested points for reflection by UNCITRAL in its comments to the General Assembly this year.

A. Summary of the briefing

199. The opening remarks were delivered on behalf of the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations by the Officer-in-Charge of the Office of Legal Affairs and Director of the General Legal Division of the Office of Legal Affairs. She emphasized that, while there was no doubt in the United Nations system about the important role played by UNCITRAL in the promotion of the rule of law, slow progress had been made in the integration of UNCITRAL instruments and tools into the United Nations joint rule of law activities. That was particularly regrettable since the need for UNCITRAL expertise, instruments and tools was manifest in reports from United Nations field operations, which referred to unfilled capacity gaps regarding measures aimed at economic revitalization, employment generation and private sector development. Among practical steps towards bringing the results of the work of UNCITRAL and its vast experience to intended beneficiaries, she identified the need for the sustained involvement of interested countries themselves, expanded outreach activities of UNCITRAL and the active involvement of United Nations and other rule of law assistance providers on the ground.

200. The Commission was subsequently updated by a representative of the Rule of Law Unit about the developments in the United Nations rule of law agenda since the briefing by the Unit to UNCITRAL in 2010. The speaker highlighted growing recognition in various United Nations bodies, including in the Security Council, of the importance of rule of law activities promoting economic development, and noted that ways should be found to reflect that growing recognition in the work of the United Nations. The attention of the Commission was drawn to: (a) the report of the Secretary-General entitled “Delivering justice: programme of action to strengthen the rule of law at the national and international levels” (A/66/749), submitted for the consideration of Member States in preparation of the high-level meeting on rule of law to be held pursuant to General Assembly resolution 66/102; (b) growing concern that current United Nations institutional arrangements in the rule of law area did not succeed in promoting a coordinated and coherent approach in

⁹⁴ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 335.

the United Nations rule of law efforts; and (c) the efforts of the Deputy Secretary-General to address that concern. The Commission took note of the point made that gathering data on the impact of UNCITRAL technical assistance would be timely and in line with the calls by the General Assembly and the Security Council for assessment of the effectiveness of United Nations rule of law assistance activities.

201. The Commission was then briefed by the representative of Mexico, a co-facilitator of informal consultations of Member States on an outcome document of the high-level meeting, on the progress made in the consultations. The Commission learned that some provisions under consideration for inclusion in an outcome document would recognize the contribution made by UNCITRAL to the promotion of the rule of law in international trade.

202. The second part of the briefing was opened by the representative of Austria, who highlighted the economic component of the rule of law, in particular the contribution of UNCITRAL to the promotion of the rule of law in both national and cross-border contexts in particular. Specific reference was made to the UNCITRAL Model Law on Public Procurement as an important tool in the fight against corruption, to UNCITRAL instruments in the area of commercial dispute resolution as relevant to the promotion of access to justice and the culture of the rule of law in society as a whole, and to UNCITRAL insolvency law texts that provided rule-based resolution of financial difficulties, exit mechanisms and the distribution of assets. In conclusion, he noted that efforts to promote the rule of law at the national and international levels did not serve an abstract goal, but were aimed at the protection of the rights and interests of individuals and that UNCITRAL might have a less visible but no less important impact in addressing the roots of economic tensions and problems, such as poverty, inequality or disputes over access to shared resources.

203. Representatives of UNDP, IDLO, ILI and Alfa-Redi (a non-governmental organization invited to participate in the panel in view of its work in promoting the rule of law as a component of the information society) described lessons learned in assisting States with strengthening the rule of law at the national level. A representative of IDLO highlighted the importance of national ownership, the involvement of civil society actors and local commitment to reforms at all levels — from political decision makers and high-level civil servants to implementing staff — for rule of law reforms in any sector to succeed. It was therefore considered essential to work with the national staff and not to impose solutions.

204. That message was echoed in a statement by one speaker, who said that the objective of the United Nations rule of law work was not about imposing foreign legal systems or overly elaborate ones but about applying basic rule of law principles to local conditions and local needs and helping to integrate various specific disciplines under commonly acceptable rule of law standards. Other speakers pointed out that UNCITRAL was doing exactly that by harmonizing legal approaches and business practices embodied in national laws from various legal systems and providing models for reform. Without them, legislatures found it difficult to proceed; with such texts in hand, local officials could dedicate their time more efficiently to local specifics. It was noted that the methods of work of UNCITRAL themselves contributed to harmonization by allowing delegations from

various legal systems to interact and exchange ideas; knowledge of other systems helped to promote better understanding of how to interact in international trade.

205. Examples were provided of the use of UNCITRAL texts as models for local reforms in various areas of commercial law. A link between UNCITRAL texts and the rule of law in the broader context was demonstrated by an example provided by the representative of ILI on the use of UNCITRAL texts in the area of security interests, in particular as they regulated non-possessory liens in property. It was argued that, as studies by academics and practitioners had shown, in the absence of such laws individuals desperate to start businesses had resorted to illegal means (e.g. forgery, false documents), resulting in more criminal convictions in some countries than for murder, armed robbery and other major felonies combined. The link between the work of UNCITRAL and good governance was demonstrated by reference to UNCITRAL texts in the area of public procurement and privately financed infrastructure projects that fostered integrity, confidence, fairness, transparency and accountability in public expenditures. A representative of UNDP provided examples in which its work on the legal empowerment of the poor could benefit from UNCITRAL work, in particular regarding regulation of microfinance, micro-businesses, access to justice and enforcement of contracts.

206. Several speakers referred to the importance of UNCITRAL texts in ensuring a nexus between the State; high-level commitments, embodied in international treaties, declarations or other instruments; and their implementation in the daily life of people. The UNCITRAL Model Law on Public Procurement, for example, was widely considered an indispensable tool in the implementation of the United Nations Convention against Corruption; the UNCITRAL instruments on privately financed infrastructure projects were considered relevant to the implementation of the outcome document of the United Nations Conference on Sustainable Development, entitled “The future we want”⁹⁵ (see para. 115 above); and UNCITRAL model laws and rules in the area of commercial arbitration and conciliation were considered important for the effective implementation of the 1958 New York Convention.

207. Other speakers referred to the need to achieve better coordination of rule of law efforts at both the national and international levels and to make them more responsive to the realities of the information society. An example of conflicting rules and efforts at the regional and international levels that negatively affected the interoperability of the e-commerce and e-governance systems of Governments was given by a representative of Alfa-Redi, with the conclusion that no rule of law could exist where there was chaos regarding applicable rules. The role of UNCITRAL as the core legal body in the field of international trade law, with its mandate to coordinate activities of various bodies active in that field and encourage cooperation among them, was highlighted.

208. The Commission heard various suggestions regarding a programme of action that it could recommend to States with a view to strengthening the rule of law in commercial relations, among them: (a) the creation of international tribunals (akin to the International Tribunal for the Law of the Sea) with competence to give advisory opinions on international conventions regulating commercial law issues (for example, the 1958 New York Convention or the United Nations Sales Convention), recognizing that the International Court of Justice did not have

⁹⁵ General Assembly resolution 66/288, annex.

jurisdiction over disputes involving private parties; (b) improving the capacity of local judiciary to handle commercial law disputes, including through the establishment of specialized commercial law courts and the provision of targeted training to judges of those courts (which did not need to involve creating a separate commercial court system, but could consist merely of having specialized judges within the regular civil court system); (c) increased research by academic institutions on issues of commercial law and the impact of commercial law reforms on economic development and the rule of law; and (d) creating, strengthening or confirming the existence of commercial law reform units and relevant expertise in ministries of justice, legislatures or legislative reform commissions, as appropriate.

209. The Commission also heard the view that in rule of law assistance programmes there was often an excessive focus on institutional reforms and no sufficient consideration of the impact of legislative reforms on institutions and the judiciary. The Commission also heard the view that, while the link between the rule of law and economic development had long been established, the mutually reinforcing impact of the two was still to be considered. It was also considered important to underscore that the rule of law in the economic development context was not only or primarily about attracting foreign investment but also about internal development.

210. During the briefing, speakers expressed the view that the Commission, during its forty-five years of existence, had already contributed and continued contributing significantly to strengthening the rule of law in commercial relations, international trade and in the broader context of the rule of law at both the national and international levels, at the crucial juncture between the two and in public and private law contexts. That contribution should be duly recognized by States and the United Nations system in the context of the high-level meeting and in its outcome document.

B. Action by the Commission

Possible outcomes of the high-level meeting

211. The Commission noted that, in paragraph 16 of resolution 66/102, the General Assembly had decided that the high-level meeting would result in a concise outcome document. The Commission was unanimous that an outcome document should refer to UNCITRAL work and recognize the contribution made by UNCITRAL to the promotion of the rule of law in the economic field, which was vital to the promotion of the rule of law in the broader context.

212. The Commission noted the availability of the Secretariat to assist Member States in formulating actions in support of the objectives of UNCITRAL if States voluntarily decided to undertake such action on the occasion of the high-level meeting or any other occasion. Support was expressed for making known to States, for their consideration, possible actions recommended by the UNCITRAL secretariat in the light of experience accumulated through UNCITRAL technical assistance and cooperation activities. The view was also expressed that recommended actions could in addition be considered by the Commission itself at a future session (see paras. 218-223 below).

Address by the Chair of the forty-fifth session of UNCITRAL to the high-level meeting

213. Concern was expressed that in paragraph 15 (b) of General Assembly resolution 66/102, the Chair of UNCITRAL was not listed among the speakers at the high-level meeting. The Commission was unanimous in emphasizing the importance of the UNCITRAL Chair addressing the high-level meeting. That was considered to be in line with paragraph 12 of resolution 66/102, by which the Assembly had requested the Commission (together with the International Court of Justice and the International Law Commission) to continue to comment on its current role in promoting the rule of law (see para. 196 above). It was also considered to be in line with the message of the Commission, endorsed by the Assembly, 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 (see para. 195 above). Otherwise, it was noted, the only expert body in the United Nations system in the field of international commercial law would be excluded from what was intended to be inclusive and comprehensive rule of law discussion in the Assembly.

214. The high-level meeting was viewed as a unique opportunity for the international community to look at rule of law issues from a commercial law point of view and to increase the knowledge of all concerned about the impact of commercial law reforms and UNCITRAL on the promotion of the rule of law.

215. The Commission requested the Chair of its forty-fifth session to transmit its views as expressed in the present report to the Office of the President of the General Assembly.

216. The Commission was informed that the Office of Legal Affairs had requested the Office of the President of the General Assembly to invite the UNCITRAL Chair to address the high-level meeting. The Office of Legal Affairs stated that no procedural obstacles existed to the UNCITRAL Chair addressing the high-level meeting; it was thus a matter of the political will of States to agree on that point in consultation with the President of the General Assembly.

217. It was considered essential that Member States themselves, in their statements at the high-level meeting, should not overlook the areas of work of UNCITRAL and its role in the promotion of the rule of law.

UNCITRAL messages to the high-level meeting

218. The Commission agreed that its message to the high-level meeting should consist of a message addressed to States and a message addressed to the United Nations system.

219. As regards the message to States, the Commission in particular noted that local capacity in commercial law reforms should continually be built, recognizing that commercial law constantly evolved in response to business practices. Nevertheless, the experience from UNCITRAL technical assistance and cooperation activities, including those of the recently established UNCITRAL Regional Centre for Asia and the Pacific (see paras. 182-186 above), demonstrated that, amid pressure to address other priorities, local needs in commercial law reforms were systematically overlooked, with the result that resources were allocated to other areas and the local

capacity of countries to engage in commercial law reforms was weakened. In many States, policymaking and legislative work related to international legal standards had not kept pace with international developments in finance and commerce. In some States, good laws regulating commerce might exist, but their economic impact was limited when there was no local capacity to properly interpret or apply them. There were often not enough people in Governments with expertise in commercial law reforms with whom the UNCITRAL secretariat would be able to establish sustainable dialogue. To overcome those deficiencies, the sustainable involvement of States in commercial law reforms was needed.

220. Such involvement should translate into concrete steps that individual States could take, such as:

(a) Establishing a national centre of international commercial law expertise with the capacity to identify local needs for commercial law reforms, utilize UNCITRAL standards and technical assistance tools to address such needs, and promote a coordinated approach by that State to the treatment of the same issues in various forums, including in the negotiation of a country-specific development assistance framework;

(b) Putting in place a mechanism for collecting, analysing and monitoring national case law related to UNCITRAL texts relevant to that State and integrating such a mechanism into the existing UNCITRAL systems aimed at addressing the need of the judiciary to better understand the internationally prevailing application and interpretation of UNCITRAL standards and achieve effective cross-border court cooperation. Such measures were aimed at building the local capacity of States necessary to ensure interpretation of UNCITRAL 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 trade⁹⁶ and thus fulfil the obligations of States under relevant international conventions to which they might be parties.

221. As regards the message to the United Nations system, the Commission in particular reiterated its view that an excessive or exclusive focus on some areas of legal reform while disregarding other areas that were less visible ought to be avoided, that advancing the rule of law should be an inclusive and comprehensive process, that the rule of law and economic development were mutually reinforcing and that institutional reforms should not be undertaken at the expense of legislative reforms.

222. In addition, the Commission reiterated 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. Noting slow progress in such integration, the Commission considered the need for: (a) designating the UNCITRAL secretariat as a lead agency on commercial law matters in current or future rule of law coordination mechanisms; (b) conducting outreach to country teams with the goal of increasing their awareness about the work of UNCITRAL and its relevance to their work on the rule of law; and

⁹⁶ See, for example, art. 7 of the United Nations Convention on Contracts for the International Sale of Goods, art. 7 of the Convention on the Limitation Period in the International Sale of Goods and art. 5 of the United Nations Convention on the Use of Electronic Communications in International Contracts.

(c) reflecting by default needs for commercial law reforms in templates used for the formulation of country-specific development assistance programmes.

223. It was noted that the above messages to States and the United Nations would be mutually reinforcing: local needs in commercial law reforms ought to be made known by local authorities to the international community, while the international community engaged in the formulation and implementation of a country-specific development programme ought to understand the importance of addressing those needs and be aware of the relevant capacity of UNCITRAL. In the long run, it was noted, the recommended steps should contribute to building the local capacity of States to continually engage in commercial law reforms at the country level and in a coordinated fashion in the rule-formulating activities of regional and international bodies.

Possible subtopics for future Sixth Committee debates

224. The attention of the Commission was drawn to paragraph 20 of General Assembly resolution 66/102, which contained an invitation by the Assembly to Member States and the Secretary-General to suggest possible subtopics for future Sixth Committee debates. The Commission noted that its secretariat had been requested to contribute to the preparation of a report of the Secretary-General, as part of the implementation of paragraph 20 of resolution 66/102. The Commission invited its members and observers to suggest UNCITRAL-related subtopics, based on the experience of UNCITRAL in international trade law, for consideration by the Sixth Committee, and took note of subtopics considered by its secretariat for contribution to that report.

225. Based on difficulties encountered by the Commission with the implementation of its mandate to coordinate legal activities in the field of international trade law and its previous decisions in that regard, a subtopic suggested for consideration by the Sixth Committee was “Means of achieving effective coordination of rule-making activities at the regional and international levels”.

226. Another suggested subtopic was “Access to justice through alternative means of dispute resolution”. The Commission noted in that regard the cost and time-consuming nature of judicial reforms, which might make it advisable to seek alternative ways of delivering justice. It was also noted that that subtopic would inevitably touch upon issues of traditional and informal justice mechanisms, much debated in the United Nations system, but should also touch upon issues of arbitration and conciliation.

227. The third subtopic suggested was “Mutually reinforcing impact of economic development and the rule of law”. The Commission noted that in the United Nations system the emphasis had so far been on the role of the rule of law in economic development but not the role of economic development in strengthening and sustaining the rule of law in the long run.

XXI. A strategic direction for UNCITRAL

228. The Commission had before it a note by the Secretariat (A/CN.9/752 and Add.1) responding to a request at the forty-fourth session of the Commission,

in 2011, for a note on strategic planning.⁹⁷ The note by the Secretariat set out a number of issues for consideration by the Commission in setting the parameters for a strategic plan for UNCITRAL, addressing first the state of play within UNCITRAL and its secretariat and, second, the harmonization mandate given to UNCITRAL by the General Assembly as it might be expressed in terms of a strategic goal and strategic priorities. The note considered the work programme of the Commission, the role of the various bodies of UNCITRAL (the Commission, its working groups and secretariat) in realizing that programme, the methods of work employed, allocation of resources and strategic issues for consideration.

229. The Commission took note of the following matters (see A/CN.9/752/Add.1, para. 26), as strategic considerations:

- (a) The subject areas that should be accorded the highest priority, by reference to the role and relevance of UNCITRAL;
- (b) Achieving the optimal balance of activities given current resources;
- (c) The sustainability of the existing *modus operandi*, i.e. current emphasis on formal rather than informal negotiations when developing texts, given current resources;
- (d) The mobilization of additional resources and the extent to which UNCITRAL should seek external resources for its activities, such as through joint activities and cooperation with other bodies.

230. Some preliminary proposals were advanced with regard to the strategic directions discussed in the note by the Secretariat. One view was that certain options set out therein might serve as the basis for a work programme for UNCITRAL on promoting the rule of law at the national and international levels. It was suggested that such a programme might encompass the following elements:

- (a) Promoting an integrated approach, beginning with the development of a project and carrying through to technical assistance and monitoring thereof;
- (b) Developing practice guidelines for judges working in cross-border areas of the law, as was done by Working Group V (Insolvency Law) with regard to cross-border insolvency;
- (c) Formalizing networking by creating a list of participants (“listserv”) that would allow experts to “meet” and exchange information, as well as help States that needed assistance to identify experts in the field. The example was given of a similar mechanism that had been launched by the Hague Conference;
- (d) Setting aside time at UNCITRAL meetings for the sharing of information by States on initiatives they were undertaking to promote UNCITRAL instruments; that would, *inter alia*, make States that might be seeking assistance aware of initiatives that they could access for their benefit;
- (e) Further developing the cooperation of UNCITRAL with the World Bank on elaborating the links between economic development and trade law, and the role of the latter in helping States attract foreign trade and investment.

⁹⁷ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 343.

231. The Commission agreed to consider, and provide guidance on, inter alia, those matters at its forty-sixth session. The Secretariat was requested to reserve sufficient time in the draft agenda for that session to allow for a detailed discussion of that important topic.

232. In addition, reference was made to the important work done by UNCITRAL in the field of commercial fraud, in particular a note by the Secretariat entitled “Indicators of commercial fraud” (A/CN.9/624 and Add.1 and 2) that had been approved by the Commission at its forty-first session, in 2008.⁹⁸ It was said that commercial fraud remained a major obstacle to international trade and noted that, given the vital role of the private sector in combating commercial fraud, UNCITRAL was in a unique position to coordinate ongoing efforts in that field and thereby help draw the attention of legislators and policymakers to that important issue. It was proposed that the Secretariat could organize a colloquium on the topic, resources permitting.

XXII. International commercial arbitration moot competitions

A. Willem C. Vis International Commercial Arbitration Moot 2012

233. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Nineteenth Moot. The oral arguments phase had taken place in Vienna from 30 March to 5 April 2012. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that the legal issues dealt with by the teams of students participating in the Nineteenth Moot had been based on article 79, paragraph (2), of the United Nations Sales Convention and involved a supply chain. A total of 280 teams from law schools in 69 countries had participated in the Nineteenth Moot. The best team in oral arguments was that of the NALSAR University of Law (India). The oral arguments of the Twentieth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 22 to 28 March 2013.

234. It was also noted that the Ninth Willem C. Vis (East) International Commercial Arbitration Moot had been organized by the Vis East Moot Foundation with the Chartered Institute of Arbitrators, East Asia Branch, and also co-sponsored by the Commission. The final phase had been organized in Hong Kong, China, from 19 to 25 March 2012. A total of 91 teams from 26 countries had taken part in the Ninth (East) Moot. The winning team in the oral arguments was from City University of Hong Kong. The Tenth (East) Moot would be held in Hong Kong, China, from 11 to 17 March 2013.

⁹⁸ For the consideration of that document by the Commission, see *ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part one, paras. 199-200; *ibid.*, *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 339-344; and *ibid.*, *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 345-348.

B. Madrid Commercial Arbitration Moot 2012

235. It was noted that Carlos III University of Madrid had organized the Fourth International Commercial Arbitration Competition in Madrid from 28 May to 1 June 2012. The Madrid Moot had also been co-sponsored by the Commission. The legal issues involved in the competition related to an international construction contract in which the United Nations Sales Convention and the UNIDROIT Principles of International Commercial Contracts⁹⁹ were involved and international commercial arbitration under the UNCITRAL Model Arbitration Law, the 1958 New York Convention and the 2012 ICC Rules of Arbitration.¹⁰⁰ A total of 17 teams from law schools or masters programmes in seven countries had participated in the Madrid Moot in Spanish. The best team in oral arguments was from Carlos III University of Madrid. The Fifth Madrid Moot would be held from 6 to 10 May 2013.

XXIII. Relevant General Assembly resolutions

236. The Commission took note of the following three General Assembly resolutions adopted on the recommendation of the Sixth Committee: resolution 66/94 on the report of the United Nations Commission on International Trade Law on the work of its forty-fourth session; resolution 66/95 on the United Nations Commission on International Trade Law Model Law on Public Procurement; and resolution 66/96 on the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency: The Judicial Perspective.

237. The Commission was reminded of the difficulties faced in 2011 in conveying to the Fifth and Sixth Committees of the General Assembly the decision of the Commission taken at its forty-fourth session, in 2011, on the pattern of alternating meetings in Vienna and New York.¹⁰¹ Regret was expressed that the Assembly, in its resolution 66/94, adopted on the recommendation of the Sixth Committee, had only noted the agreement on that matter in the Commission without formulating strong support for continuing a pattern of meetings that was considered essential, in particular for developing countries.

238. The Commission noted the need to convey on future occasions an appropriately strong message to the General Assembly on issues relating to resources available to the Commission. The need for closer and more continuous coordination of the positions of States in the Fifth and Sixth Committees was emphasized.

⁹⁹ Available from www.unidroit.org/english/principles/contracts/main.htm.

¹⁰⁰ Available from www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration.

¹⁰¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 334-340.

XXIV. Other business

A. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

239. The Commission took note of the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework,¹⁰² which had been endorsed by the Human Rights Council in its resolution 17/4. In that resolution, the Council had requested the Secretary-General to prepare a report on how the United Nations system as a whole could contribute to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles, addressing in particular how capacity-building of all relevant actors to that end could best be addressed within the United Nations system.

240. One delegation proposed the inclusion of the topic of business and human rights in the future work programme of the Commission. It was suggested that the Guiding Principles should be discussed at a future session of the Commission. Due to time constraints, the proposal and the suggestion were not discussed by the Commission at its forty-fifth session.

B. Entitlement to summary records

241. The Commission recalled that, at its forty-fourth session, in 2011, it had considered proposals to substitute the production of summary records of UNCITRAL meetings with either unedited transcripts of proceedings or digital recordings of proceedings. At that session, the Commission expressed its willingness to discuss the subject again at its forty-fifth session on the basis of a report to be prepared by the Secretariat setting out the issues and options involved.¹⁰³

242. The Commission heard a report by the Secretariat on the digital recording system available in the United Nations and saw a demonstration of the website where digital recordings of one of the United Nations bodies had been made available. It was also informed that the UNCITRAL secretariat had requested digital recordings for the forty-fifth session of the Commission, in addition to the provision of summary records, to examine their utility as compared to summary records.

243. The Commission recalled differences between summary records and other documents of UNCITRAL. The Commission recalled that UNCITRAL made use of summary records only in the context of its deliberations for the preparation of a normative instrument, including in committees of the whole but excluding meetings of the working groups. It was also recalled that suggestions to relinquish or curtail the use of summary records were not new and had been previously discussed in the Commission, for example at its thirty-seventh session, in 2004.¹⁰⁴ The Commission

¹⁰² A/HRC/17/31, annex I.

¹⁰³ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 332-333.

¹⁰⁴ *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 129-130.

recalled that at that time it had unanimously stressed the importance of summary records as essential elements of the *travaux préparatoires* that should be available for subsequent reference when interpreting the standards drawn up by the Commission.

244. The Commission reiterated the importance of preserving complete and accurate *travaux préparatoires* of its legal texts in a form and by means that would ensure the record of the content of the information and the usability, availability and accessibility of such information for subsequent reference. The Commission considered the benefits and drawbacks of each currently available means of preserving its records in accordance with those criteria.

245. In particular, it was noted that the preparation of summary records involved high costs for the Organization, while summary records did not always satisfactorily meet the intended goal of preserving all elements of deliberations since they were prepared by précis-writers in English who might lack the necessary legal expertise to act as reliable filters of UNCITRAL deliberations. Further issues could arise at the time of translation of summary records into other official languages of the United Nations. Long delays in the issuance of summary records in all languages was a recurrent problem, which, as the Commission had been informed at its thirty-seventh session, in 2004,¹⁰⁵ was unlikely to be resolved soon under the prevailing circumstances. Improving the delivery of high-quality summary records while preserving their accuracy and reliability required additional work and resources on the part of the Secretariat.

246. The Commission reaffirmed the position taken at its thirty-seventh session, in 2004, as regards unedited verbatim transcripts, in particular that they would be of little use in view of the lack of a translation into the other official languages.¹⁰⁶ Difficulties with their use in the past, in particular with respect to the comprehensiveness of the text, were also noted.

247. As regards digital recordings, while noting the many benefits they would bring (they would be promptly available and authentic, obviate the need for précis-writers and translators and thus be inexpensive), the Commission noted that they would be less useful than good-quality summary records in view of the lack of proper indexing, which would make the performance of the search function on such recordings a time-consuming process. The need for the long-term retention and usability of non-paper-based records of information in the light of evolving technologies was also noted.

248. Support was expressed for digital recordings that provided full authentic records of discussions, which currently no other documents might provide, including reports and summary records. It was noted, however, that, for the system of digital recordings to be useful, the Secretariat should establish a mechanism for proper archiving and searching. It was also noted that a chronological way of presenting digital recordings would be insufficient, since the most relevant information would not be so easy to find in a potentially long series of relevant statements.

249. After discussion, the Commission confirmed that good-quality summary records remained the best available option for preserving complete and accurate

¹⁰⁵ Ibid., para. 129.

¹⁰⁶ Ibid., para. 130.

travaux préparatoires in the most user-friendly and reliable way. At the same time, it noted the need to consider modern solutions that might address existing problems with the issuance of summary records and add useful features in the use of UNCITRAL records. The Commission therefore 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. 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.

C. Strategic framework for the biennium 2014-2015

250. The Commission had before it the proposed strategic framework for the period 2014-2015 (A/67/6 (Prog. 6)) and was invited to review the proposed biennial programme plan for subprogramme 5 (Progressive harmonization, modernization and unification of the law of international trade) of programme 6 (Legal affairs). The Commission noted that the proposed framework had been reviewed by the Committee for Programme and Coordination at its fifty-second session, held from 4 to 29 June 2012, and would be transmitted to the General Assembly at its sixty-seventh session.

251. Concerns were expressed that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet the increased and pressing demands from developing countries and countries with economies in transition for technical assistance with law reform in the field of commercial law. The Commission urged the Secretary-General to take steps to ensure that the comparatively small amount of additional resources necessary to meet a demand so crucial to development were made promptly available.

252. The Secretariat was encouraged to continue exploring various means of responding to the growing need for uniform interpretation of UNCITRAL texts. Such uniform interpretation was considered indispensable for the effective implementation of UNCITRAL texts. It was noted that some instruments that had emanated from the work of UNCITRAL explicitly prescribed that, in their interpretation, regard should be had to their international character and to the need to promote uniformity in their application and the observance of good faith in international trade (see para. 220 (b) above). Continuing work of the Secretariat on the CLOUT system as a means of complying with such a requirement was considered vital. Concern over the lack of sufficient resources in the Secretariat to sustain and expand such work was noted. Building partnerships with interested institutions and exploring various other means, besides seeking additional resources from the regular budget of the United Nations, were mentioned as possible ways to address that concern. The Commission also took note of the desirability of

establishing within its secretariat a third pillar, concentrating on the promotion of ways and means of encouraging uniform interpretation of UNCITRAL texts (see also paras. 149-158 above).

D. Internship programme

253. The Commission recalled its deliberation on the considerations taken by the secretariat in selecting candidates for internship.¹⁰⁷ The Commission was informed that, since the secretariat's oral report to the Commission at its forty-fourth session, in July 2011, 11 new interns had undertaken an internship with the Secretariat. The Commission was further informed that during that period the Secretariat had faced problems with last-minute cancellation of internships by candidates from developing countries and difficulties in finding on the roster eligible and qualified candidates from African States and Latin American and Caribbean States, as well as candidates with Arabic language skills.

E. Evaluation of the role of the Secretariat in facilitating the work of the Commission

254. The Commission recalled that at its fortieth session,¹⁰⁸ in 2007, 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).¹⁰⁹ The Commission had agreed to provide feedback to the Secretariat and, at the close of the forty-fourth session, a questionnaire on the level of satisfaction with services provided by the Secretariat had been circulated.¹¹⁰ The Commission was informed that the questionnaire had elicited replies from six delegations, with an average rating of 4.83.

F. Election of UNCITRAL member States

255. The Commission was informed that the term of 30 member States of the Commission (see para. 4 above) would expire on the day prior to the opening of the forty-sixth session of the Commission, in 2013. The Commission noted that the election to fill the vacancies in the Commission was scheduled to take place during the sixty-seventh session of the General Assembly.¹¹¹ It was further noted that retiring member States would be eligible for re-election and that elected member States would serve a six-year term.

¹⁰⁷ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 328-330.

¹⁰⁸ Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 243.

¹⁰⁹ A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

¹¹⁰ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 331.

¹¹¹ Item 111 (b) of the provisional agenda of the sixty-seventh session of the General Assembly (A/67/150).

G. Documents related to the working methods of UNCITRAL

256. The Commission was informed that, pursuant to the request by the Commission at its forty-fourth session, in 2011,¹¹² the Secretariat had updated the UNCITRAL website to ensure that all documents related to the working methods of UNCITRAL were made available on the web page entitled “Methods of Work” in the section entitled “About UNCITRAL”.

XXV. Date and place of future meetings

257. 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 from the unused entitlement of another working group provided that such arrangement would not result in an increase in 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 in 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.¹¹³

258. The Commission 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 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. Otherwise, adjustments would need to be made within the current 14-week allotment for all sessions of the Commission and its working groups.

A. Forty-sixth session of the Commission

259. In the light of the considerations set out above, the Commission approved the holding of its forty-sixth session in Vienna from 8 to 26 July 2013. 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.

¹¹² Ibid., para. 297.

¹¹³ Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

B. Sessions of working groups

Sessions of working groups between the forty-fifth and the forty-sixth sessions of the Commission

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

(a) Working Group II (Arbitration and Conciliation) would hold its fifty-seventh session in Vienna from 1 to 5 October 2012 and its fifty-eighth session in New York from 4 to 8 February 2013;

(b) Working Group III (Online Dispute Resolution) would hold its twenty-sixth session in Vienna from 5 to 9 November 2012 and its twenty-seventh session in New York from 20 to 24 May 2013;

(c) Working Group IV (Electronic Commerce) would hold its forty-sixth session in Vienna from 29 October to 2 November 2012 and its forty-seventh session in New York from 13 to 17 May 2013;

(d) Working Group V (Insolvency Law) would hold its forty-second session in Vienna from 26 to 30 November 2012 and its forty-third session in New York from 15 to 19 April 2013;

(e) Working Group VI (Security Interests) would hold its twenty-second session in Vienna from 10 to 14 December 2012 and its twenty-third session in New York from 8 to 12 April 2013.

261. 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.

Additional time

262. Tentative arrangements were made for sessions to be held in Vienna from 3 to 7 December 2012 and in New York from 11 to 15 February 2013. That time could be used to accommodate the need for holding colloquiums, subject to consultation with States.

Sessions of working groups in 2013 after the forty-sixth session of the Commission

263. The Commission noted that tentative arrangements had been made for working group meetings in 2013 after its forty-sixth session, subject to the approval of the Commission at that session:

(a) Working Group I (Procurement) would hold its twenty-second session in Vienna from 23 to 27 September 2013;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-ninth session in Vienna from 16 to 20 September 2013;

(c) Working Group III (Online Dispute Resolution) would hold its twenty-eighth session in Vienna from 7 to 11 October 2013;

(d) Working Group IV (Electronic Commerce) would hold its forty-eighth session in Vienna from 30 September to 4 October 2013;

(e) Working Group V (Insolvency Law) would hold its forty-fourth session in Vienna from 16 to 20 December 2013;

(f) Working Group VI (Security Interests) would hold its twenty-fourth session in Vienna from 25 to 29 November 2013.

Annex I

Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010

A. Introduction

1. The UNCITRAL Arbitration Rules as revised in 2010

1. The UNCITRAL Arbitration Rules were originally adopted in 1976¹ and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, commercial disputes administered by arbitral institutions, investor-State disputes and State-to-State disputes. The Rules are recognized as one of the most successful international instruments of a contractual nature in the field of arbitration. They have also strongly contributed to the development of the arbitration activities of many arbitral institutions in all parts of the world.

2. The 1976 UNCITRAL Arbitration Rules were revised in 2010² to better conform to current practices in international trade and to account for changes in arbitral practice over the past 30 years. The revision was aimed at enhancing the efficiency of arbitration under the 1976 UNCITRAL Arbitration Rules and did not alter the original structure of the text, its spirit or its drafting style. The UNCITRAL Arbitration Rules as revised in 2010 have been in effect since 15 August 2010.

2. General Assembly resolution 65/22

3. In 2010, the General Assembly, by its resolution 65/22, recommended the use of the UNCITRAL Arbitration Rules as revised in 2010 in the settlement of disputes arising in the context of international commercial relations. That recommendation was based on the conviction that “the revision of the Arbitration Rules in a manner that is acceptable to countries with different legal, social and economic systems can significantly contribute to the development of harmonious international economic relations and to the continuous strengthening of the rule of law”.

4. In that resolution, the General Assembly noted that “the revised text can be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes”.

3. Purpose of the recommendations

5. The present recommendations are made with regard to the use of the UNCITRAL Arbitration Rules. (For recommendations on the use of the 1976 UNCITRAL Arbitration Rules, see the “Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the

¹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57.

² *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 13-187 and annex I.

UNCITRAL Arbitration Rules”,³ adopted at the fifteenth session of UNCITRAL, in 1982.) Their purpose is to inform and assist arbitral institutions and other interested bodies that envisage using the UNCITRAL Arbitration Rules as described in paragraph 6 below.

4. Different usages by arbitral institutions and other interested bodies

6. The UNCITRAL Arbitration Rules have been used in the following different ways by arbitral institutions and other interested bodies, including chambers of commerce and trade associations:

(a) They have served as a model for institutions drafting their own arbitration rules. The degree to which the UNCITRAL Arbitration Rules have been used as a drafting model ranges from inspiration to full adoption of the Rules (see section B below);

(b) Institutions have offered to administer disputes under the UNCITRAL Arbitration Rules or to render administrative services in ad hoc arbitrations under the Rules (see section C below);

(c) An institution (or a person) may be requested to act as appointing authority, as provided for under the UNCITRAL Arbitration Rules (see section D below).

B. Adoption of the UNCITRAL Arbitration Rules as the institutional rules of arbitral institutions or other interested bodies

1. Appeal to leave the substance of the UNCITRAL Arbitration Rules unchanged

7. Institutions, when preparing or revising their institutional rules, may wish to consider adopting the UNCITRAL Arbitration Rules as a model.⁴ An institution that intends to do so should take into account the expectations of the parties that the rules of the institution will then faithfully follow the text of the UNCITRAL Arbitration Rules.

8. This appeal to follow closely the substance of the UNCITRAL Arbitration Rules does not mean that the particular organizational structure and needs of a given institution should be neglected. Institutions adopting the UNCITRAL Arbitration Rules as their institutional rules will certainly need to add provisions, for instance on administrative services or fee schedules. In addition, formal modifications, affecting very few provisions of the UNCITRAL Arbitration Rules, as indicated below in paragraphs 9-17, should be taken into account.

³ Ibid., *Thirty-seventh Session, Supplement No. 17* and corrigenda (A/37/17 and Corr.1 and 2), annex I.

⁴ See, for example, the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration in force as from 1 March 2011 (available from www.crcica.org.eg) or the Arbitration Rules (as revised in 2010) of the Kuala Lumpur Regional Centre for Arbitration (available from www.klrca.org.my).

2. Presentation of modifications

(a) A short explanation

9. If an institution uses the UNCITRAL Arbitration Rules as a model for drafting its own institutional rules, it may be useful for the institution to consider indicating where those rules diverge from the UNCITRAL Arbitration Rules. Such indication may be helpful to the readers and potential users who would otherwise have to embark on a comparative analysis to identify any disparity.

10. The institution may wish to include a text, for example a foreword, which refers to the specific modifications included in the institutional rules as compared with the UNCITRAL Arbitration Rules.⁵ The indication of the modifications could also come at the end of the text of the institutional rules.⁶ Further, it might be advisable to accompany the institutional rules with a short explanation of the reasons for the modifications.⁷

(b) Effective date

11. Article 1, paragraph 2, of the UNCITRAL Arbitration Rules defines an effective date for those Rules. Obviously, the institutional rules based on the UNCITRAL Arbitration Rules will have their own specific date of application. In the interest of legal certainty, it is recommended to refer in the arbitration rules to the effective date of application of the rules so that the parties know which version is applicable.

⁵ For example, in the introduction to the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration in force as from 1 March 2011, it is provided that those rules “are based upon the new UNCITRAL Arbitration Rules, as revised in 2010, with minor modifications emanating mainly from the Centre’s role as an arbitral institution and an appointing authority”. The Arbitration Rules (as revised in 2010) of the Kuala Lumpur Regional Centre of Arbitration provide that the rules for arbitration of the institution shall be the “UNCITRAL Arbitration Rules as modified in accordance with the rules set out below”.

⁶ See, for example, the Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties, effective 1 July 1996 (based on the 1976 version of the UNCITRAL Arbitration Rules); available from www.pca-cpa.org/showfile.asp?fil_id=201.

⁷ For example, in the text of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, effective 6 July 1993 (available from www.pca-cpa.org/showfile.asp?fil_id=194), the following note is inserted: “These Rules are based on the [1976] UNCITRAL Arbitration Rules, with the following modifications: ... Modifications to indicate the functions of the Secretary-General and the International Bureau of the Permanent Court of Arbitration: Article 1, para. 4 (added) ...”.

(c) Communication channel

12. Usually, when an institution administers a case, communications between the parties before the constitution of the arbitral tribunal would be carried out through the institution. Therefore, it is recommended to adapt articles 3 and 4 of the UNCITRAL Arbitration Rules relating to communication before the constitution of the arbitral tribunal. For example, in relation to article 3, paragraph 1:

(a) If the communications take place through the institution, article 3, paragraph 1, could be amended as follows:

1. The party or parties initiating recourse to arbitration (hereinafter called the “claimant”) shall communicate to [name of the institution] a notice of arbitration. [Name of the institution] shall communicate the notice of arbitration to the other party or parties (hereinafter called the “respondent”) [without undue delay] [immediately].

Or as follows:

1. The party or parties initiating recourse to arbitration (hereinafter called the “claimant”) shall file with [name of the institution] a notice of arbitration and [name of the institution] shall communicate it to the other party or parties (hereinafter called the “respondent”).⁸

(b) If the institution receives copies of the communications, article 3, paragraph 1, would remain unchanged, and the following provision could be added:

All documents transmitted pursuant to articles 3 and 4 of the UNCITRAL Arbitration Rules shall be served on [name of the institution] at the time of such transmission to the other party or parties or immediately thereafter.⁹

13. To address the matter of communications after the constitution of the arbitral tribunal, the institution may either:

(a) Modify each article in the UNCITRAL Arbitration Rules referring to communications, namely: article 5; article 11; article 13, paragraph 2; article 17, paragraph 4; article 20, paragraph 1; article 21, paragraph 1; article 29, paragraphs 1, 3 and 4; article 34, paragraph 6; article 36, paragraph 3; article 37, paragraph 1; article 38, paragraphs 1 and 2; article 39, paragraph 1; article 41, paragraphs 3 and 4; or

(b) Include in article 17 of the UNCITRAL Arbitration Rules a provision along the lines of:

(i) If the institution decides to receive all communications for the purpose of notification:

“Except as otherwise permitted by the arbitral tribunal, all communications addressed to the arbitral tribunal by a party shall be filed with the [name of the institution] for notification to the arbitral tribunal and the other party or parties. All communications addressed from the arbitral tribunal to a party

⁸ For example, this is the approach adopted in the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration in force as from 1 March 2011.

⁹ For example, a similar approach can be found in Rule 2, paragraph 1, of the Arbitration Rules (as revised in 2010) of the Kuala Lumpur Regional Centre for Arbitration.

shall be filed with the [name of the institution] for notification to the other party or parties.”;¹⁰ or

(ii) If the institution decides to receive copies of all communications for the purpose of information:

“Except as otherwise permitted by the arbitral tribunal, all communications between the arbitral tribunal and any party shall also be sent to [name of the institution].”

14. In the interest of procedural efficiency, it might be appropriate for an institution to consider whether to require receiving copies of communications only after the constitution of the arbitral tribunal. If such requirement is adopted by the institution, it would be advisable to refer to the receipt of the copies in a manner that is technology-neutral, in order not to exclude new and evolving technologies. To receive copies of communications through new technologies could also result in a desirable reduction of costs for the institution.

(d) Substitution of the reference to the “appointing authority” by the name of the institution

15. Where an institution uses the UNCITRAL Arbitration Rules as a model for its institutional rules, the institution typically carries out the functions attributed to the appointing authority under the Rules; it therefore should amend the corresponding provisions of the Rules as follows:

(a) Article 3, paragraph 4 (a); article 4, paragraph 2 (b); article 6, paragraphs 1-4; and the reference to the designating authority in article 6, paragraph 5, should be deleted;

(b) The term “appointing authority” could be replaced by the name of the institution in the following provisions: article 6, paragraphs 5-7; article 7, paragraph 2; article 8, paragraphs 1 and 2; article 9, paragraphs 2 and 3; article 10, paragraph 3; article 13, paragraph 4; article 14, paragraph 2; article 16; article 43, paragraph 3; and, if the arbitral institution adopts the review mechanism to the extent compatible with its own institutional rules, article 41, paragraphs 2-4. As an alternative, a rule clarifying that reference to the appointing authority shall be understood as a reference to the institution could be added, along the following lines: “The functions of the appointing authority under the UNCITRAL Arbitration Rules are fulfilled by [name of the institution].”

16. If the functions of an appointing authority are fulfilled by an organ of the institution, it is advisable to explain the composition of that organ and, if appropriate, the nomination process of its members, in an annex, for example. In the interest of certainty, it may be advisable for an institution to clarify whether the reference to the organ is meant to be to the function and not to the person as such (i.e. in case the person is not available, the function could be fulfilled by his or her deputy).

¹⁰ For example, a similar provision is included in article 17, paragraph 5, of the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration in force as from 1 March 2011.

(e) Fees and schedule of fees

17. Where an institution adopts the UNCITRAL Arbitration Rules as its own institutional rules:

(a) The provisions of article 40, paragraph 2 (f), would not apply;¹¹

(b) The institution may include the fee review mechanism as set out in article 41 of the Rules (as adjusted to the needs of the institution).¹²

C. Arbitral institutions and other interested bodies administering arbitration under the UNCITRAL Arbitration Rules or providing some administrative services

18. One measure of the success of the UNCITRAL Arbitration Rules in achieving broad applicability and in demonstrating their ability to meet the needs of parties in a wide range of legal cultures and types of disputes has been the significant number of independent institutions that have declared themselves willing to administer (and that do administer) arbitrations under the UNCITRAL Arbitration Rules, in addition to proceedings under their own rules. Some arbitral institutions have adopted procedural rules for offering to administer arbitrations under the UNCITRAL Arbitration Rules.¹³ Further, parties have also turned to institutions in order to

¹¹ An arbitral institution, may, however, retain article 40, paragraph 2 (f), for cases in which the arbitral institution would not act as appointing authority. For example, the Qatar International Center for Conciliation and Arbitration states in article 43, paragraph 2 (h), of its Rules of Arbitration 2012 (effective 1 May 2012), which are based on the UNCITRAL Arbitration Rules as revised in 2010: “Any fees and expenses of the appointing authority in case the Center is not designated as the appointing authority.”

¹² Such an approach has been adopted by the Cyprus Arbitration and Mediation Centre, which based its Arbitration Rules on the UNCITRAL Arbitration Rules.

¹³ For example, the Permanent Court of Arbitration (PCA) indicates on its website (www.pca-cpa.org) that “in addition to the role of designating appointing authorities, the Secretary-General of the PCA will act as the appointing authority under the UNCITRAL Arbitration Rules when the parties so agree. The PCA also frequently provides full administrative support in arbitrations under the UNCITRAL Arbitration Rules.” The London Court of International Arbitration (LCIA) indicates on its website (www.lcia.org) that “the LCIA regularly acts both as appointing authority and as administrator in arbitrations conducted pursuant to the UNCITRAL arbitration rules. Further information: Recommended clauses for adoption by the parties for these purposes; the range of administrative services offered; and details of the LCIA charges for these services are available on request from the Secretariat”. See also the UNCITRAL Arbitration Rules Administered by the German Institution of Arbitration (available from www.dis-arb.de); the Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules as amended and effective on 1 July 2009 of the Japan Commercial Arbitration Association (JCAA) (available from www.jcaa.or.jp); and the Hong Kong International Arbitration Centre (HKIAC) Procedures for the Administration of International Arbitration, adopted to take effect from 31 May 2005 (available from www.hkiac.org). (The Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules of JCAA and the HKIAC Procedures for the Administration of International Arbitration are both, at the date of the present recommendations, based on the 1976 UNCITRAL Arbitration Rules.)

receive some administrative services, in contrast to having the arbitral proceedings fully administered by the arbitral institution.¹⁴

19. The following remarks and suggestions are intended to assist any interested institutions in taking the necessary organizational measures and in devising appropriate administrative procedures in conformity with the UNCITRAL Arbitration Rules when they either fully administer a case under the Rules or only provide certain administrative services in relation to arbitration under the Rules. It may be noted that institutions, while offering services under the UNCITRAL Arbitration Rules as revised in 2010, are continuing to also offer services under the 1976 UNCITRAL Arbitration Rules.¹⁵

1. Administrative procedures in conformity with the UNCITRAL Arbitration Rules

20. In devising administrative procedures or rules, the institutions should have due regard to the interests of the parties. Since the parties in these cases have agreed that the arbitration is to be conducted under the UNCITRAL Arbitration Rules, their expectations should not be frustrated by administrative rules that would conflict with the UNCITRAL Arbitration Rules. The modifications that the UNCITRAL Arbitration Rules would need to undergo to be administered by an institution are minimal and similar to those mentioned above in paragraphs 9-17. It is advisable that the institution clarify the administrative services it would render by either:

(a) Listing them; or

(b) Proposing to the parties a text of the UNCITRAL Arbitration Rules highlighting the modifications made to the Rules for the sole purpose of the administration of the arbitral proceedings; in the latter case, it is recommended to indicate that the UNCITRAL Arbitration Rules are “as administered by [name of the institution]” so that the user is notified that there is a difference from the original UNCITRAL Arbitration Rules.¹⁶

21. It is further recommended that:

(a) The administrative procedures of the institution distinguish clearly between the functions of an appointing authority as envisaged under the UNCITRAL Arbitration Rules (see section D below) and other full or partial

¹⁴ For example, the HKIAC Procedures for the Administration of International Arbitration state in their introduction: “Nothing in these Procedures shall prevent parties to a dispute under the UNCITRAL Rules from naming the HKIAC as appointing authority, nor from requesting certain administrative services from the HKIAC without subjecting the arbitration to the provisions contained in the Procedures. Neither the designation of the HKIAC as appointing authority under the Rules nor a request by the parties or the tribunal for specific and discrete administrative assistance from the HKIAC shall be construed as a designation of the HKIAC as administrator of the arbitration as described in these Procedures. Conversely, unless otherwise stated, a request for administration by the HKIAC will be construed as a designation of the HKIAC as appointing authority and administrator pursuant to these Procedures.”

¹⁵ For an illustration, see the services offered under both versions of the UNCITRAL Arbitration Rules by the Arbitration Institute of the Stockholm Chamber of Commerce (www.sccinstitute.com).

¹⁶ See, as an illustration of such an approach, the UNCITRAL Arbitration Rules Administered by the German Institution of Arbitration.

administrative assistance, and the institution should declare whether it is offering both or only one of these types of services;

(b) An institution which is prepared either to fully administer a case under the UNCITRAL Arbitration Rules or to provide certain administrative services of a technical and secretarial nature describe in its administrative procedures the services offered; such services may be rendered upon request of the parties or the arbitral tribunal.

22. In describing the administrative services, it is recommended that the institution indicate:

(a) Which services would be covered by its general administrative fee and which would not (i.e. which would be billed separately);¹⁷

(b) The services provided within its own facilities and those arranged to be rendered by others;

(c) That parties could also choose to have only a particular service (or services) rendered by the institution without having the arbitral proceedings fully administered by the institution (see para. 18 above and paras. 23-25 below).

2. Offer of administrative services

23. The following list of possible administrative services, which is not intended to be exhaustive, may assist institutions in considering and publicizing the services they may offer:

(a) Maintenance of a file of written communications;¹⁸

(b) Facilitating communication;¹⁹

(c) Providing necessary practical arrangements for meetings and hearings, including:

(i) Assisting the arbitral tribunal in establishing the date, time and place of hearings;

(ii) Meeting rooms for hearings or deliberations of the arbitral tribunal;

(iii) Telephone conference and videoconference facilities;

(iv) Stenographic transcripts of hearings;

(v) Live streaming of hearings;

¹⁷ For example, in the Bahrain Chamber for Dispute Resolution (BCDR) Arbitration Rules, it is stated: "The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the BCDR for availability and rates." The BCDR Arbitration Rules are from 2009 and based on the 1976 UNCITRAL Arbitration Rules.

¹⁸ The maintenance of a file of written communications could include a full file of written correspondence and submissions to facilitate any inquiry that arises and to prepare such copies as the parties or the tribunal may require at any time during the arbitral proceedings. In addition, the maintenance of such a file could include, automatically or only upon request by the parties, the forwarding of the written communications of a party or the arbitrators.

¹⁹ Facilitating communication could include ensuring that communications among parties, attorneys and the tribunal are kept open and up to date, and may also consist in merely forwarding written communications.

- (vi) Secretarial or clerical assistance;
- (vii) Making available or arranging for interpretation services;
- (viii) Facilitating entry visas for the purposes of hearings when required;
- (ix) Arranging accommodation for parties and arbitrators;
- (d) Providing fund-holding services;²⁰
- (e) Ensuring that procedurally important dates are followed and advising the arbitral tribunal and the parties when not adhered to;
- (f) Providing procedural directions on behalf of the tribunal, if and when required;²¹
- (g) Providing secretarial or clerical assistance in other respects;²²
- (h) Providing assistance for obtaining certified copies of any award, including notarized copies, where required;
- (i) Providing assistance for the translation of arbitral awards;
- (j) Providing services with respect to the storage of arbitral awards and files relating to the arbitral proceedings.²³

3. Administrative fee schedule

24. The institution, when indicating the fee it charges for its services, may reproduce its administrative fee schedule or, in the absence thereof, indicate the basis for calculating it.²⁴

25. In view of the possible categories of services an institution may offer, such as functioning as an appointing authority and/or providing administrative services

²⁰ Fund-holding services usually consist of the receipt and the disbursement of funds received from the parties. They include the setting up of a dedicated bank account, into which sums are paid by the parties, as directed by the tribunal. The institution typically disburses funds from that account to cover costs, accounting periodically to the parties and to the tribunal for funds lodged and disbursed. The institution usually credits the interests on the funds to the party that has lodged the funds at the prevailing rate of the bank where the account is kept. Fund-holding services could also include more broadly the calculation and collection of a deposit as security for the estimated costs of arbitration. If the institution is fully administering the arbitral proceedings, then the fund-holding services may extend to more closely monitoring the costs of the arbitration, in particular ensuring that fees-and-costs notes are regularly submitted and the level of further advances calculated, in consultation with the tribunal, and by reference to the established procedural timetable.

²¹ Providing procedural directions on behalf of the tribunal, if and when required, relates most typically to directions for advances on costs.

²² The provision of secretarial or clerical assistance could include proofreading draft awards to correct typographical and clerical errors.

²³ Storage of documents relating to the arbitral proceedings might be an obligation under the applicable law.

²⁴ See, for example, article 42, paragraph 4, on definition of costs, of the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration, which entered into force on 1 March 2011, according to which the provisions of its section on the costs of arbitration shall apply by default in case the parties to ad hoc arbitrations agree that the Centre will provide its administrative services to such arbitrations.

(see para. 21 above), it is recommended that the fee for each category be stated separately (see para. 22 above). Thus, an institution may indicate its fees for:

- (a) Acting as an appointing authority only;
- (b) Providing administrative services without acting as an appointing authority;
- (c) Acting as an appointing authority and providing administrative services.

4. Draft model clauses

26. In the interest of procedural efficiency, institutions may wish to set forth in their administrative procedures model arbitration clauses covering the above services. It is recommended that:

- (a) Where the institution fully administers arbitration under the UNCITRAL Arbitration Rules, the model clause should read as follows:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules administered by [name of the institution]. [Name of the institution] shall act as appointing authority.”

- (b) Where the institution provides certain services only, the agreement as to the services that are requested should be indicated:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. [Name of the institution] shall act as appointing authority and provide administrative services in accordance with its administrative procedures for cases under the UNCITRAL Arbitration Rules.”

- (c) In both cases, as suggested in the model arbitration clause in the annex to the UNCITRAL Arbitration Rules, parties should consider adding the following note:

“(a) The number of arbitrators shall be [one or three];

“(b) The place of arbitration shall be [city and country];

“(c) The language to be used in the arbitral proceedings shall be [language]”.

D. Arbitral institution acting as appointing authority

27. An institution (or a person) may act as appointing authority under the UNCITRAL Arbitration Rules. It is noteworthy that article 6 of the Rules highlights the importance of the role of the appointing authority. Parties are invited to agree on an appointing authority at the time that they conclude the arbitration agreement, if possible. Alternatively, the appointing authority could be appointed by the parties at any time during the arbitration proceedings.

28. Arbitral institutions are usually experienced with fulfilling functions similar to those required from an appointing authority under the Rules. For an individual who takes on that responsibility for the first time, it is important to note that, once designated as appointed authority, he or she must be and must remain independent and be prepared to act promptly for all purposes under the Rules.

29. An institution that is willing to act as appointing authority under the UNCITRAL Arbitration Rules may indicate in its administrative procedures the various functions of an appointing authority envisaged by the Rules. It may also describe the manner in which it intends to perform these functions.

30. The UNCITRAL Arbitration Rules foresee six main functions for the appointing authority: (a) appointment of arbitrators; (b) decisions on the challenge of arbitrators; (c) replacement of arbitrators; (d) assistance in fixing the fees of arbitrators; (e) participation in the review mechanism on the costs and fees; and (f) advisory comments regarding deposits. The paragraphs that follow are intended to provide some guidance on the role of the appointing authority under the UNCITRAL Arbitration Rules based on the *travaux préparatoires*.

1. Designating and appointing authorities (article 6)

31. Article 6 was included as a new provision in the UNCITRAL Arbitration Rules as revised in 2010 to clarify for the users of the Rules the importance of the role of the appointing authority, particularly in the context of non-administered arbitration.²⁵

(a) Procedure for choosing or designating an appointing authority (article 6, paragraphs 1-3)

32. Article 6, paragraphs 1-3, determines the procedure to be followed by the parties in order to choose an appointing authority, or to have one designated in case of disagreement. Paragraph 1 expresses the principle that the appointing authority can be appointed by the parties at any time during the arbitration proceedings, not only in some limited circumstances.²⁶

(b) Failure to act: substitute appointing authority (article 6, paragraph 4)

33. Article 6, paragraph 4, addresses the situation where an appointing authority refuses or fails to act within a time period provided by the Rules or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so. Then, any party may request the Secretary-General of the Permanent Court of Arbitration to designate a substitute appointing authority. The failure to act of the appointing authority in the context of the fee review mechanism under article 41, paragraph 4, of the Rules, does not fall under article 6, paragraph 4 ("except as referred to in article 41, paragraph 4") but is dealt with directly in article 41, paragraph 4 (see para. 58 below).²⁷

²⁵ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 42, and A/CN.9/619, para. 69.

²⁶ A/CN.9/619, para. 69.

²⁷ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 49.

(c) Discretion in the exercise of its functions (article 6, paragraph 5)

34. Article 6, paragraph 5, provides that, in exercising its functions under the Rules, the appointing authority may require from any party and the arbitrators the information it deems necessary. That provision was included in the UNCITRAL Arbitration Rules to explicitly provide the appointing authority with the power to require information not only from the parties, but also from the arbitrators. The arbitrators are explicitly mentioned in the provision, as there are instances, such as a challenge procedure, in which the appointing authority, in exercising its functions, may require information from the arbitrators.²⁸

35. In addition, article 6, paragraph 5, provides that the appointing authority shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner the appointing authority considers appropriate. During the deliberations on the revisions to the Rules, it was agreed that the general principle should be included that the parties should be given an opportunity to be heard by the appointing authority.²⁹ That opportunity should be given “in any manner” the appointing authority “considers appropriate”, in order to better reflect the discretion of the appointing authority in obtaining views from the parties.³⁰

36. Article 6, paragraph 5, determines that all such communications to and from the appointing authority shall be provided by the sender to all other parties. That provision is consistent with article 17, paragraph 4, of the Rules.

(d) General provision on appointment of arbitrators (article 6, paragraphs 6 and 7)

37. Article 6, paragraph 6, provides that, when the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

38. Article 6, paragraph 7, provides that the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. To that end, paragraph 7 states that the appointing authority shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties (see also para. 44 below).

2. Appointment of arbitrators

(a) Appointment of a sole arbitrator (article 7, paragraph 2, and article 8)

39. The UNCITRAL Arbitration Rules envisage various possibilities concerning the appointment of an arbitrator by an appointing authority. Under article 8, paragraph 1, the appointing authority may be requested to appoint a sole arbitrator, in accordance with the procedures and criteria set forth in article 8, paragraph 2. The appointing authority shall appoint the sole arbitrator as promptly as possible and shall intervene only at the request of a party. The appointing authority may use the list-procedure as defined in article 8, paragraph 2. It should be noted that the

²⁸ A/CN.9/WG.II/WP.157, para. 22.

²⁹ A/CN.9/619, para. 76.

³⁰ A/CN.9/665, para. 54.

appointing authority has discretion pursuant to article 8, paragraph 2, to determine that the use of the list-procedure is not appropriate for the case.

40. Article 7, dealing with the number of arbitrators, provides as a default rule that, in case parties do not agree on the number of arbitrators, three arbitrators should be appointed. However, article 7, paragraph 2, includes a corrective mechanism so that, if no other parties have responded to a party's proposal to appoint a sole arbitrator and the party (or parties) concerned have failed to appoint a second arbitrator, the appointing authority may, at the request of a party, appoint a sole arbitrator if it determines that, in view of the circumstances of the case, this is more appropriate. That provision has been included in the Rules to avoid situations where, despite the claimant's proposal in its notice of arbitration to appoint a sole arbitrator, a three-member arbitral tribunal has to be constituted owing to the respondent's failure to react to that proposal. It provides a useful corrective mechanism in case the respondent does not participate in the process and the arbitration case does not warrant the appointment of a three-member arbitral tribunal. That mechanism is not supposed to create delays, as the appointing authority will in any event have to intervene in the appointment process. The appointing authority should have all relevant information or require information under article 6, paragraph 5, to make its decision on the number of arbitrators.³¹ Such information would include, in accordance with article 6, paragraph 6, copies of the notice of arbitration and any response thereto.

41. When an appointing authority is requested under article 7, paragraph 2, to determine whether a sole arbitrator is more appropriate for the case, circumstances to be taken into consideration include the amount in dispute and the complexity of the case (including the number of parties involved),³² as well as the nature of the transaction and of the dispute.

42. In some cases, the respondent might not take part in the constitution of the arbitral tribunal, so that the appointing authority has before it the information received from the claimant only. Then, the appointing authority can make its assessment only on the basis of that information, being aware that it might not reflect all aspects of the proceedings to come.

(b) Appointment of a three-member arbitral tribunal (article 9)

43. The appointing authority may be requested by a party, under article 9, paragraph 2, to appoint the second of three arbitrators in case a three-arbitrator panel is to be appointed. If the two arbitrators cannot agree on the choice of the third (presiding) arbitrator, the appointing authority can be called upon to appoint the third arbitrator under article 9, paragraph 3. That appointment would take place in the same manner that a sole arbitrator would be appointed under article 8. In accordance with article 8, paragraph 1, the appointing authority should act only at the request of a party.³³

³¹ Ibid., paras. 62-63.

³² For example, if one party is a State, whether there are (or will potentially be) counterclaims or set-off claims.

³³ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 59.

44. When an appointing authority is asked to appoint the presiding arbitrator pursuant to article 9, paragraph 3, factors that might be taken into consideration include the experience of the arbitrator and the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties (see para. 38 above, on article 6, paragraph 7).

(c) Multiple claimants or respondents (article 10)

45. Article 10, paragraph 1, provides that, in case of multiple claimants or respondents and unless otherwise agreed, the multiple claimants, jointly, and the multiple respondents, jointly, shall appoint an arbitrator. In the absence of such a joint nomination and if all parties are unable to otherwise agree on a method for the constitution of the arbitral tribunal, the appointing authority shall, upon the request of any party pursuant to article 10, paragraph 3, constitute the arbitral tribunal and designate one of the arbitrators to act as the presiding arbitrator.³⁴ An illustration of a case in which parties on either side could be unable to make such an appointment is if the number of either claimants or respondents is very large or if they not form a single group with common rights and obligations (for instance, cases involving a large number of shareholders).³⁵

46. The power of the appointing authority to constitute the arbitral tribunal is broadly formulated in article 10, paragraph 3, in order to cover all possible failures to constitute the arbitral tribunal under the Rules and is not limited to multiparty cases. Also, it is noteworthy that the appointing authority has the discretion to revoke any appointment already made and to appoint or reappoint each of the arbitrators.³⁶ The principle in paragraph 3 that the appointing authority shall appoint the entire arbitral tribunal when parties on the same side in a multiparty arbitration are unable to jointly agree on an arbitrator was included in the Rules as an important principle, in particular in situations like the one that gave rise to the case *BKMI and Siemens v. Dutco*.³⁷ The decision in the *Dutco* case was based on the requirement that parties receive equal treatment, which paragraph 3 addresses by shifting the appointment power to the appointing authority.³⁸ The *travaux préparatoires* of the UNCITRAL Arbitration Rules show that emphasis was given to maintaining a flexible approach, granting discretionary powers to the appointing authority, in article 10, paragraph 3, in order to accommodate the wide variety of situations arising in practice.³⁹

(d) Successful challenge and other reasons for replacement of an arbitrator (articles 12 and 13)

47. The appointing authority may be called upon to appoint a substitute arbitrator under article 12, paragraph 3, or article 13 or 14 of the UNCITRAL Arbitration

³⁴ A/CN.9/614, paras. 62-63, and A/CN.9/619, para. 86.

³⁵ A/CN.9/614, para. 63.

³⁶ A/CN.9/619, paras. 88 and 90.

³⁷ *BKMI and Siemens v. Dutco*, French Court of Cassation, 7 January 1992 (see *Revue de l'Arbitrage*, No. 3 (1992), pp. 470-472).

³⁸ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 60.

³⁹ A/CN.9/619, para. 90.

Rules (failure or impossibility to act, successful challenge and other reasons for replacement; see paras. 49-54 below).

(e) Note for institutions acting as an appointing authority

48. For each of these instances where an institution may be called upon under the UNCITRAL Arbitration Rules to appoint an arbitrator, the institution may provide details as to how it would select the arbitrator. In particular, it may state whether it maintains a list of arbitrators, from which it would select appropriate candidates, and may provide information on the composition of any such list. It may also indicate which person or organ within the institution would make the appointment (for example, the president, a board of directors, the secretary-general or a committee) and, in the case of a board or committee, how that organ is composed and/or its members would be elected.

3. Decision on challenge of arbitrator

(a) Articles 12 and 13

49. Under article 12 of the UNCITRAL Arbitration Rules, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence. When such a challenge is contested (i.e. if the other party does not agree to the challenge or the challenged arbitrator does not withdraw within 15 days of the notice of the challenge), the party making the challenge may seek a decision on the challenge by the appointing authority pursuant to article 13, paragraph 4. If the appointing authority sustains the challenge, it may also be called upon to appoint the substitute arbitrator.

(b) Note for institution acting as an appointing authority

50. The institution may indicate details as to how it would make the decision on such a challenge in accordance with the UNCITRAL Arbitration Rules. In that regard, the institution may wish to identify any code of ethics of its institution or other written principles which it would apply in ascertaining the independence and impartiality of arbitrators.

4. Replacement of an arbitrator (article 14)

51. Under article 14, paragraph 1, of the UNCITRAL Arbitration Rules, in the event that an arbitrator has to be replaced in the course of the arbitral proceedings, a substitute arbitrator shall normally be appointed or chosen pursuant to the procedure provided for in articles 8-11 of the Rules that was applicable to the appointment or choice of the arbitrator being replaced. That procedure shall apply even if, during the process of appointing the arbitrator to be replaced, a party failed to exercise its right to appoint or to participate in the appointment.

52. This procedure is subject to an exception pursuant to article 14, paragraph 2, of the Rules, which provides the appointing authority with the power to determine, at the request of a party, whether it would be justified for a party to be deprived of its right to appoint a substitute arbitrator. If the appointing authority makes such a determination, it may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) after

the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

53. It is noteworthy that the appointing authority should deprive a party of its right to appoint a substitute arbitrator only in exceptional circumstances. To that end, the wording “the exceptional circumstances of the case” in article 14, paragraph 2, was chosen to allow the appointing authority to take account of all circumstances or incidents that might have occurred during the proceedings. The *travaux préparatoires* of the UNCITRAL Arbitration Rules show that depriving a party of its right to appoint an arbitrator is a serious decision, one which should be taken based on the faulty behaviour of a party to the arbitration and on the basis of a fact-specific inquiry and which should not be subject to defined criteria. Rather, the appointing authority should determine, in its discretion, whether the party has the right to appoint another arbitrator.⁴⁰

54. In determining whether to permit a truncated tribunal to proceed with the arbitration under article 14, paragraph 2 (b), the appointing authority must take into consideration the stage of the proceedings. Bearing in mind that the hearings are already closed, it might be more appropriate, for the sake of efficiency, to allow a truncated tribunal to make any decision or final award than to proceed with the appointment of a substitute arbitrator. Other factors that might be taken into consideration, to the extent feasible, in deciding whether to allow a truncated tribunal to proceed include the relevant laws (i.e. whether the laws would permit or restrict such a procedure) and relevant case law on truncated tribunals.

5. Assistance in fixing fees of arbitrators

(a) Articles 40 and 41

55. Pursuant to article 40, paragraphs 1 and 2, of the UNCITRAL Arbitration Rules, the arbitral tribunal fixes the costs of arbitration. Pursuant to article 41, paragraph 1, the fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case. In this task, the arbitral tribunal may be assisted by an appointing authority: if the appointing authority applies or has stated that it will apply a schedule or particular method for determining the fees of arbitrators in international cases, the arbitral tribunal, in fixing its fees, shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case (article 41, paragraph 2).

(b) Note for institutions acting as an appointing authority

56. An institution willing to act as appointing authority may indicate, in its administrative procedures, any relevant details in respect of assistance in fixing the fees. In particular, it may state whether it has issued a schedule or defined a particular method for determining the fees for arbitrators in international cases as envisaged in article 41, paragraph 2 (see para. 17 above).

⁴⁰ A/CN.9/688, para. 78, and A/CN.9/614, para. 71.

6. Review mechanism (article 41)

57. Article 41 of the UNCITRAL Arbitration Rules addresses the fees and expenses of arbitrators and foresees a review mechanism for such fees that involves a neutral body, the appointing authority. Notwithstanding that an institution may have its own rules on fees, it is recommended that the institution acting as appointing authority should follow the rules set out in article 41.

58. The review mechanism consists of two stages. At the first stage, article 41, paragraph 3, requires the arbitral tribunal to inform the parties promptly after its constitution of how it proposes to determine its fees and expenses. Any party then has 15 days to request the appointing authority to review that proposal. If the appointing authority considers the proposal of the arbitral tribunal to be inconsistent with the requirement of reasonableness in article 41, paragraph 1, it shall within 45 days make any necessary adjustments, which are binding upon the arbitral tribunal. At the second stage, article 41, paragraph 4, provides that, after being informed of the determination of the arbitrators' fees and expenses, any party has the right to request the appointing authority to review that determination. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in the Rules, the review shall be made by the Secretary-General of the Permanent Court of Arbitration. Within 45 days of the receipt of such referral, the reviewing authority shall make any adjustments to the arbitral tribunal's determination that are necessary to meet the criteria in article 41, paragraph 1, if the tribunal's determination is inconsistent with its proposal (and any adjustment thereto) under paragraph 3 of that article or is otherwise manifestly excessive.

59. The *travaux préparatoires* of the UNCITRAL Arbitration Rules show that the process for establishing the arbitrators' fees was regarded as crucial for the legitimacy and integrity of the arbitral process itself.⁴¹

60. The criteria and mechanism set out in article 41, paragraphs 1-4, was chosen to provide sufficient guidance to an appointing authority and to avoid time-consuming scrutiny of fee determinations.⁴² Article 41, paragraph 4 (c), by cross-referring to paragraph 1 of that article, refers to the notion of reasonableness of the amount of arbitrators' fees, an element to be taken into account by the appointing authority if the adjustment of fees and expenses is necessary. In order to clarify that the review process should not be too intrusive, the words "manifestly excessive" were included in article 41, paragraph 4 (c).⁴³

7. Advisory comments regarding deposits

61. Under article 43, paragraph 3, of the UNCITRAL Arbitration Rules, the arbitral tribunal shall fix the amounts of any initial or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal it deems appropriate concerning the amount of such deposits and supplementary deposits, if a party so requests and the appointing authority consents to perform this function. The institution may wish to indicate in its

⁴¹ A/CN.9/646, para. 20.

⁴² A/CN.9/688, para. 23.

⁴³ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 172.

administrative procedures its willingness to do so. Supplementary deposits may be required if, in the course of proceedings, it appears that the costs will be higher than anticipated, for instance if the arbitral tribunal decides pursuant to the Rules to appoint an expert. Although not explicitly mentioned in the Rules, appointing authorities have in practice also commented and advised on interim payments.

62. It should be noted that, under the Rules, this kind of advice is the only task relating to deposits that an appointing authority may be requested to fulfil. Thus, if an institution offers to perform any other functions (such as holding deposits or rendering an accounting thereof), it should be pointed out that this would constitute additional administrative services not included in the functions of an appointing authority (see para. 30 above).

Note: In addition to the information and suggestions set forth herein, assistance may be obtained from the secretariat of UNCITRAL:

International Trade Law Division
Office of Legal Affairs
United Nations
Vienna International Centre
P.O. Box 500
1400 Vienna
Austria
E-mail: uncitral@uncitral.org.

The secretariat could, for example, if so requested, assist in the drafting of institutional rules or administrative provisions, or it could make suggestions in this regard.

Annex II

List of documents before the Commission at its forty-fifth session

<i>Symbol</i>	<i>Title or description</i>
A/CN.9/735 and Add.1	Provisional agenda, annotations thereto and scheduling of meetings of the forty-fifth session
A/CN.9/736	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session (Vienna, 3-7 October 2011)
A/CN.9/737	Report of Working Group IV (Electronic Commerce) on the work of its forty-fifth session (Vienna, 10-14 October 2011)
A/CN.9/738	Report of Working Group V (Insolvency Law) on the work of its fortieth session (Vienna, 31 October-4 November 2011)
A/CN.9/739	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14-18 November 2011)
A/CN.9/740	Report of Working Group VI (Security Interests) on the work of its twentieth session (Vienna, 12-16 December 2011)
A/CN.9/741	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session (New York, 6-10 February 2012)
A/CN.9/742	Report of Working Group V (Insolvency Law) on the work of its forty-first session (New York, 30 April-4 May 2012)
A/CN.9/743	Report of Working Group VI (Security Interests) on the work of its twenty-first session (New York, 14-18 May 2012)
A/CN.9/744	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session (New York, 21-25 May 2012)
A/CN.9/745	Report of Working Group I (Procurement) on the work of its twenty-first session (New York, 16-20 April 2012)
A/CN.9/746 and Add.1	Note by the Secretariat on settlement of commercial disputes: recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010
A/CN.9/747 and Add.1	Note by the Secretariat on settlement of commercial disputes: recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010; compilation of comments by Governments
A/CN.9/748	Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/749	Note by the Secretariat on coordination activities
A/CN.9/750	Note by the Secretariat on bibliography of recent writings related to the work of UNCITRAL

<i>Symbol</i>	<i>Title or description</i>
A/CN.9/751	Note by the Secretariat on status of conventions and model laws
A/CN.9/752 and Add.1	Note by the Secretariat on a strategic direction for UNCITRAL
A/CN.9/753	Note by the Secretariat on technical cooperation and assistance
A/CN.9/754 and Add.1-3	Note by the Secretariat on a revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement
A/CN.9/755	Note by the Secretariat on procurement and infrastructure development: possible future work
A/CN.9/756	Note by the Secretariat on selected legal issues impacting microfinance
A/CN.9/757	Note by the Secretariat on selected legal issues impacting microfinance: observations by the New York State Bar Association (NYSBA) International Section
A/CN.9/758	Note by the Secretariat on possible future work in the area of international contract law: proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law

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

(TD/B/59/7)

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

At its 1088th plenary meeting, the Board took note of the annual report of the United Nations Commission on International Trade Law at its forty-fifth session (A/67/17; New York, 25 June-6 July 2012).

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-fifth session

(A/67/465)

[Original: English]

Rapporteur: Mr. **Pham** Quang Hieu (Viet Nam)

I. Introduction

1. At its 2nd plenary meeting, on 21 September 2012, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its sixty-seventh session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-fifth session” and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 9th, 23rd and 24th meetings, on 15 October and on 6 and 9 November 2012. The views of the representatives who spoke during the Committee’s consideration of the item are reflected in the relevant summary records (A/C.6/67/SR.9, 23 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-fifth session (A/67/17).
4. At the 9th meeting, on 15 October, the Chair of the United Nations Commission on International Trade Law at its forty-fifth session introduced the report of the Commission on the work of its forty-fifth session.

II. Consideration of proposals

A. Draft resolution A/C.6/67/L.8

5. At the 23rd meeting, on 6 November, the representative of Austria, on behalf of Albania, Argentina, Armenia, Australia, Austria, Belarus, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cyprus, the Czech Republic, Denmark, El Salvador, Estonia, Finland, France, Gabon, Germany, Greece, Guatemala, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Montenegro, the Netherlands, New Zealand, Nigeria, Panama, the Philippines, Poland, Portugal, the Republic of Korea, the Republic of Moldova, Romania, the Russian Federation, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Turkey, Uganda, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela (Bolivarian Republic of), introduced a draft resolution entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-fifth session” (A/C.6/67/L.8).

6. At the 24th meeting, on 9 November, Belgium and Malaysia joined in sponsoring the draft resolution.
7. At the same meeting, the Committee adopted draft resolution A/C.6/67/L.8 without a vote (see para. 10, draft resolution I).

B. Draft resolution A/C.6/67/L.7

8. At the 23rd meeting, on 6 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010” (A/C.6/67/L.7).
9. At its 24th meeting, on 9 November, the Committee adopted draft resolution A/C.6/66/L.7 without a vote (see para. 10, draft resolution II).

III. Recommendations of the Sixth Committee

10. 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-fifth 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,¹

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

¹ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17).*

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;¹

2. *Commends* the Commission for the finalization and adoption of the Guide to Enactment of the United Nations Commission on International Trade Law Model Law on Public Procurement² and the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under its Arbitration Rules as revised in 2010;³

3. *Takes note with interest* of the progress made by the Commission in its work in the areas of arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law and security interests;⁴

4. *Notes* the discussions undertaken by the Commission as regards its possible future work in the areas of public procurement and related areas, including public-private partnerships, microfinance and international contract law, and endorses the Commission's agreement to hold one or more colloquiums on microfinance and related matters, possibly in different regions, as well as a colloquium to identify the scope of possible work and primary issues to be addressed in the area of public-private partnerships;⁵

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, done at New York on 10 June 1958,⁶ including the preparation of a guide on the Convention;⁷

6. *Notes* the decision of the Commission to commend the use of the 2010 edition of the International Institute for the Unification of Private Law Principles of International Commercial Contracts, as appropriate, for their intended purposes, and of Incoterms 2010, as appropriate, in international sales transactions;⁸

7. *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

² Ibid., chap. III.

³ Ibid., chap. IV and annex I.

⁴ Ibid., chaps. V-IX.

⁵ Ibid., chaps. X-XII.

⁶ United Nations, *Treaty Series*, vol. 330, No. 4739.

⁷ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, chap. XIII.

⁸ Ibid., chap. XIV.

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;

8. *Notes with appreciation* the significant progress made in the coordination and cooperation activities of the Commission in the field of security interests, in particular the publication of “UNCITRAL, Hague Conference and Unidroit texts on security interests”, prepared with the contribution of the Permanent Bureau of the Hague Conference and the secretariat of the International Institute for the Unification of Private Law, and the ongoing preparation of a joint set of principles on effective secured transaction regimes in cooperation with the World Bank and outside experts;⁹

9. *Notes* the agreement of the Commission that a coordinated approach to the matter of the law applicable to the proprietary effects of assignments of receivables is in the interest of all States and its request to the Secretariat to cooperate closely with the European Commission with a view to ensuring a coordinated approach to the matter, taking into account the approach followed in the United Nations Convention on the Assignment of Receivables in International Trade¹⁰ and the *UNCITRAL Legislative Guide on Secured Transactions*;¹¹

10. *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;

⁹ Ibid., paras. 165-168.

¹⁰ Resolution 56/81, annex.

¹¹ United Nations publication, Sales No. E.09.V.12; see also *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 168.

(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 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 United Nations development agenda, including the achievement of the Millennium Development Goals;

11. *Takes note with interest* of the note by the Secretariat setting out a number of issues for consideration by the Commission in setting the parameters for a strategic plan for the Commission,¹² and endorses the Commission's agreement to consider and provide guidance on, inter alia, the strategic considerations at its forty-sixth session;¹³

12. *Calls upon* Member States, non-member States, observer organizations and the Secretariat to apply the rules of procedure and methods of work of the Commission, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,¹⁴ with a view to ensuring the high quality of the work of the Commission and international acceptability of its instruments, and in this regard recalls its previous resolutions related to this matter;

13. *Welcomes* the opening, on 10 January 2012, of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, as a novel yet important first step for the Commission in reaching out and providing technical assistance to developing countries in the region, notes with satisfaction expressions of interest from other States, including Kenya and Singapore, in hosting regional centres of the Commission and the request by the Commission to the Secretariat to further pursue administrative arrangements with the Governments of Kenya and Singapore for the establishment of such centres, 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;¹⁵

14. *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 the field of international trade law in those countries to facilitate the development of international trade and the promotion of foreign investment;

¹² A/CN.9/752 and Add.1.

¹³ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, chap. XXI.

¹⁴ *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*.

¹⁵ *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, chap. XIX.

15. *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-seventh 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;

16. *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;

17. *Takes note with appreciation*, in this regard, of the rule of law briefing by the Rule of Law Unit, held at the forty-fifth session of the Commission,¹⁶ which allowed the Commission to contribute its views to the high-level meeting of the General Assembly on the topic of the rule of law at the national and international levels, held on 24 September 2012;

18. *Notes* the actions taken by the Commission after the briefing on the rule of law, in particular the messages of the Commission to the high-level meeting addressed to States and the United Nations, including recommended steps that should contribute to building the local capacity of States to continually engage in commercial law reforms at the country level and in a coordinated fashion in the rule-formulating activities of regional and international bodies;¹⁷

19. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,¹⁸ 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 progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;¹⁹

20. *Requests* the Secretary-General to continue providing 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, takes note of the Commission's confirmation that good-quality summary records remain the best available option for preserving complete and accurate *travaux préparatoires* of the Commission's work in the most user-friendly and reliable way, welcomes the Commission's willingness to consider at the same time modern solutions that might address existing problems with the issuance of summary records and add useful features in the use of the Commission's records,

¹⁶ Ibid., chap. XX.

¹⁷ Ibid., paras. 211-227.

¹⁸ Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

¹⁹ 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.

and endorses the agreement of the Commission to assess at its forty-seventh session, in 2014, 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;²⁰

21. *Welcomes* the review by the Commission of the proposed biennial programme plan for subprogramme 5 (Progressive harmonization, modernization and unification of the law of international trade) of programme 6 (Legal affairs) of the proposed strategic framework for the period 2014-2015,²¹ takes note that the Commission expressed concern that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet the increased demand from developing countries and countries with economies in transition for technical assistance with law reform in the field of commercial law, also takes note that the Commission urged the Secretary-General to take steps to ensure that the comparatively small amount of additional resources necessary to meet a demand so crucial to development are made available promptly,²² and recalls paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

22. *Notes* the concern expressed by the Commission over the lack of sufficient resources in its secretariat for responding to the growing need for the uniform interpretation of Commission texts, which is considered indispensable for their effective implementation, and also notes that the Commission encouraged the Secretariat to explore various means of addressing this concern, inter alia, by building partnerships with interested institutions and establishing within the Commission's secretariat a pillar concentrating on the promotion of ways and means of interpreting uniformly Commission texts, in particular by sustaining and expanding the system for the collection and dissemination of case law on Commission texts (the CLOUT system);²³

23. *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;

24. *Welcomes* the preparation of digests of case law relating to the texts of the Commission, notes with appreciation the continuing increase in the number of abstracts available through the CLOUT system, and welcomes the publication of the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 edition, and the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*,²⁴ as well as the agreement of the Commission that a digest of case law on the Model Law on

²⁰ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 241-249.

²¹ A/67/6 (Prog. 6).

²² *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 250 and 251.

²³ *Ibid.*, para. 252.

²⁴ United Nations publication, Sales No. E.12.V.9.

Cross-Border Insolvency be prepared, subject to the availability of resources in the Secretariat.²⁵

²⁵ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 156.

Draft resolution II
Recommendations to assist arbitral institutions and other
interested bodies with regard to arbitration under the Arbitration
Rules of the United Nations Commission on International Trade
Law as revised in 2010

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 the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recalling also its resolutions 31/98 of 15 December 1976 and 65/22 of 6 December 2010, in which it recommended the use of the Arbitration Rules of the United Nations Commission on International Trade Law,¹

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international commercial relations,

Noting that the Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions, in all parts of the world,

Recognizing the value of the 1982 recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as adopted in 1976,²

Also recognizing the need for issuing updated recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as revised in 2010,

Believing that updated recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as revised in 2010 will significantly enhance the efficiency of arbitration under the Rules,

Noting that the preparation of the 2012 recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as revised in 2010 was the subject of due deliberation and consultations with Governments, arbitral institutions and interested bodies,

Convinced that the recommendations as adopted by the Commission at its forty-fifth session³ are acceptable to arbitral institutions and other interested bodies in countries with different legal, social and economic systems and can significantly contribute to the establishment of a harmonized legal framework for a fair and

¹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C; and ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), annex I.*

² *Ibid., Thirty-seventh Session, Supplement No. 17 (A/37/17), annex I.*

³ *Ibid., Sixty-seventh Session, Supplement No. 17 (A/67/17), annex I.*

efficient settlement of international commercial disputes and to the development of harmonious international economic relations,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having formulated and adopted the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as revised in 2010;³

2. *Recommends* the use of the recommendations in the settlement of disputes arising in the context of international commercial relations;

3. *Requests* the Secretary-General to transmit the recommendations broadly to Governments, with a call for the recommendations to be made available to arbitral institutions and other interested bodies, so that the recommendations become widely known and available;

4. *Also requests* the Secretary-General to publish the recommendations, including electronically, and to make all efforts to ensure that they become generally known and available.

D. General Assembly resolutions 67/1, 67/89, 67/90, and 67/97
Resolutions adopted by the General Assembly without reference
to a Main Committee and on the reports of the
Sixth Committee
(A/67/465, A/67/471)

67/1. Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels

The General Assembly,

Adopts the following declaration:

Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels

We, Heads of State and Government, and heads of delegation have gathered at United Nations Headquarters in New York on 24 September 2012 to reaffirm our commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development. We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built.

I

1. We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world.
2. We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.
3. We are determined to establish a just and lasting peace all over the world, in accordance with the purposes and principles of the Charter of the United Nations. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, to respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, and to uphold the resolution of disputes by peaceful means and in conformity with the principles of justice and

international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and the fulfilment in good faith of the obligations assumed in accordance with the Charter.

4. We reaffirm the duty of all States to settle their international disputes by peaceful means, *inter alia* through negotiation, enquiry, good offices, mediation, conciliation, arbitration and judicial settlement, or other peaceful means of their own choice.

5. We reaffirm 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.

6. We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for, and the observance and protection of, all human rights and fundamental freedoms for all. The universal nature of these rights and freedoms is beyond question. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect human rights and fundamental freedoms for all, without distinction of any kind.

7. We are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.

8. We recognize 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 we commend the work of the United Nations Commission on International Trade Law in modernizing and harmonizing international trade law.

9. States are strongly urged to refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law and the Charter of the United Nations that impede the full achievement of economic and social development, particularly in developing countries.

10. We recognize the progress made by countries in advancing the rule of law as an integral part of their national strategies. We also recognize that there are common features founded on international norms and standards which are reflected in a broad diversity of national experiences in the area of the rule of law. In this regard, we stress the importance of promoting the sharing of national practices and of inclusive dialogue.

11. We recognize the importance of national ownership in rule of law activities, strengthening justice and security institutions that are accessible and responsive to

the needs and rights of all individuals and which build trust and promote social cohesion and economic prosperity.

12. We reaffirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid.

13. We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.

14. We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.

15. We acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms.

16. We recognize the importance of ensuring that women, on the basis of the equality of men and women, fully enjoy the benefits of the rule of law, and commit to using law to uphold their equal rights and ensure their full and equal participation, including in institutions of governance and the judicial system, and recommit to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to secure their empowerment and full access to justice.

17. We recognize the importance of the rule of law for the protection of the rights of the child, including legal protection from discrimination, violence, abuse and exploitation, ensuring the best interests of the child in all actions, and recommit to the full implementation of the rights of the child.

18. We emphasize the importance of the rule of law as one of the key elements of conflict prevention, peacekeeping, conflict resolution and peacebuilding, stress that justice, including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations, and stress the need for the international community, including the United Nations, to assist and support such countries, upon their request, as they may face special challenges during their transition.

19. We stress the importance of supporting national civilian capacity development and institution-building in the aftermath of conflict, including through peacekeeping operations in accordance with their mandates, with a view to delivering more effective civilian capacities, as well as enhanced, international, regional, North-South, South-South and triangular cooperation, including in the field of the rule of law.

20. We stress that greater compliance with international humanitarian law is an indispensable prerequisite for improving the situation of victims of armed conflict, and we reaffirm the obligation of all States and all parties to armed conflict to

respect and ensure respect for international humanitarian law in all circumstances, and also stress the need for wide dissemination and full implementation of international humanitarian law at the national level.

21. We stress the importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law. In this respect, we underline that truth-seeking processes, including those that investigate patterns of past violations of international human rights law and international humanitarian law and their causes and consequences, are important tools that can complement judicial processes.

22. We commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose we encourage States to strengthen national judicial systems and institutions.

23. We recognize the role of the International Criminal Court in a multilateral system that aims to end impunity and establish the rule of law, and in this respect we welcome the States that have become parties to the Rome Statute of the International Criminal Court,¹ and call upon all States that are not yet parties to the Statute to consider ratifying or acceding to it, and emphasize the importance of cooperation with the Court.

24. We stress the importance of strengthened international cooperation, based on the principles of shared responsibility and in accordance with international law, in order to dismantle illicit networks and counter the world drug problem and transnational organized crime, including money-laundering, trafficking in persons, trafficking in arms and other forms of organized crime, all of which threaten national security and undermine sustainable development and the rule of law.

25. We are convinced of the negative impact of corruption, which obstructs economic growth and development, erodes public confidence, legitimacy and transparency and hinders the making of fair and effective laws, as well as their administration, enforcement and adjudication, and therefore stress the importance of the rule of law as an essential element in addressing and preventing corruption, including by strengthening cooperation among States concerning criminal matters.

26. We reiterate our strong and unequivocal condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security; we reaffirm that all measures used in the fight against terrorism must be in compliance with the obligations of States under international law, including the Charter of the United Nations, in particular the purposes and principles thereof, and relevant conventions and protocols, in particular human rights law, refugee law and humanitarian law.

¹ United Nations, *Treaty Series*, vol. 2187, No. 38544.

II

27. We recognize the positive contribution of the General Assembly, as the chief deliberative and representative organ of the United Nations, to the rule of law in all its aspects through policymaking and standard setting, and through the progressive development of international law and its codification.

28. We recognize the positive contribution of the Security Council to the rule of law while discharging its primary responsibility for the maintenance of international peace and security.

29. Recognizing the role under the Charter of the United Nations of effective collective measures in maintaining and restoring international peace and security, we encourage the Security Council to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are maintained and further developed.

30. We recognize the positive contribution of the Economic and Social Council to strengthening the rule of law, pursuing the eradication of poverty and furthering the economic, social and environmental dimensions of sustainable development.

31. We recognize the positive contribution of the International Court of Justice, the principal judicial organ of the United Nations, including in adjudicating disputes among States, and the value of its work for the promotion of the rule of law; we reaffirm the obligation of all States to comply with the decisions of the International Court of Justice in cases to which they are parties; and we call upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute. We also recall the ability of the relevant organs of the United Nations to request advisory opinions from the International Court of Justice.

32. We recognize the contributions of the International Tribunal for the Law of the Sea, as well as other international courts and tribunals, in advancing the rule of law at the international and national levels.

33. We commend the work of the International Law Commission in advancing the rule of law at the international level through the progressive development of international law and its codification.

34. We recognize the essential role of parliaments in the rule of law at the national level, and welcome the interaction among the United Nations, national parliaments and the Inter-Parliamentary Union.

35. We are convinced that good governance at the international level is fundamental for strengthening the rule of law, and stress the importance of continuing efforts to revitalize the General Assembly, to reform the Security Council and to strengthen the Economic and Social Council, in accordance with relevant resolutions and decisions.

36. We take note of the important decisions on reform of the governance structures, quotas and voting rights of the Bretton Woods institutions, better reflecting current realities and enhancing the voice and participation of developing countries, and we reiterate the importance of the reform of the governance of those

institutions in order to deliver more effective, credible, accountable and legitimate institutions.

III

37. We reaffirm that States shall abide by all their obligations under international law, and stress the need to strengthen support to States, upon their request, in the national implementation of their respective international obligations through enhanced technical assistance and capacity-building.

38. We stress the importance of international cooperation and invite donors, regional, subregional and other intergovernmental organizations, as well as relevant civil society actors, including non-governmental organizations, to provide, at the request of States, technical assistance and capacity-building, including education and training on rule of law-related issues, as well as to share practices and lessons learned on the rule of law at the international and national levels.

39. We take note of the report of the Secretary-General entitled “Delivering justice: programme of action to strengthen the rule of law at the national and international levels”.²

40. We request the Secretary-General to ensure greater coordination and coherence among the United Nations entities and with donors and recipients to improve the effectiveness of rule of law capacity-building activities.

41. We emphasize the importance of continuing our consideration and promotion of the rule of law in all its aspects, and to that end we decide to pursue our work in the General Assembly to develop further the linkages between the rule of law and the three main pillars of the United Nations: peace and security, human rights and development. To that end, we request the Secretary-General to propose ways and means of developing, with wide stakeholder participation, further such linkages, and to include this in his report to the Assembly at its sixty-eighth session.

42. We acknowledge the efforts to strengthen the rule of law through voluntary pledges in the context of the high-level meeting, and encourage States that have not done so to consider making pledges individually or jointly, based on their national priorities, including pledges aimed at sharing knowledge, best practices and enhancing international cooperation, including regional and South-South cooperation.

*3rd plenary meeting
24 September 2012*

² A/66/749.

67/89. Report of the United Nations Commission on International Trade Law on the work of its forty-fifth 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,¹

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;¹

2. *Commends* the Commission for the finalization and adoption of the Guide to Enactment of the United Nations Commission on International Trade Law Model Law on Public Procurement² and the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under its Arbitration Rules as revised in 2010;³

* Reissued for technical reasons on 15 July 2013.

¹ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17).*

² *Ibid.*, chap. III.

³ *Ibid.*, chap. IV and annex I.

3. *Takes note with interest* of the progress made by the Commission in its work in the areas of arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law and security interests;⁴

4. *Notes* the discussions undertaken by the Commission as regards its possible future work in the areas of public procurement and related areas, including public-private partnerships, microfinance and international contract law, and endorses the Commission's agreement to hold one or more colloquiums on microfinance and related matters, possibly in different regions, as well as a colloquium to identify the scope of possible work and primary issues to be addressed in the area of public-private partnerships;⁵

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, done at New York on 10 June 1958,⁶ including the preparation of a guide on the Convention;⁷

6. *Notes* the decision of the Commission to commend the use of the 2010 edition of the International Institute for the Unification of Private Law Principles of International Commercial Contracts, as appropriate, for their intended purposes, and of Incoterms 2010, as appropriate, in international sales transactions;⁸

7. *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;

8. *Notes with appreciation* the significant progress made in the coordination and cooperation activities of the Commission in the field of security interests, in particular the publication of "UNCITRAL, Hague Conference and Unidroit texts on security interests", prepared with the contribution of the Permanent Bureau of the Hague Conference and the secretariat of the International Institute for the Unification of Private Law, and the ongoing preparation of a joint set of principles on effective secured transaction regimes in cooperation with the World Bank and outside experts;⁹

9. *Notes* the agreement of the Commission that a coordinated approach to the matter of the law applicable to the proprietary effects of assignments of receivables is in the interest of all States and its request to the Secretariat to cooperate closely with the European Commission with a view to ensuring a

⁴ Ibid., chaps. V-IX.

⁵ Ibid., chaps. X-XII.

⁶ United Nations, *Treaty Series*, vol. 330, No. 4739.

⁷ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, chap. XIII.

⁸ Ibid., chap. XIV.

⁹ Ibid., chap. XVIII, paras. 165-168.

coordinated approach to the matter,¹⁰ taking into account the approach followed in the United Nations Convention on the Assignment of Receivables in International Trade¹¹ and the *UNCITRAL Legislative Guide on Secured Transactions*;¹²

10. *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 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 United Nations development agenda, including the achievement of the Millennium Development Goals;

11. *Takes note with interest* of the note by the Secretariat setting out a number of issues for consideration by the Commission in setting the parameters for a strategic plan for the Commission,¹³ and endorses the Commission's agreement to consider and provide guidance on, inter alia, the strategic considerations at its forty-sixth session;¹⁴

¹⁰ Ibid., para. 168.

¹¹ Resolution 56/81, annex.

¹² United Nations publication, Sales No. E.09.V.12.

¹³ A/CN.9/752 and Add.1.

¹⁴ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, chap. XXI.

12. *Calls upon* Member States, non-member States, observer organizations and the Secretariat to apply the rules of procedure and methods of work of the Commission, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,¹⁵ with a view to ensuring the high quality of the work of the Commission and international acceptability of its instruments, and in this regard recalls its previous resolutions related to this matter;

13. *Welcomes* the opening, on 10 January 2012, of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, as a novel yet important first step for the Commission in reaching out and providing technical assistance to developing countries in the region, notes with satisfaction expressions of interest from other States, including Kenya and Singapore, in hosting regional centres of the Commission and the request by the Commission to the Secretariat to further pursue administrative arrangements with the Governments of Kenya and Singapore for the establishment of such centres, 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;¹⁶

14. *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 the field of international trade law in those countries to facilitate the development of international trade and the promotion of foreign investment;

15. *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-seventh 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;

16. *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;

17. *Takes note with appreciation*, in this regard, of the rule of law briefing by the Rule of Law Unit, held at the forty-fifth session of the Commission,¹⁷ which allowed the Commission to contribute its views to the high-level meeting of the

¹⁵ Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17).

¹⁶ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), chap. XIX.

¹⁷ Ibid., chap. XX.

General Assembly on the topic of the rule of law at the national and international levels, held on 24 September 2012;

18. *Notes* the actions taken by the Commission after the briefing on the rule of law, in particular the messages of the Commission to the high-level meeting addressed to States and the United Nations, including recommended steps that should contribute to building the local capacity of States to continually engage in commercial law reforms at the country level and in a coordinated fashion in the rule-formulating activities of regional and international bodies;¹⁸

19. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,¹⁹ 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 progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;²⁰

20. *Requests* the Secretary-General to continue providing 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, takes note of the Commission's confirmation that good-quality summary records remain the best available option for preserving complete and accurate *travaux préparatoires* of the Commission's work in the most user-friendly and reliable way, welcomes the Commission's willingness to consider at the same time modern solutions that might address existing problems with the issuance of summary records and add useful features in the use of the Commission's records, and endorses the agreement of the Commission to assess at its forty-seventh session, in 2014, 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;²¹

21. *Welcomes* the review by the Commission of the proposed biennial programme plan for subprogramme 5 (Progressive harmonization, modernization and unification of the law of international trade) of programme 6 (Legal affairs) of the proposed strategic framework for the period 2014-2015,²² takes note that the Commission expressed concern that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet the increased demand from developing countries and countries with economies in transition for technical assistance with law reform in the field of commercial law, also takes note that the Commission urged the Secretary-General to take steps to ensure that the comparatively small amount of additional resources necessary to meet a demand so

¹⁸ Ibid., paras. 211-227.

¹⁹ Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

²⁰ 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.

²¹ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 241-249.

²² A/67/6 (Prog. 6).

crucial to development are made available promptly,²³ and recalls paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

22. *Notes* the concern expressed by the Commission over the lack of sufficient resources in its secretariat for responding to the growing need for the uniform interpretation of Commission texts, which is considered indispensable for their effective implementation, and also notes that the Commission encouraged the Secretariat to explore various means of addressing this concern, inter alia, by building partnerships with interested institutions and establishing within the Commission's secretariat a pillar concentrating on the promotion of ways and means of interpreting uniformly Commission texts, in particular by sustaining and expanding the system for the collection and dissemination of case law on Commission texts (the CLOUT system);²⁴

23. *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;

24. *Welcomes* the preparation of digests of case law relating to the texts of the Commission, notes with appreciation the continuing increase in the number of abstracts available through the CLOUT system, and welcomes the publication of the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 edition, and the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, as well as the agreement of the Commission that a digest of case law on the Model Law on Cross-Border Insolvency be prepared, subject to the availability of resources in the Secretariat.²⁵

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²³ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 250 and 251.

²⁴ *Ibid.*, para. 252.

²⁵ *Ibid.*, para. 156.

67/90. Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010

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 the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recalling also its resolutions 31/98 of 15 December 1976 and 65/22 of 6 December 2010, in which it recommended the use of the Arbitration Rules of the United Nations Commission on International Trade Law,¹

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international commercial relations,

Noting that the Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions, in all parts of the world,

Recognizing the value of the 1982 recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as adopted in 1976,²

Also recognizing the need for issuing updated recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as revised in 2010,

Believing that updated recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as revised in 2010 will significantly enhance the efficiency of arbitration under the Rules,

Noting that the preparation of the 2012 recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as revised in 2010 was the subject of due deliberation and consultations with Governments, arbitral institutions and interested bodies,

Convinced that the recommendations as adopted by the Commission at its forty-fifth session³ are acceptable to arbitral institutions and other interested bodies in countries with different legal, social and economic systems and can significantly contribute to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes and to the development of harmonious international economic relations,

¹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C; and ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), annex I.*

² *Ibid., Thirty-seventh Session, Supplement No. 17 (A/37/17), annex I.*

³ *Ibid., Sixty-seventh Session, Supplement No. 17 (A/67/17), annex I.*

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having formulated and adopted the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules as revised in 2010;³
2. *Recommends* the use of the recommendations in the settlement of disputes arising in the context of international commercial relations;
3. *Requests* the Secretary-General to transmit the recommendations broadly to Governments, with a call for the recommendations to be made available to arbitral institutions and other interested bodies, so that the recommendations become widely known and available;
4. *Also requests* the Secretary-General to publish the recommendations, including electronically, and to make all efforts to ensure that they become generally known and available.

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67/97. The rule of law at the national and international levels

The General Assembly,

Recalling its resolution 66/102 of 9 December 2011,

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,

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,¹

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;²

2. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;³

3. *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;

¹ Resolution 60/1.

² Resolution 67/1.

³ A/67/290.

4. *Reaffirms also* 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;

5. *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;

6. *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;

7. *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;

8. *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;

9. *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;

10. *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;

11. *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;

12. *Recognizes* the importance of restoring confidence in the rule of law as a key element of transitional justice;

13. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;

14. *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;

15. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue to interact with Member States on a regular basis, in particular in informal briefings;

16. *Stresses* the need to provide the Rule of Law Unit with the necessary funding and staff in order to enable it to carry out its tasks in an effective and sustainable manner, and urges the Secretary-General and Member States to continue to support the functioning of the Unit;

17. *Decides* to include in the provisional agenda of its sixty-eighth 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 debates on the subtopics “The rule of law and the peaceful settlement of international disputes” (sixty-eighth session) and “Sharing States’ national practices in strengthening the rule of law through access to justice” (sixty-ninth session).

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Part Two

STUDIES AND REPORTS ON SPECIFIC SUBJECTS

I. ARBITRATION AND CONCILIATION

A. Report of the Working Group on Arbitration and Conciliation on the work of its fifty-fifth session (Vienna, 3-7 October 2011) (A/CN.9/736)

[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)¹ 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.²

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 large number of treaties already concluded.³ Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State Party to the investment treaty should be regarded as falling within the mandate of the Working Group. Whether the legal standard on transparency should deal with such a right of intervention, and if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group.⁴

3. The most recent compilation of historical references regarding the consideration by the Commission of work of the Working Group can be found in document A/CN.9/WG.II/WP.165, paragraphs 5-12.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its fifty-fifth session in Vienna, from 3 to 7 October 2011. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, El Salvador, France, Germany, Greece, India, Israel, Italy, Japan, Mauritius, Mexico, Nigeria, Norway, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, 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: Belarus, Belgium, Croatia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, Indonesia, Netherlands, New Zealand, Panama, Romania, Slovakia and Switzerland.

¹ *Official records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 314.

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

³ *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200.

⁴ *Ibid.*, para. 202.

6. The session was also attended by observers from Palestine and the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: International Centre for Settlement of Investment Disputes (ICSID);

(b) *Intergovernmental organizations*: Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) and the Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association for the Promotion of Arbitration in Africa (APAA), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic Trade and Arbitration Commission (CIETAC), Comité Français de l'Arbitrage (CFA), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Hong Kong International Arbitration Center (HKIAC), Inter-American Bar Association (IABA), International Arbitration Centre of the Austrian Federal Economic Chamber (VIAC), International Arbitration Institute (IAI), International Bar Association (IBA), International Court of Arbitration (ICC), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), Madrid Court of Arbitration, Milan Club of Arbitrators, New York State Bar Association (NYSBA), Pakistan Business Council (PBC), Swiss Arbitration Association (ASA), Tehran Regional Arbitration Centre (TRAC), The Swedish Arbitration Association (SAA), and Union Internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. Markus Maurer (Germany)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.165); (b) a note by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.166 and its addendum); (c) a note by the Secretariat reproducing comments by the International Centre for Settlement of Investment Disputes (ICSID) (A/CN.9/WG.II/WP.167).

10. 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 legal standard on transparency in treaty-based investor-State arbitration.

5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.166 and its addendum; and A/CN.9/WG.II/WP.167). 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 draft of revised rules on transparency, based on the deliberations and decisions of the Working Group.

IV. Preparation of a legal standard on transparency in treaty-based investor-State arbitration

12. The Working Group resumed discussions on the preparation of a legal standard on transparency in treaty-based investor-State arbitration on the basis of documents A/CN.9/WG.II/WP.166 and A/CN.9/WG.II/WP.166/Add.1 and the proposed draft rules on transparency (“rules on transparency”) contained therein.

A. Rules on transparency in treaty-based investor-State arbitration

1. General remarks on the structure of the rules on transparency

13. The Working Group recalled its decision that the legal standard on transparency should be drafted in the form of rules, rather than guidelines (A/CN.9/717, paras. 26 and 58). Before commencing its first reading of the rules on transparency, the Working Group heard a presentation on the structure of the draft rules (see also below, para. 38). Article 1 (1) dealt with the scope of application of the rules on transparency, and in particular with the question of how the consent of the States Parties to an investment treaty would be expressed so that the rules on transparency would apply to the settlement of an investor-State dispute under the treaty. Article 1 (2) served the purpose of clarifying that, where the rules on transparency provided for the exercise of discretion by the arbitral tribunal, that discretion should be exercised by the arbitral tribunal taking into account both the legitimate public interest in transparency in the field of treaty-based investor-State arbitration and in the arbitral proceedings as well the arbitrating parties’ own legitimate interest in an efficient resolution of their dispute. Articles 2 to 6 dealt with substantive issues on transparency. Article 7 addressed exceptions to transparency, which were limited to the protection of confidential and sensitive information and of the integrity of the arbitral process. Article 8 was meant to determine who would be in charge of making the information available to the public.

2. Preamble — Purposes of the rules on transparency

14. The Working Group recalled that the preamble to the rules on transparency as contained in paragraph 8 of document A/CN.9/WG.II/WP.166 reflected a suggestion

made in the Working Group that the purposes the rules on transparency were intended to serve should be expressed in an introduction to the instrument (A/CN.9/717, para. 112). The preamble addressed the balance that the rules sought to achieve in providing both a meaningful opportunity for public participation and a fair and efficient resolution of the dispute for the parties. Some views expressed against including a preamble in the rules on transparency indicated that a preamble would be quite unusual for such an instrument, and its binding nature would be uncertain. As an alternative, it was suggested that the substance of the preamble be included in the decision of the Commission adopting the rules as well as in the text of the resolution of the General Assembly recommending their use. As another alternative, it was noted that a similar balancing provision as between the objectives of transparency and efficient adjudication was already contained in article 1 (2). It was suggested that that might replace the preamble.

15. As a matter of drafting, it was suggested that the word “fast” appearing before the words “and efficient” in the first sentence of the preamble should be replaced by the word “fair”, for the sake of consistency with article 17 (1) of the UNCITRAL Arbitration Rules, as revised in 2010 (“2010 UNCITRAL Arbitration Rules”) (see also below, para. 39).

16. The view was expressed that it might be preferable to defer the decision on a possible need for a preamble until after the content of the rules on transparency had been considered.

17. After discussion, the Working Group agreed to further consider that matter at a future session.

3. Article 1 — Scope of application and structure of the rules

(a) Article 1 (1) — Scope of application

Opt-in or opt-out solution

18. The Working Group considered article 1 (1) of the draft rules as contained in paragraph 10 of document A/CN.9/WG.II/WP.166. Article 1 (1) dealt with the scope of application of the rules on transparency and provided for two options, and variants. The Working Group agreed that discussion on article 1 (1) would be useful to identify trends among member States on the scope of application of the rules on transparency. It was generally understood that no decision could be made at that point and that that matter would require further consideration at future sessions of the Working Group.

19. A view was expressed that different aspects with respect to the scope of application of the rules could be identified. It was said that the material scope of application related to the question whether the rules on transparency would apply in the context of arbitration initiated under the UNCITRAL Arbitration Rules only, or also to arbitration conducted under other rules if the parties so chose. The material scope should be distinguished from the temporal scope of application, which raised questions whether the rules on transparency would apply only to arbitration under investment treaties concluded after the date of coming into effect of the rules on transparency or also under treaties concluded before that date.

Opt-out solution, material application

20. One option, referred to as the “opt-out solution”, provided that “[T]he Rules on Transparency shall apply to any arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments (“treaty”) [which entered into force] after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply.” Under that option, the rules on transparency would apply as an extension of the UNCITRAL Arbitration Rules under investment treaties expressly providing for arbitration under the UNCITRAL Rules, unless States otherwise provided in the investment treaty by opting out of the rules on transparency. The consent to apply the rules on transparency would be manifested when, in investment treaties, parties would include a reference to the UNCITRAL Arbitration Rules, being on notice that the UNCITRAL Arbitration Rules included the rules on transparency. Application of the rules on transparency would then be understood to be the norm, while the parties would retain the ability to expressly exclude their application.

21. It was said that that option could only apply to arbitration initiated under the UNCITRAL Arbitration Rules, and not in the context of arbitration under other international arbitration rules. It was underlined that if the rules on transparency were to be applied only to arbitration under the UNCITRAL Arbitration Rules, that would permit an investor to choose to arbitrate under a different set of arbitration rules that did not include any transparency provisions. A question was raised whether that would be a desirable effect. It was said that the opt-out solution was not incompatible, as a matter of principle, with the application of the rules on transparency to arbitration initiated under other international arbitration rules, as the parties to an investment treaty could also agree to apply them to such other arbitration.

Opt-out solution, temporal application — “[which entered into force]”

22. Those delegations that favoured option 1 expressed different views on whether the words “which entered into force” in brackets under option 1 should be retained.

23. If the words “which entered into force” were retained, the rules on transparency would apply, without a retroactive effect, to investment treaties entered into force after the date of adoption of the rules on transparency. In favour of that option, it was said that States Parties to the investment treaty would know that application of the UNCITRAL Arbitration Rules triggered application of rules on transparency for investment treaties concluded after the date of adoption of the rules on transparency. For investment treaties concluded before that date, solutions such as those described in paragraphs 15 to 23 of document A/CN.9/WG.II/WP.166/Add.1 should be further considered.

24. If the words “which entered into force” were to be deleted, the rules on transparency might then apply to any arbitration initiated under the UNCITRAL Arbitration Rules after the date of adoption of the rules on transparency, even if the treaty had entered into force before that date (provided that the treaty itself did not specify application of an earlier version of the UNCITRAL Arbitration Rules). It was highlighted by those delegations favouring application of the rules on transparency to investment treaties entered into force before the date of adoption of the rules on transparency, that some treaties could be interpreted as allowing for

such an application. For instance, that would be the case for investment treaties referring to the application of the UNCITRAL Arbitration Rules as in force at the time the arbitration commenced. It was pointed out that, under that option, in certain instances, if States Parties to an existing treaty did not want the rules on transparency to apply, they would then have to amend or modify their investment treaty to that effect.

Opt-in solution, material and temporal applications

25. Under the second option, referred to as the “opt-in solution”, States would be required expressly to adopt the rules on transparency in order for them to apply. Two variants were proposed for consideration by the Working Group: variant 1 provided that the rules on transparency should apply in respect of arbitration initiated under any set of arbitration rules, and variant 2 limited the application of the rules to arbitration under the UNCITRAL Arbitration Rules. In both cases, consent of States to apply the rules on transparency could be given in respect of arbitration initiated under investment treaties concluded either before or after the date of adoption of the rules on transparency. The rules on transparency would then operate as a stand-alone text.

26. A majority of delegations expressed a preference for option 2 for the reasons that they favoured express adoption by States of the rules on transparency and that that solution would ensure that States had taken the conscious decision to apply those rules.

27. Regarding option 2, variant 1, it was suggested that it might be simpler to limit the application of the rules on transparency to arbitration under the UNCITRAL Arbitration Rules, as it was considered that legal uncertainties and difficulties could arise in the application of the rules on transparency together with other arbitration rules.

28. Arbitration institutions were invited to provide comments on whether application of the rules on transparency to arbitration arising under their own rules could be envisaged. The International Centre for Settlement of Investment Disputes (“ICSID”), the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), the ICC International Court of Arbitration and the Permanent Court of Arbitration at The Hague, confirmed that, as a matter of principle, application of transparency rules in conjunction with their institutional rules was unlikely to create problems. All the institutions expressed interest in being associated with the work in order to identify how to practically apply rules on transparency to the arbitration cases administered under their arbitration rules. ICSID further informed the Working Group that it had already gained experience in applying a broader standard of transparency in the context of ICSID arbitration under the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”). The Arbitration Institute of the SCC explained that the SCC rules were equally applied in commercial and investment arbitral proceedings and that, although the SCC rules contained the principle of confidentiality, parties could deviate from that principle if they so agreed.

29. After having heard the comments of the arbitration institutions, a number of delegations considered that option 2, variant 1, could constitute a viable solution,

allowing a broader application of the rules on transparency, which was said to be in line with the mandate given by the Commission to the Working Group.

30. After discussion, the Working Group noted that a majority of delegations expressed preference for option 2, it being understood that the two variants it contained should be further considered at a future session of the Working Group. A few delegations expressed support for option 1, with diverging views on whether article 1 (1) should deal with the question of application of the rules on transparency to existing investment treaties, or whether that should be dealt with through other means. It was suggested that option 1, which was limited to the UNCITRAL Arbitration Rules, could be restricted to future investment treaties and combined with option 2, variant 1, which covered all other situations (i.e. application to existing treaties, and irrespective of the arbitration rules chosen by the parties). The Working Group agreed to further consider the two options and their two variants at a future session of the Working Group. It requested the Secretariat to provide an analysis of issues that might arise in the application of the rules on transparency to arbitration under both the 1976 UNCITRAL Arbitration Rules and their 2010 revised version, and to do so in respect of the various options considered under article 1 as well as regarding the other substantive provisions of the rules on transparency.

Rules on transparency and transparency provisions in the investment treaty

31. The Working Group considered the relationship between the rules on transparency and any transparency provisions in an investment treaty under which the arbitration could arise. In that light, a suggestion was made to include in the rules on transparency wording that the rules would not supersede a provision in the relevant investment treaty that required greater levels of transparency. The Working Group found that policy acceptable and requested the Secretariat to draft a provision pursuant to that suggestion for consideration at a future session.

Application of the rules on transparency by the disputing parties

32. The Working Group then considered whether article 1 should include a provision regarding the application of the rules on transparency by the disputing parties to reflect the discussion at its fifty-fourth session (A/CN.9/717, paras. 47-55). The purpose of such a provision would be to clarify that once the States Parties to the investment treaty agreed that rules on transparency should apply according to article 1 (1), the disputing parties should not be entitled to exclude or vary their application.

33. There was broad support for the suggestion that there should not be a provision allowing the disputing parties to vary the offer for transparent arbitration for the policy reason that it would not be appropriate for the disputing parties to reverse a decision on that matter. In addition, the legal standard on transparency was meant to benefit not only the investor and the host State but also the general public, with the consequence that it was not for the disputing parties to renounce transparency provisions adopted by the States.

34. The Working Group then considered the drafting proposal for such provision as contained in paragraph 21 of document A/CN.9/WG.II/WP.166. It was said that the wording "The Rules on Transparency are designed to confer rights and benefits

on the general public” had either to be elaborated or should be deleted. As an alternative, the phrase could be replaced by wording along the lines of “The Rules on Transparency are adopted in the public interest (...)” Support was expressed for deleting that phrase as its content was too descriptive and unnecessary.

35. It was also suggested to omit the words “in the course of the arbitration” as the provision should make clear that disputing parties were not entitled to opt-out of, or derogate from, the rules on transparency at any time, whether before or during the arbitral proceedings.

36. The prevailing view was in favour of including the proposal referred to in paragraph 21 of document A/CN.9/WG.II/WP.166, taking account of the drafting adjustments, and the Working Group agreed that that matter would be further considered at a future session. A few delegations were of the view that, in line with the principle of party autonomy, the disputing parties should be able to agree to not apply the rules on transparency.

“a treaty providing for the protection of investments”

37. The Working Group agreed that the term “a treaty providing for the protection of investments” used under article 1 (1) should be clarified in order to delineate its scope of application. The notion of a “treaty providing for the protection of investments” under the rules was said to be an important matter, as that notion constituted the gateway for applying the transparency rules. It was agreed that that notion should be understood broadly as including free trade agreements, and bilateral and multilateral investment treaties, as long as they contained provisions on the protection of an investor or investment and the right to resort to investor-State arbitration. In addition, it was noted that many investment treaties provided for dispute settlement between the Contracting States Parties and between the investor and a State. In that light, it was observed that there was a need to clarify that the rules on transparency would only apply to dispute settlement regarding the protection of investments and investors and not to disputes between States under the treaty. The Working Group requested the Secretariat to include wording in the revised version of the rules that would clarify that term.

(b) Article 1 (2) — Structure of the rules on transparency

38. The Working Group considered article 1 (2) of the rules as contained in paragraph 10 of document A/CN.9/WG.II/WP.166. It was noted that article 1 (2) dealt with the structure of the rules on transparency (see also above, para. 13). It clarified that each of the substantive rules set out in articles 2 to 6 was subject to the limited exceptions set out in article 7. It further reflected discussions held in the Working Group to the effect that, while there was a need to balance the legitimate public interest in transparency in the field of treaty-based investor-State arbitration with the arbitrating parties’ own legitimate interest in a fast and efficient resolution of their dispute, the exceptions in article 7 should be applied strictly and constituted the only limitations to the transparency rules under articles 2 to 6 (A/CN.9/717, paras. 129-143).

39. The principle contained in article 1 (2) found broad support. Some drafting suggestions were made. To align the wording with article 17 (1) of the 2010 UNCITRAL Arbitration Rules, it was suggested to replace the word “fast”

appearing in the last sentence of article 1 (2) by the word “fair” (see also above, para. 15). Further, it was suggested to delete the first two sentences of the paragraph, as they were viewed as too descriptive and repetitive of the content of article 7 (1), and thus redundant. It was noted that human rights considerations might fall within paragraph (2) (i). In addition, it was suggested, as a matter of drafting, to clarify that there were two matters for the public interest set out in paragraph (2) (i): treaty-based investor-State arbitration in general and the arbitral proceeding itself.

40. After discussion, the Working Group agreed that paragraph (2) should be redrafted in line with the suggestions contained in paragraph 39 above, for further consideration by the Working Group at a future session.

4. Article 2 — Initiation of arbitral proceedings

41. As part of the discussions on the substantive provisions on transparency contained in articles 2 to 6 of the rules on transparency, the Working Group was reminded of its mandate to prepare a legal standard on transparency that would reflect best practices in the field of transparency in the context of investor-State arbitration. At its fifty-fourth session, the Working Group had agreed to proceed with a discussion on developing the content of the highest standards on transparency, on the basis that the legal standard on transparency be drafted in the form of rules. That was done on the understanding that delegations that had initially proposed that the legal standard on transparency take the form of guidelines had agreed on the preparation of draft rules if those rules would only apply where there was an express reference to them (opt-in solution). It was said that the content of the rules on transparency might need to be reconsidered, and possibly diluted, in the event the Working Group would at a later stage decide that the application of the rules would be based on an opt-out approach (A/CN.9/717, paras. 26 and 58).

42. The Working Group then considered article 2 on information to be made available to the public at the stage of the initiation of arbitral proceedings as contained in paragraph 24 of document A/CN.9/WG.II/WP.166. Article 2 contained different drafting options to reflect the diverging views expressed at the fifty-fourth session (A/CN.9/717, paras. 60-74). Option 1 provided that some information should be made public once the arbitral proceedings were initiated and did not address publication of the notice of arbitration. Under that option, the publication of the notice of arbitration would be dealt with under article 3 of the rules on transparency, after the constitution of the arbitral tribunal. Option 2 dealt with the publication of the notice of arbitration when the proceedings were initiated, before the constitution of the arbitral tribunal, and included two variants.

Publication of general information

43. There was a general understanding in the Working Group that some information should be made publicly available before the constitution of the arbitral tribunal, in order to allow the general public to be informed of the commencement of the proceedings. The Working Group agreed that article 2 should, at a minimum, provide the names of the parties and a broad indication of the field of activity concerned before the constitution of the arbitral tribunal. It was said that that proposal was in line with the current practice of ICSID (see A/CN.9/WG.II/WP.167, paras. 5 to 7), and therefore constituted a procedure many States were already

familiar with. It was agreed to include in article 2 a reference to the investment treaty under which the claim was brought, as it was seen as a factual matter unlikely to create debate. The Working Group agreed that the nationalities of the parties, as well as a brief description of the claim, contained in option 1 of article 2, should not be part of the information communicated to the public at the early stage of the proceedings, as that information could be contentious.

Means of publication

44. On the question of the means of publication, preference was expressed for publication via a repository of published information (“registry”), as the intervention of a neutral institution to handle publication, in particular at that stage of the procedure, was seen as a preferable solution. The Working Group agreed that any party, and not only the respondent, should be entitled to communicate the notice of arbitration to the registry, which could in turn extract therefrom the relevant information listed under paragraph 43 above, for publication.

45. A question was raised whether publication of information at that stage should be made mandatory and, if so, whether there should be any sanction in case of non-compliance by the parties of their obligation to communicate information to the registry. It was said that the question of sanctions was a difficult matter to address in an instrument of the nature of the rules.

46. The Secretariat was requested to propose a new version of option 1 of article 2, based on the discussion reflected above in paragraphs 43 and 44.

Publication of the notice of arbitration (and of the response thereto)

47. The Working Group turned its attention to the question whether, in addition to publishing the general information referred to in paragraph 43 above, the notice of arbitration should also be made publicly available before the constitution of the arbitral tribunal as contemplated under option 2.

48. Those delegations that supported publication of the notice of arbitration before the constitution of the arbitral tribunal considered that early disclosure of the notice of arbitration would permit the general public not only to be informed of the commencement of the proceedings, but also to express their views at an early stage of the proceedings. It was said that prompt publication of the notice of arbitration best served the interest of transparency and that such publication would allow protection of sensitive and confidential information, as proposed under variant 1 of option 2.

49. However, reservations were expressed on the publication of the notice of arbitration before the constitution of the arbitral tribunal. It was suggested that the fact that the information should be “promptly” communicated, as proposed in option 2, would need to be clarified. It was said that not all States were necessarily prepared to deal with publication of the notice of arbitration in a timely manner and that the respondent State would need time to organize its defence and to prepare its response to the notice of arbitration. It was recalled that under the UNCITRAL Arbitration Rules, the arbitral tribunal could be appointed within two to three months from the date of the notice of arbitration. In addition, it was said that during the time following the notice of arbitration and until the response to the notice was filed, there were possibilities for settling the dispute which would be

compromised once the parties' positions as expressed in the notice of arbitration and the response were published.

50. Questions were raised regarding how the publication would be made, and the costs that would be associated therewith, such as the costs of maintaining a secured website and of redacting confidential and sensitive information from the notice of arbitration, and possibly from the response to the notice. It was also said that publication of the notice of arbitration was better dealt with under article 3, regarding publication of documents, as it was said that the arbitral tribunal would be best placed to oversee matters of confidential and sensitive information that might be contained in the notice of arbitration, and that screening of the notice of arbitration would go beyond the role of a registry.

51. In response, those favouring publication of the notice of arbitration before the constitution of the arbitral tribunal said that expenses involved in publishing the notice of arbitration had to be balanced with the values of transparency and accountability, which should prevail. It was suggested that publication of the notice of arbitration would not entail costs for the registry, as the burden of providing a redacted version of the notice was on the parties. It was further said that experience showed that disclosure of the notice of arbitration at the early stage of the proceedings did not constitute an impediment to an amicable settlement of the dispute. To alleviate concerns regarding possible disputes between the parties on the information to be redacted, it was suggested that the arbitral tribunal, once constituted, would have the power to rule on any such dispute, and that matter could be clarified under option 2.

52. Support was expressed for the proposition that if the notice of arbitration was to be published, the response thereto should also be published. With a view to ensuring fairness, it was suggested that details of the dispute contained in the notice should be made public only when the respondent State had an opportunity to present its own position in the response to the notice.

53. After discussion, the majority view was not in favour of the publication of the notice of arbitration before the constitution of the arbitral tribunal, while a minority favoured prompt publication of the notice of arbitration. The Secretariat was requested to propose a revised version of option 2, variant 1, taking account of the discussions.

5. Article 3 — Publication of documents

54. The Working Group recalled its discussion at its fifty-third session, where different views were expressed on whether, and if so, which documents should be published (A/CN.9/712, paras. 40 to 42). At the fifty-fourth session of the Working Group, different approaches had emerged from the consideration of the matter (A/CN.9/717, paras. 87-92). Those approaches were reflected in article 3, as contained in paragraph 32 of document A/CN.9/WG.II/WP.166.

Option 1 — Publication of all documents

55. Under option 1, documents to be published were all documents submitted to, or issued by, the arbitral tribunal, subject to article 7. If certain documents to be published could not be made publicly available, third parties should have a right to access the information. That option did not receive support.

Option 2 — Publication of documents, at the discretion of the arbitral tribunal

56. Under option 2, the arbitral tribunal should decide which documents to publish, unless disputing parties objected to the publication. A few delegations that expressed preference for option 2 were reminded that that option would be even stricter than the 1976 and 2010 UNCITRAL Arbitration Rules by providing the parties with a veto, and therefore would not promote transparency. It was further said that it would be burdensome for the arbitral tribunal to decide which documents to make available to the public, a procedure, it was said, which might impede the efficiency of the arbitral proceedings. That option received little support.

Option 3 — List of documents to be published

57. Under a third option, the provision on publication of documents contained a first paragraph that listed documents that would be made available to the public, either automatically, or as decided by the arbitral tribunal. Paragraph (2) provided the arbitral tribunal with discretion to order publication of any documents provided to or issued by it. Paragraph (3) allowed third parties to request access to any documents provided to, or issued by, the arbitral tribunal, and provided the arbitral tribunal with discretion to grant such access.

58. Strong support was expressed in favour of option 3. The structure of the provision was said to be clear, in that it identified in a first paragraph which documents would be made publicly available; it further included in a second paragraph a possibility for the arbitral tribunal to decide to publish additional documents; finally, the last paragraph covered any other documents that could be requested by third parties, and that would not be included under the first two paragraphs. That proposal was seen as establishing a good balance between the documents to be published and the exercise by the arbitral tribunal of its discretion in managing the process.

Paragraph (1)

59. Diverging views were expressed on the documents to be listed under paragraph (1). Some favoured publication of all documents in the proceedings, so that paragraphs (2) and (3) could be omitted, while others considered that the list should be kept limited, giving effect to the arbitral tribunal's discretion to order publication of additional documents under paragraphs (2) and (3). Those in favour of a comprehensive list of documents to be automatically published proposed that, in addition to the documents already listed under paragraph 1, the following documents be added: the response to the notice of arbitration, the submissions by the experts appointed by the arbitral tribunal, and all decisions of the arbitral tribunal.

60. Views diverged on whether exhibits, which could be voluminous documents, should be part of the list under paragraph (1). It was suggested that in order to allow parties to be aware of the documents that would be produced during the proceedings, a table of contents of exhibits otherwise not produced should be included in the list. It was also said that the notion of "submission" by a party was very vague. As a drafting suggestion, it was proposed to add the word "written" before the words "submissions" and "order" in paragraph (1).

61. Furthermore, it was said that the documents listed referred to legal terms that might be understood differently. To address that concern, it was suggested to align the wording of paragraph (1) with the terminology of the 2010 UNCITRAL Arbitration Rules and to refer to the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence, any expert reports, submissions by amici and non-disputing State parties and further written statements.

62. Strong support was expressed in favour of automatic publication of listed documents without the arbitral tribunal exercising any discretion under paragraph (1).

Paragraphs (2) and (3)

63. As paragraphs (2) and (3) permitted the arbitral tribunal to exercise its discretion in ordering publication of additional documents, it was proposed to add the words “in the exercise of its discretion” under paragraph (2), in order to use terminology consistent with that of article 1 (2).

64. Wide support was expressed for the retention of the words in square brackets in both paragraphs that provided for a consultation of the parties by the arbitral tribunal.

Revised draft of option 3

65. After discussion, the prevailing view was in favour of option 3, which would constitute a basis for continuation of discussion on the matter of publication of documents at a future session. The Working Group requested the Secretariat to provide a revised draft of option 3, as follows. The chapeau of paragraph (1) would read along the lines of: “1. Subject to the express exceptions set out in article 7, the following documents shall be made available to the public:”. The list of documents would then include a number of categories, such as (i) notice of arbitration and response thereto, (ii) memorials, (iii) witness statements and expert reports, (iv) exhibits, (v) submissions by third parties and non-disputing State Parties, and (v) decisions and orders of the arbitral tribunal. It was pointed out that further consideration should be given to the documents to be made available to the public under paragraph (1), as well as on the issue of timing for the publication. The Secretariat was requested to prepare a list of documents to be included in those categories, using precise terminology, including taking account of the terms used in the UNCITRAL Arbitration Rules. Paragraphs (2) and (3) would be drafted along the lines of: “2. Subject to the express exceptions set out in article 7, the arbitral tribunal may, in the exercise of its discretion and in consultation with the disputing parties, order publication of any documents provided to, or issued by, the tribunal. 3. Subject to the express exceptions set out in article 7, third parties may request access to any documents provided to, or issued by, the arbitral tribunal, and the tribunal shall decide whether to grant such access after consultation with the disputing parties.”

Form and means of publication

66. The Working Group then considered two options on the form and means of publication, as contained in paragraph 32 of document A/CN.9/WG.II/WP.166. Preference was expressed for option 1, which provided that the documents to be

published were to be communicated by the arbitral tribunal to the repository. The Working Group agreed to consider the question of timing of the publication in the context of its discussion on article 7.

6. Article 4 — Publication of arbitral awards

67. The Working Group considered article 4, as contained in paragraph 41 of document A/CN.9/WG.II/WP.166. Broad support was expressed for paragraph (1), which provided that awards would be made publicly available, subject to article 7. Paragraph (2) contained two options that dealt with the question of form and means of publication. In light of the decision taken on the form and means of publication under article 3 (see above, para. 66), the Working Group agreed that option 1 was the preferred option.

7. Article 5 — Submission by third party and non-disputing Party

(a) Article 5 (1) to (5) — Submission by third party

68. The Working Group considered article 5 as contained in document A/CN.9/WG.II/WP.166, paragraph 43. It was clarified that discussions on article 5, paragraphs 1 to 5, would focus on submission by third party and not on submission by a non-disputing State Party to the treaty. That matter would be dealt with separately (see below, paras. 78-98).

Option 1

69. Option 1 was based on a provision used in certain investment treaties, which expressed the principle that submission by third party should be permitted, without detailing modalities. A view was expressed in favour of option 1 on the grounds that such a provision reflected an evolution in practice, and that arbitral tribunals would usually know how to deal with submission by third party, without the need for specific guidance. However, a concern was expressed that many States might not be familiar with submission by third party in the context of arbitral proceedings, and it was widely felt that more guidance should be provided in the rules on that matter.

Option 2

70. The Working Group agreed to proceed on the basis of option 2, which was seen as addressing the concern that guidance should be provided with respect to submission by third party. Option 2 reflected the proposal to draft a provision along the lines of Rule 37 (2) of the ICSID Arbitration Rules, as complemented by elements dealt with under paragraph B.2 of the NAFTA Free Trade Commission's "Statement of the Free Trade Commission on non-disputing party participation of 7 October 2004" (A/CN.9/717, para. 121). Option 2 contained a detailed procedure on information to be provided regarding the third party that wishes to make a submission (paragraph (2)); matters to be considered by the arbitral tribunal (paragraphs (3) and (5)); and the submission itself (paragraph (4)).

"Amicus curiae" — "third party"

71. A question was raised whether the term "amicus curiae" should be used. It was said that that notion was well known in certain legal systems, where it was used in the context of court procedure. Amicus curiae participation in arbitral proceedings

was said to be a more recent evolution. In order to provide rules that would be understood in the same manner in all legal systems, it was recommended to avoid any reference to the term “amicus curiae” and to use instead words such as “third party submission”, “third party participation”, or other terms with similar import. That proposal received support.

72. A further question was raised whether the term “third party” was an appropriate term to use, taking into account the different interpretation that could be given to it in different contexts and in different jurisdictions. The attention of the Working Group was drawn to article 17 (5) of the 2010 UNCITRAL Arbitration Rules, that referred to “third persons”. The Working Group took note of the suggestion that the terms “non-disputing parties” or “third persons” instead of “third parties” should be considered for use in the provision and requested the Secretariat to provide appropriate language in that respect.

73. The appropriateness of the term “submission” was questioned, as that term was also used in connection with submissions made by disputing parties to the arbitral tribunal. As an alternative, it was suggested to use the term “communication”.

74. After discussion, the Working Group agreed that the term “amicus curiae” should not be used in the title and the content of the provision and the Secretariat was requested to provide an appropriate wording in that respect.

Paragraphs (2) and (4) — Page limit

75. It was observed that paragraph (2) set a page limit for the application to the arbitral tribunal by a third party and paragraph (4) for the actual submission. It was said that setting a specific page limit might not be appropriate for each case and that it would be best left to the arbitral tribunal’s discretion. In that light, it was suggested to replace the words in paragraph (2) “, within the limit of [5 typed pages]” by the words “in a concise manner, within the limits as may be set by the arbitral tribunal” and to delete the words “[20 typed pages, including any appendices]”, in paragraph 4. That proposal found broad support.

Paragraph (3) — “among other things”

76. It was observed that paragraph (3) did not contain the words “among other things” before listing the criteria for accepting a submission, as contained in ICSID Rule 37 (2), on which option 2 was based. The Working Group agreed that those words should be inserted in a revised version of paragraph (3), for the reason that it permitted the arbitral tribunal to exercise its discretion as to the criteria it considered to be relevant.

Paragraph (5)

77. A view was expressed that paragraph (5) dealt with two matters that might need to be differentiated. In relation to the first part of the paragraph, providing that the arbitral tribunal should “ensure that the submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party”, it was said that that might be a difficult task for the arbitral tribunal to undertake. It was suggested to differentiate the procedural from the substantive impact that a submission might have. From the procedural angle, the arbitral tribunal should ensure that the

submission by third party would not burden the arbitral proceedings, and that, for instance, time limits would be complied with. It was suggested to consider addressing that matter in a revised version of paragraph (5). In relation to the second part of paragraph (5) dealing with the fact that both parties should be given an opportunity to present their observations on the submissions by the third party, it was generally felt that that provision was an important one, to be retained.

(b) Article 5 (6) — Submission by a non-disputing Party to the treaty

78. At the fifty-third session of the Working Group, it was observed that a State Party to the investment treaty that was not a party to the dispute could also wish, be invited, or have a treaty right to make submissions. It was noted that such State(s) often had important information to provide, such as information on the *travaux préparatoires*, thus preventing one-sided treaty interpretation (A/CN.9/712, para. 49). The Working Group agreed to bring that matter to the attention of the Commission and ask its guidance on whether it should be made part of the scope of its current work (A/CN.9/712, para. 103, A/CN.9/717, para. 124). Following the decision of the Commission at its forty-fourth session (see above, para. 2), the Working Group undertook consideration of the matter, on the basis of the draft contained in paragraph 43 of document A/CN.9/WG.II/WP.166.

79. Article 5 (6) was meant to limit non-disputing State intervention to issues of law and matters of interpretation. That limited scope of intervention was meant to address concerns raised that an intervention by a non-disputing State, of which the investor was a national, could resemble aspects of diplomatic protection.

Separate provision on non-disputing State Party to the treaty

80. It was said that several investment treaties allowed for the participation of a non-disputing State, such as the North American Free Trade Agreement (NAFTA), which included an article 1128 entitled “Participation by a Party”. Instances of similar provisions found in other treaties included the Central American Free Trade Agreement (CAFTA), and in the Canadian Model BIT (2004).

81. Doubts were expressed on the need for such a provision in the rules, because it was said that non-disputing State(s) Party(ies) to a treaty enjoyed the right to comment on the treaty, or arbitral tribunals might request submissions, a situation that was said to arise in practice. For instance, a State Party to a treaty might issue statements on treaty interpretation, or unilateral declarations on its understanding of a treaty provision.

82. A different view was expressed that a provision on submission by a non-disputing State Party to the treaty was not needed for the reason that a State should enjoy the same rights as third parties in that respect, and therefore, it was suggested to include a reference to non-disputing State Party to a treaty under article 5 (1), and to delete paragraph 6.

83. However, wide support was expressed for a separate provision devoted to the matter of submission by a non-disputing State Party to the treaty for the reasons that it would contribute to clarifying the legal regime applicable to that category of submissions and would mark the difference between submission by third party and by non-disputing State Party to the treaty. It was explained that a non-disputing State Party’s participation might pose the risk of resurgence of diplomatic

protection, a risk not posed by participation of third parties. Therefore, support was expressed for excluding from the scope of paragraph (1) of article 5 non-disputing States Parties, and retaining paragraph (6).

84. It was suggested that some provisions of article 5, such as paragraphs (3) and (5) might also apply in the context of paragraph 6. Therefore, it was suggested that a separate article be developed for consideration at a future session.

Scope: treaty interpretation, matters of law and fact

85. Paragraph (6) restricted intervention by a non-disputing State Party to the treaty to issues of law and of treaty interpretation and excluded submission on the factual aspects of the dispute.

86. Regarding treaty interpretation, it was widely felt that the non-disputing State Party to the treaty might bring a perspective on the interpretation of the treaty, including access to the *travaux préparatoires* which might not be otherwise available to the tribunal, thus avoiding one-sided interpretations limited to the respondent State's contentions.

87. Views were expressed that if the investor's home State were allowed to file a submission beyond matters of treaty interpretation, and to address matters of law, there would be a risk that the submission by the non-disputing State Party to the treaty might come very close to diplomatic protection. Therefore, it was suggested to delete from paragraph (6) the words "law and of" before the words "treaty interpretation".

88. Contrary views were expressed that a State should not be prevented from making a factual submission or a submission on matters of law, and it was suggested that paragraph 6 should be drafted so that a non-disputing State Party to the treaty might make such a submission to the arbitral tribunal, without limiting the scope of such submission. As an example, it was said that the arbitral tribunal might need information on the nationality or corporate status of the investor, or the policy of the investor's home State, and the non-disputing State Party to the treaty, as home State of the investor, might be best placed to provide such information that belonged to the realm of domestic law or factual matters. It was said that the 1976 and 2010 UNCITRAL Arbitration Rules were silent on submission by non-disputing State Party, thereby not limiting such intervention. In addition, the experience in the context of NAFTA showed that intervention by non-disputing State Party to the treaty did not bring the risk of resurgence of diplomatic protection.

89. A question was raised whether the term "issue of law" in paragraph (6) was meant to refer to public international law or domestic law. It was further said that it might be in many instances difficult to distinguish an issue of law from a factual issue. For instance, records of treaty negotiations might fall in either category.

Right to make submission

90. Views diverged on whether the rules ought to create a right for the non-disputing State Party to make a submission, by providing that the arbitral tribunal "shall" instead of "may" accept a submission from a non-disputing State Party. It was said that the non-disputing State Party should have the right to make submission, and if it did so, the arbitral tribunal should accept it. However, it was

pointed out that ICSID Rule 37 (2), which provided that “the Tribunal may allow a person or entity ...” indicated that the arbitral tribunal enjoyed discretion to refuse a submission by non-disputing State Party, and views were expressed that a similar approach should be adopted in paragraph (6).

91. It was suggested that a non-disputing State Party to the treaty should not be under an obligation to make a submission, and in instances where the arbitral tribunal would invite such a State to make a submission, the arbitral tribunal should not draw any inference from non-participation by the State. It was agreed that paragraph (6) should be amended to reflect that the arbitral tribunal might accept or might invite submissions, but could not compel a State to make such submission.

92. A further suggestion was made that a non-disputing State Party should not be entitled to make a submission on its own motion, and should be entitled to do so only if so requested by the arbitral tribunal. That suggestion received little support.

Operation of the provision in multilateral context

93. A suggestion was made that the provision should limit non-disputing State Party’s submission to cases where the State was the home State of the investor, in particular if the non-disputing State Party could make submission on factual matters. That was proposed as an important distinction to bear in mind in the context of multilateral investment treaties.

Negotiating State

94. A suggestion was also made that a State that had participated in the treaty negotiation, but was not Party to the treaty, might have useful information to provide to the arbitral tribunal on treaty interpretation, and therefore it was suggested to consider whether the provision should also deal with that matter. There was no support for that suggestion.

“Non-disputing Party to the treaty”

95. It was further said that a party to an investment treaty was not necessarily a State, and therefore, paragraph (6) should refer to “non-disputing Party to the treaty”, instead of “non-disputing State Party to the treaty”. That suggestion received broad support.

Drafting proposal

96. With the objective to address the various views and concerns expressed on paragraph (6), a proposal was made to draft a provision on submission by a non-disputing Party to the treaty as follows: “(1) The arbitral tribunal shall accept or, after consulting with the parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty. (2) The arbitral tribunal, after consulting with the parties, may accept or may invite submissions on questions of law [or fact] from a non-disputing Party to the treaty. In exercising its discretion whether to accept or invite such submissions, the arbitral tribunal shall take into consideration the factors referred to in article 5, paragraph 3. (3) The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2. (4) The arbitral tribunal shall ensure that any submission does not disrupt the proceeding or unduly burden

or unfairly prejudice either party. The arbitral tribunal shall also ensure that both parties are given an opportunity to present their observations on any submission by a non-disputing Party to the treaty.”

97. After discussion, the Working Group took note of the broad agreement for (i) dealing with submissions by non-disputing Parties to the treaty in a provision distinct from the provision on third party’s submission; (ii) providing that the arbitral tribunal should consult the parties where the tribunal would exercise its discretion, and (iii) allowing parties to present their observations on the submission. The Working Group further agreed that the proposal under paragraph 96 would form the basis for its consideration of that matter at its next session. It took note of the various matters that would need to be considered in relation thereto.

98. In paragraph (1), it was questioned whether the arbitral tribunal should enjoy discretion to accept submission by a non-disputing Party, and therefore whether the word “shall” before the word “accept” should be replaced by the word “may”. In paragraph (2), the notion of “questions of law” was said to require further consideration, in particular taking account of the discussion on the difficulty to distinguish in certain instances questions of law and of fact. In addition, the question of whether issues of law and fact should be part of the scope of an intervention by a non-disputing Party was also considered an open question for further consideration. Some opposed its inclusion, while others considered that the reference to “questions of law [or fact]” should be replaced by a reference to “matters within the scope of the dispute”, in order to align the right of non-disputing Parties with those of third parties. It was further suggested that the provision could be restructured in case the non-disputing Party would be subject to the same regime as third parties. As a matter of drafting, it was suggested that the reference to paragraph (3) in paragraph (2) of the proposal should be carefully considered in order to ensure that the criteria for assessing the submission would not be limited to the two criteria mentioned in paragraph (3), but would also include discretion of the arbitral tribunal to take account of other possible criteria. Paragraph (3) was seen as too detailed, and unnecessary. The question of operation of the provision in the context of multiparty treaties was also listed as a matter for further consideration. Lastly, it was said that paragraph (4) should mirror any revision that would be made to article 5, paragraph (5).

8. Article 6 — Hearings and publication of transcripts of hearings

99. The Working Group considered article 6, as contained in paragraph 52 of document A/CN.9/WG.II/WP.166. It recalled that information contained in documents A/CN.9/WG.II/WP.163 and A/CN.9/WG.II/WP.167 could provide useful insight on some practical questions regarding public hearings.

Paragraph (1) — Hearings

100. Support was expressed in favour of option 1 without the words “[, unless a disputing party objects thereto]”, as that option was seen to best further the interests of transparency. A few delegations favoured option 1 with the party’s veto right contained in square brackets. Some delegations preferred option 2, as they viewed the discretion of the tribunal as vital, in particular in view of practical difficulties and costs of public hearings. As a compromise, it was proposed to combine options 1 and 2, so that hearings should, in principle, be public, but the decision to

hold public hearings should be in the hands of the tribunal after consultation with the parties. That proposal found support, as it was viewed to provide an appropriate balance, including by those that had expressed preference for option 1 with a veto right of the parties.

101. It was questioned whether the availability of transcripts instead of public hearings would not equally satisfy the public interest of transparency. In response, it was said that participation of the public via public hearings was a meaningful opportunity, in particular with regard to certain groups that could not easily make use of transcripts.

102. After discussion, the Working Group agreed to consider at a future session option 1 without the words “[, unless a disputing party objects thereto]” and the compromise proposal referred to above in paragraph 100. With respect to terminology, the Working Group further agreed to use the term “public” hearings.

Paragraph 2 — Mandatory exceptions to public hearings

103. General support was expressed for paragraph (2). As a matter of drafting, it was suggested that the words “a hearing is to be [public] [held openly] and” were redundant and could be deleted, in particular if option 1 under paragraph (1) would be retained.

Paragraph 3 — Logistical arrangements and discretionary exception to public hearings

104. It was noted that paragraph (3) contained two elements, the arbitral tribunal’s power to make logistical arrangements to provide public access to the hearings and its discretion to close the hearings for logistical reasons. Some views were expressed that paragraph (3) was redundant and should be deleted, as the arbitral tribunal would generally have that power and discretion. In response, it was said that the provision was needed to provide guidance to parties that were not familiar with public hearings and also to arbitral tribunals. Some views were expressed that paragraph (3) might be too broad as it permitted closing the entire hearing for logistical reasons which, in certain instances, might give rise to abuse. In reply, it was said that the words “where this is or becomes necessary for logistical reasons” might take sufficient account of that concern. In addition, it was proposed to provide in paragraph (3) that the arbitral tribunal should consult the parties before deciding whether to close the hearings.

105. A concern was raised on how to deal with an oral submission that would suddenly touch on confidential information during a public hearing. In response, it was said that there had been no difficulties encountered so far with that question, including with live broadcasting of hearings. A delegation expressed the view that, based on the information contained in the documents by the Secretariat, all the examples of such live broadcasting raised took place pursuant to the agreement of the disputing parties and in the context of institutional arbitration. That was disputed by other delegations.

Costs

106. A question was raised regarding the costs of public hearings. In that light, it was said that it would be useful to receive information on that matter. After

discussion, the Working Group agreed to invite arbitral institutions to provide the Secretariat with information on their experience with costs associated with public hearings and, more generally, with costs associated with publication of documents, arbitral awards and submissions by third parties. The Working Group agreed that the matter of allocation of costs should also be further considered.

Paragraphs (4) and (5) — Transcripts of hearings

107. The Working Group proceeded with the consideration of paragraphs (4) and (5), which provided that the decision on availability of transcripts should depend upon the solution adopted in respect of public access to hearings, with the exception of hearings held closed for logistical reasons. It was clarified that the purpose of those paragraphs was not to make transcripts mandatory for all hearings, but to make them available insofar as they had been issued.

108. It was said that, in instances where hearings were closed for reasons covered under article 7, it would nevertheless be possible to redact certain information from the transcripts and publish them. Therefore, the logic of providing a parallel regime for hearings and transcripts was questioned. It was suggested that transcripts could be treated in the same fashion as documents in the list contained in paragraph (1) of option 3 of article 3.

109. After discussion, the Working Group agreed that the provision should simply provide that transcripts should be made available to the public subject only to the exceptions referred to in article 7. Also, the Working Group agreed to further consider whether there would be a need for a specific paragraph on transcripts under article 6 or whether transcripts of hearings should be added to the list of documents to be published under paragraph (1) of option 3 of article 3. In addition, it was agreed that the question of procedure for redacting confidential information from transcripts would be considered in the context of discussion on article 7.

9. Article 7 — Exceptions to transparency

110. The Working Group considered article 7 as contained in paragraph 1 of document A/CN.9/WG.II/WP.166/Add.1. Article 7 contained four parts, dealing with the determination of exceptions to transparency in paragraph (1), the definition of confidential and sensitive information in paragraph (2), the procedure for identifying and protecting confidential and sensitive information in paragraphs (3) and (4), and a procedure for protecting the integrity of the arbitral process in paragraph (5). It was suggested that the overall structure of the article would be further considered after its content had been discussed.

Paragraph (1) — Exceptions to transparency

111. Paragraph (1) limited the exceptions to transparency to the protection of confidential and sensitive information and the protection of the integrity of the arbitral process. The Working Group agreed that those two categories should constitute exceptions to transparency provisions in articles 2 to 6 of the rules.

112. As matters of drafting regarding subparagraph (a), it was suggested that the opening words of subparagraph (a), which read “A party shall not be under any obligation to publish any confidential and sensitive information,” were unclear, as they dealt with the notion of party’s obligation, whereas under the rules,

communication of information would be mainly channelled through the arbitral tribunal. If that approach were to be kept, it was suggested that, in subparagraph (a), the words “nor entitled” be added after the word “obligation”. Also, it was suggested that as the procedure for identifying confidential and sensitive information under paragraph (4) involved the arbitral tribunal, there should be a reference in subparagraph (a) to paragraph (4) in order to clarify that it might not be for the parties alone to decide what constituted protected information.

113. As a matter of drafting regarding subparagraph (b), it was proposed to replace the words “shall be entitled to” by the word “may”. It was further suggested, in keeping with the approach adopted in the rules, to provide that the arbitral tribunal should consult the parties where it decided, on its own motion, to restrain the publication of information for the reasons mentioned in subparagraph (b). However, to take account of the exceptional circumstances in which the arbitral tribunal might have to restrain publication, it was suggested that the consultation would take place “if practicable”. In support of that proposal, it was explained that, in urgent situations, the arbitral tribunal would not necessarily have the ability to consult the parties. Furthermore, it was suggested to provide that the arbitral tribunal should, at a later stage, consult the parties on its proposed way forward. That suggestion was supported.

114. It was further suggested to define a limited list of instances where publication could jeopardize the integrity of the arbitral process, and to that end, to delete the word “including” in subparagraph (b). Then a separate sentence should be drafted to provide that publication would be considered as jeopardizing the arbitral process in the instances listed in subparagraph (b), or in “comparable exceptional circumstances”. That suggestion received support, as it provided adequate guidance to the arbitral tribunal by clarifying that restrictions to publication could only occur in circumstances that met the threshold of exceptional circumstances.

115. However, it was pointed out that there could be other instances not comparable to the examples given under subparagraph (b) where the arbitral tribunal should take measures to limit publication, and the reference to “comparable exceptional circumstances” might be too restrictive. It was recalled that article 17 (1) of the 2010 UNCITRAL Arbitration Rules provided the arbitral tribunal with discretion to conduct the arbitration in such manner as it considered appropriate. A question was raised whether that discretion ought to be limited by the rules on transparency. To address that concern, it was proposed to use the word “comparably” instead of “comparable” before the words “exceptional circumstances”. That proposal received support. It was further suggested that subparagraph (b) be simplified to only express the principle, and that the modalities be left to be entirely covered under paragraph (5).

Proposal on paragraphs (1) and (5)

116. To address the concerns expressed on the drafting of paragraph (1), it was suggested that paragraph (1) be reformulated along the following lines: “1) Information shall not be made available to the public pursuant to articles 2 to 6 where: a) The information is confidential and sensitive as defined in paragraph 2 and as identified pursuant to paragraphs 3 and 4; or b) The information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 5.” Paragraph (5) would then be redrafted as

follows: “5) The arbitral tribunal may, upon the application of a party or, after consultation with the parties where practicable, upon its own initiative, determine that making information available to the public would jeopardise the integrity of the arbitral process (a) because it could hamper the collection or production of evidence or (b) because it could lead to the intimidation of witnesses, lawyers acting for the parties, or members of the arbitral tribunal, or (c) in comparably exceptional circumstances.” That proposal received broad support. The Working Group requested the Secretariat to propose a revised version of paragraphs (1) and (5), taking account of the proposal and including a provision that would address cases where consultation of the parties by the arbitral tribunal was initially not possible for practical reasons (see above, para. 113).

Paragraph (2) — Definition of confidential and sensitive information

117. Paragraph (2) dealt with the definition of confidential and sensitive information. It was questioned whether the terms “confidential and sensitive information” should be replaced by the terms “confidential or sensitive information” or “protected information”. The Working Group agreed to consider questions of terminology after its deliberation on the definition of such information.

118. Regarding subparagraph (a), it was questioned whether the phrase “confidential business information” was sufficiently broad. A concern was expressed that that phrase could be understood as not covering, for instance, industrial or financial information, or personal data. It was suggested that a list of situations where information would need to be protected could be elaborated that would include business, political, institutional sensitive information, personal data and legal impediments under a law. That list could be preceded by a general formulation which would define confidential and sensitive information in abstract terms, along the lines, for instance, of article 19 (2) of the Norwegian Model Bilateral Investment Treaty. It was suggested that subparagraph (a) should be deleted because the protection of “confidential business information” would fall under subparagraph (b) as being protected by applicable law. In response, it was said that some jurisdictions did not have laws protecting that information.

119. Regarding subparagraph (b), the reference to “applicable law” was said to be too vague, and it was suggested to better define which law would need to be taken into account.

120. Subparagraph (c) as contained in paragraph 1 of document A/CN.9/WG.II/WP.166/Add.1 was seen as redundant and unclear. A suggestion was made to amend subparagraph (c) by adding the words “other than” before the words “for any of the aforementioned reasons” or, as an alternative, to delete those words. With that amendment, it was said that subparagraph (c) would then create discretion for the arbitral tribunal to protect information that would not fall within the categories covered under subparagraphs (a) and (b). That would cover, for instance, personal data, or any other category not contemplated under paragraph (2).

121. However, it was felt by some delegations that leaving too broad discretion to the arbitral tribunal might not be desirable, and the provision should seek to delineate which information should be protected. It was said that the discretion of the arbitral tribunal should be limited by reference to applicable laws and rules. It was further explained that that approach would not eliminate discretion of the

arbitral tribunal, but would define a basis for it. The discretion of the arbitral tribunal should comprise assessing for instance how to apply the domestic laws of the parties in order to equalize the protection of confidential information which might differ between the home State of the investor and the State party to the dispute.

Proposal on paragraph (2)

122. In order to address the aforementioned concerns, the following proposal to revise paragraph (2) was made: “2. Confidential and sensitive information consists of: “(a) Confidential business information; (b) Information which is protected against being made available to the public under the treaty; (c) Information which is protected against being made available to the public under the law of a disputing party or any other law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.”

123. It was explained that the proposal sought to achieve a balance between the need to provide a basis for the determination of protected information and the necessary flexibility to ensure fairness in the treatment of the parties. That proposal received support for the reason that it provided adequate guidance to the arbitral tribunal.

124. However, it was pointed out by those in favour of granting wider discretion to the arbitral tribunal that the proposed draft was too restrictive. In that light, it was suggested to add after subparagraph (c) the following subparagraph: “; or (d) Information which, if made available to the public, would breach essential interests of any individual or entity”.

125. It was suggested that confidential business information should be more extensively defined under subparagraph (a), but there was no support for providing a list of possible categories of protected information.

126. Subparagraph (b) was found acceptable. It was questioned whether application of mandatory laws and rules referred to under subparagraph (c) of the proposal should be left to the discretion of the arbitral tribunal, as it might not be for the tribunal to decide on those issues. A suggestion was made that subparagraph (c) be merged with subparagraph (b).

127. It was said that subparagraph (c) intended to grant to the arbitral tribunal discretion to determine whether the law of a disputing party or any other law or rules were applicable to the disclosure of confidential information. Concerns were expressed regarding the ability of the arbitral tribunal to determine whether the law of a disputing party applied to the disclosure of information. It was stated that the arbitral tribunal should be under an obligation to apply the laws of a disputing party in that regard. It was further explained that States that had developed legislation on protected information might find themselves in a difficult situation in case an order of the arbitral tribunal in respect of information to be disclosed was inconsistent with their legislation. Similarly, a State could be obliged under legislation to disclose information, and an arbitral tribunal could not be granted the power to prevent such disclosure. It was suggested that that matter ought to be clarified under paragraph 2.

128. After discussion, it was suggested that the proposal under paragraph 122 above would constitute a basis for further consideration, and the Secretariat was requested to provide a revised version of paragraph (2) taking account of the discussion.

Paragraphs (3) and (4)

129. The Working Group considered paragraphs (3) and (4) and agreed that those paragraphs should be revised to provide: (1) that they applied to all documents, including reports of tribunal appointed experts, submissions by third parties, and not only to documents submitted by the disputing parties; in doing so, the revised version of those paragraphs should deal with redaction of protected information in arbitral awards in a manner consistent with article 4, and also address confidentiality for submissions by third parties; (2) some flexibility in terms of timing, as it was not practicable to require from a party that, at the time it submitted the information to the arbitral tribunal, it also submitted a redacted version; (3) that the arbitral tribunal should be entitled to oversee the process of redaction of confidential information, regardless of whether there was an objection by a party to such designation in order to avoid that parties through implied or express agreement on confidentiality, defeated the whole purpose of the transparency rules; and (4) that, if the tribunal determined that certain information did not constitute confidential and sensitive information, the party that submitted the information might withdraw all or part of it, and not rely on it, when that party felt that confidential and sensitive information would not be sufficiently protected.

Paragraph (5)

130. It was suggested that paragraph (5) should include a provision that would permit disclosure of information when the threat that led to prohibit such publication dissipated. It was further suggested to consider whether a more general rule could be proposed, whereby any designation of information as confidential and sensitive could be revisited on the motion of a party in light of a change in circumstances. Concerns were expressed that that approach would create uncertainties, and add additional burden to the process. The Working Group agreed to further consider that question at a future session.

10. Article 8 — Repository of published information (“registry”)

131. The Working Group recalled that, at its fifty-fourth session, it had agreed that a neutral registry would be crucial to provide the necessary level of neutrality in the administration of the rules on transparency. With respect to the principle of a registry, three proposals were considered. The first one was the establishment of a single registry as contained in paragraph 8 of document A/CN.9/WG.II/WP.166/Add.1. The second proposal was in favour of a list of arbitral institutions that could fulfil the function of a registry and would read along the lines of: “1. In case the arbitral procedure is administered by one of the following institutions, that institution shall be in charge of making information available to the public pursuant to the Rules on Transparency.” That proposal would then contain a list of arbitral institutions that have agreed to participate. A second paragraph would read as follows: “2. In case the arbitral procedure is not administered by one of the institutions listed in paragraph 1, the respondent shall

designate one of them, which shall be in charge of making information available to the public pursuant to the Rules on Transparency.”

132. A third proposal made was that the establishment of a registry in the context of the rules on transparency should follow by analogy the procedure for the designation of an appointing authority as contained in the 2010 UNCITRAL Arbitration Rules, i.e. disputing parties would agree on the choice of a registry and in case they could not agree, an institution would designate the registry.

133. After discussion, the Working Group requested the Secretariat to prepare, for consideration at a future session, a revised draft of article 8 with options to reflect the proposals mentioned in paragraphs 131 and 132 above. The Working Group also requested the Secretariat to provide information on the cost of a registry and to do so in close cooperation with the arbitral institutions that had expressed an interest in the matter, which included ICSID, the PCA, and the Arbitration Institute of the SCC.

B. Applicability to the settlement of disputes arising under existing treaties

134. The Working Group recalled that, at its fifty-fourth session, views had been expressed in favour of pursuing further the options to prepare an instrument that, once adopted by States, could make the rules on transparency applicable to existing investment treaties. The Working Group then considered various instruments to make the rules on transparency applicable to existing investment treaties, as contained in document A/CN.9/WG.II/WP.166/Add.1, paragraphs 10-23. The instruments included (i) a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement, (ii) a convention, whereby States could express consent to apply the rules on transparency to arbitration under their existing investment treaties, and (iii) joint interpretative declarations pursuant to article 31 (3) (a) Vienna Convention on the Law of Treaties (the “Vienna Convention”) or amendment or modification pursuant to articles 39-41 Vienna Convention.

135. All proposed instruments were found to be interesting and it was noted that they were not mutually exclusive, but could complement one another. In particular, it was said that a convention on the applicability of the rules on transparency as contained in document A/CN.9/WG.II/WP.166/Add.1, paragraph 19 was feasible and interesting, as that instrument was said to best fulfil the mandate of the Working Group to further transparency in treaty-based investor-State arbitration. The Working Group recalled its understanding that such a convention would make the rules on transparency applicable only to investment treaties between such States Parties that were also parties to the convention. As a matter of drafting, it was suggested that the opening words of article 3 of the draft convention be amended to read “Each Contracting State agrees that the UNCITRAL Rules on Transparency shall apply” for the reason that the language needed to be more specific. A question was raised whether the convention should also include the text of the rules on transparency. Regarding the recommendations contained in paragraphs 13 and 14 of document A/CN.9/WG.II/WP.166/Add.1, it was agreed to further consider them, in

particular in light of the decision that would be made regarding the scope of application of the rules on transparency (see above, paras. 18-30).

B. Note by the Secretariat on settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration, submitted to the Working Group on Arbitration and Conciliation at its fifty-fifth session

(A/CN.9/WG.II/WP.166 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 entrusted the Working Group with the task of preparing a legal standard on the topic of transparency in treaty-based investor-State arbitration.¹ Support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues that arose more generally in treaty-based investor-State arbitration and that would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

was agreed that any such topic might be brought to the attention of the Commission at its next session.²

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session (New York, 16 June-3 July 2008)³ regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission noted that the Working Group had considered matters of content, form and applicability to both future and existing investment treaties of the legal standard on transparency. It was 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 (see A/CN.9/WG.II/WP.166/Add.1, paras. 10-23). Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. It was said that whether the legal standard on transparency should deal with such a right of intervention, and if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group (see below, paras. 43 and 49-51).⁴

3. At its fifty-third (Vienna, 4-8 October 2010)⁵ and fifty-fourth (New York, 7-11 February 2011)⁶ sessions, the Working Group considered the matters of form, applicability and content of a legal standard on transparency in treaty-based investor-State arbitration.

4. In accordance with the decisions of the Working Group at its fifty-fourth session, this note contains a draft of rules on transparency and deals with the question of applicability of the rules on transparency to the settlement of disputes arising under existing investment treaties. The preamble and articles 1 to 6 of the draft rules on transparency are dealt with in this note and articles 7 and 8 as well as the question of applicability of the rules on transparency are dealt with in the addendum to this note.

II. Content of rules on transparency in treaty-based investor-State arbitration

A. General remarks

Form of the legal standard on transparency

5. The draft rules on transparency are intended to comply with the decision of the Working Group that the legal standard on transparency should be drafted in the form of clear rules, rather than guidelines (A/CN.9/717, para. 58). It may be recalled that those delegations that had expressed preference for guidelines agreed that the legal standard on transparency be drafted in the form of clear rules rather than looser and

² Ibid., para. 191.

³ Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 313-314.

⁴ Report of the Commission on the work of its forty-fourth session, paras. 203-205.

⁵ A/CN.9/712.

⁶ A/CN.9/717.

more discursive guidelines. That agreement was reached on the strict understanding that their prior insistence on guidelines was motivated by a desire to ensure that the legal standard on transparency should only apply where there was clear and specific reference to it (opt-in solution, see below, para. 16) (A/CN.9/717, paras. 26 and 58).

Legal standard on transparency applicable as a supplement to the UNCITRAL Arbitration Rules, or more generally to treaty-based investor-State arbitration, irrespective of the applicable arbitration rules

6. At its fifty-fourth session, the Working Group did not take a final decision on whether the legal standard on transparency should apply in the context of arbitration under the UNCITRAL Arbitration Rules, or irrespective of the set of rules chosen by the parties (A/CN.9/717, paras. 27-32). Therefore, where appropriate, this note and its addendum present different drafting proposals reflecting both options for consideration by the Working Group.

Content of the legal standard on transparency

7. At its fifty-third and fifty-fourth sessions, the Working Group generally agreed that the substantive issues to be addressed in the legal standard on transparency were the following: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submissions by third parties (“amicus curiae”) in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information (“registry”) (A/CN.9/712, para. 31; A/CN.9/717, para. 56). At its fifty-fourth session, the Working Group agreed to resume its discussion on each of the identified substantive issues and gave indications as to their possible content. The draft rules on transparency contained in section B below seek to reflect the various options that were discussed by the Working Group.

B. Draft rules on transparency in treaty-based investor-State arbitration

Preamble

8. Draft preamble — Purposes of the rules

“The UNCITRAL Rules on Transparency have been developed to apply in treaty-based investor-State arbitrations [initiated under the UNCITRAL Arbitration Rules] in order to ensure transparency in treaty-based investor-State arbitration so as to enhance the legitimacy of, and to foster the public interest inherent in, treaty-based investor-State arbitration, in a way that is compatible with the disputing parties’ interest in a fast and efficient resolution of their dispute. These purposes shall guide disputing parties and arbitral tribunals in the application of these Rules.”

Remarks

9. The preamble to the rules on transparency reflects a suggestion made in the Working Group that the purposes the rules on transparency were intended to serve

should be clarified (A/CN.9/717, para. 112). The preamble clarifies the balance that the rules seek to achieve in preserving both a meaningful opportunity for public participation and a fair and efficient resolution of the dispute for the parties. That approach is further developed under article 1, paragraph (2) dealing with the structure of the rules (see below, paras. 10 and 23).

Article 1. Scope of application and structure of the rules

10. Draft article 1 — Scope of application and structure of the rules

Option 1 (opt-out solution): “1. *The Rules on Transparency shall apply to any arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments (“treaty”) [which entered into force] after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply.*

Option 2 (opt-in solution), Variant 1 (applying irrespective of the applicable set of arbitration rules): “1. *The Rules on Transparency shall apply to any arbitration initiated under a treaty providing for the protection of investments (“treaty”) where States Parties to the treaty under which the dispute arose have expressed consent to their application.*

Variant 2 (applying only in the context of arbitration under the UNCITRAL Arbitration Rules): “1. *The Rules on Transparency shall apply to any arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments (“treaty”) where States Parties to the treaty under which the dispute arose have expressed consent to their application.*

“2. *Articles 2 to 6 of the Rules on Transparency contain rules relating to disclosure of the initiation of arbitral proceedings (article 2), publication of documents (article 3), publication of arbitral awards (article 4), submissions by third parties in arbitral proceedings (article 5), and [public/open] hearings and publication of transcripts (article 6). These rules are subject to the express exceptions set out in article 7. Where the Rules on Transparency provide for the exercise of a discretion by the arbitral tribunal, that discretion shall be exercised by the arbitral tribunal as it considers appropriate, taking into account all circumstances it deems relevant, including where applicable the need to balance (i) the legitimate public interest in transparency in the field of treaty-based investor-State arbitration and in the arbitral proceedings and (ii) the arbitrating parties’ own legitimate interest in a fast and efficient resolution of their dispute.”*

Remarks

Paragraph (1) — Scope of the rules on transparency

11. Paragraph (1) deals with the scope of application of the rules on transparency and contains two options, and variants.

- Option 1: opt-out solution

12. Under the first option (opt-out solution), the provision establishes a presumption that the rules on transparency apply as an extension of the UNCITRAL

Arbitration Rules, unless States otherwise provide in the investment treaty by opting out of the rules on transparency (A/CN.9/717, paras. 19 and 20). The Working Group may wish to discuss the formulation of an opting-out declaration so as to avoid unintended impact of a decision to opt-out of the rules on transparency on the applicability of the UNCITRAL Arbitration Rules.

“[which entered into force]”

13. The Working Group may wish to consider whether the words “which entered into force”, which appear in square brackets in paragraph (1), option 1, should be retained.

14. If the words “which entered into force” were to be retained in the text of that paragraph, the rules on transparency would apply, without a retroactive effect, to treaties concluded after the date of adoption of the rules on transparency.

15. If those words were deleted, the rules on transparency would then apply to any arbitration initiated after the date of adoption of the rules on transparency, even if the treaty entered into force before that date (provided that the treaty itself does not prohibit application of transparency rules). That option would require further consideration in order to clarify the instances where the rules on transparency could apply to treaties concluded before the date of adoption of the rules.

- Option 2: opt-in solution

16. Under the second option (opt-in solution), express consent of States is required for the rules on transparency to apply (A/CN.9/717, paras. 19 and 21). Two variants are proposed for consideration by the Working Group: variant 1 provides that the rules on transparency shall apply in respect of arbitration initiated under any set of arbitration rules, and variant 2 limits the application of the rules to arbitration under the UNCITRAL Arbitration Rules. In both cases, consent of States to apply the rules on transparency can be given in respect of arbitration initiated under investment treaties concluded either before or after the date of adoption of the rules on transparency.

- Additional matters for consideration

Relationship between the rules on transparency and the UNCITRAL Arbitration Rules

17. Under option 1 and option 2, variant 2, the rules on transparency apply only in the context of arbitration under the UNCITRAL Arbitration Rules (A/CN.9/717, paras. 19 and 20). The Working Group may wish to consider whether a footnote should be added in order to clarify that the operation of the rules on transparency under the UNCITRAL Arbitration Rules would apply under both the 1976 UNCITRAL Arbitration Rules and their 2010 revised version.

18. Further, the Working Group may wish to consider whether the 2010 UNCITRAL Arbitration Rules should be amended to refer to the application of the rules on transparency (A/CN.9/717, para. 20). On that matter, diverging views were expressed at the fifty-fourth session of the Working Group: it was said that there could be clarity in amending article 1 on the scope of application of the UNCITRAL Arbitration Rules to refer to the legal standard on transparency; other views were expressed that it might be confusing to propose three different sets of UNCITRAL

Arbitration Rules (1976 Rules, 2010 Rules, and those revised to address the specific matter of transparency in treaty-based investor-State arbitration). After discussion, it was decided to defer that question to a later stage of the deliberations (A/CN.9/717, paras. 31 and 32).

Relationship between the rules on transparency and any applicable set of arbitration rules

19. The Working Group may wish to consider whether a provision should be included in the rules on transparency to address the relation between the rules on transparency and the applicable set of arbitration rules.

Relationship between the rules on transparency and any transparency provisions in the investment treaty

20. Another matter for consideration is the relationship between the rules on transparency and any transparency provisions in the investment treaty under which the arbitration arises. For instance, the Working Group may wish to consider the need to clarify that the rules on transparency will not supersede a provision in the relevant investment treaty that actually requires greater levels of transparency.

Application of the rules on transparency by the disputing parties

21. The Working Group may wish to consider whether article 1 should include a provision regarding the application of the rules on transparency by the disputing parties to reflect the discussion at its fifty-fourth session (A/CN.9/717, paras. 47-55). The purpose of such an additional provision would be to clarify that once the States Parties to the investment treaty agree that rules on transparency shall apply according to article 1, paragraph (1), the disputing parties are not entitled to exclude their application. That provision could be drafted along the following lines: “*The Rules on Transparency are designed to confer rights and benefits on the general public, and they shall accordingly be of mandatory effect so that the disputing parties shall not be entitled to opt out thereof or derogate therefrom in the course of the arbitration*”. The Working Group may wish to discuss further the desirability and effectiveness of such a provision.

“a treaty providing for the protection of investments”

22. As a general matter, the Working Group may wish to consider whether the rules on transparency should clarify that the term “a treaty providing for the protection of investments” should be understood in a broad sense as including free trade agreements, bilateral and multilateral investment treaties, as long as they contain provisions on the protection of an investor and its right to resort to investor-State arbitration (see also A/CN.9/WG.II/WP.166/Add.1, para. 18).

Paragraph (2) — structure of the rules on transparency

23. Paragraph (2) deals with the structure of the rules on transparency. It clarifies that each of the substantive norms set out in articles 2 to 6 is subject to the limited exceptions set out in article 7. It further reflects discussions held in the Working Group to the effect that, while there is a need to balance the public interest in transparency in the field of treaty-based investor-State arbitration with the arbitrating parties’ own legitimate interest in a fast and efficient resolution of their

dispute, the exceptions in article 7 should be applied strictly and constitute the only limitations to the transparency rules under articles 2 to 6 (A/CN.9/717, paras. 129-143).

Article 2. Initiation of arbitral proceedings

24. Draft article 2 — Initiation of arbitral proceedings

Option 1: *“Once the notice of arbitration has been received by the respondent, the respondent shall promptly [communicate to the repository referred to under article 8][make available to the public] information regarding the name of the disputing parties, their nationalities [and][the economic sector involved][and][a brief description of the subject matter of the claim].”*

Option 2: *“Once the notice of arbitration has been received by the respondent, the respondent shall promptly [communicate to the repository referred to under article 8][make available to the public] (i) information regarding the name of the disputing parties, their nationalities [and][the economic sector involved][and][a brief description of the subject matter of the claim]; and (ii) the notice of arbitration,*

Variant 1: except with respect to any portion of the notice to which either the claimant (at the time it submits the notice) or the respondent objects on the ground that it contains confidential and sensitive information as defined under article 7, paragraph 2.”

Variant 2: [unless any disputing party objects to its publication.][provided all disputing parties agree to its publication.]”

Remarks

25. At its fifty-fourth session, the Working Group expressed general agreement on the need to provide information to the public on the initiation of arbitral proceedings. The Working Group focused its attention on whether and when the notice of arbitration should be made public (A/CN.9/717, paras. 60-74). The Working Group generally agreed that the notice of arbitration should be disclosed (A/CN.9/717, para. 61). However, diverging views were expressed on the question whether the notice of arbitration should be published at the early stage of the initiation of the arbitral proceedings, before the constitution of the arbitral tribunal, in particular taking account of the fact that, where applied to ad hoc arbitration under the UNCITRAL Arbitration Rules, the rules on transparency could not rely on an institution to handle issues that might arise before the constitution of the arbitral tribunal (A/CN.9/717, para. 62).

Option 1 — Publication of general information

26. Option 1 provides that some information should be made public once the arbitral proceedings are initiated, and does not address publication of the notice of arbitration (A/CN.9/717, paras. 67 and 68). Under that option, the publication of the notice of arbitration would be dealt with under article 3 of the rules on transparency, after the constitution of the arbitral tribunal (see below, paras. 32-38 on publication of documents).

Option 2 — Possible publication of the notice of arbitration in addition to general information

27. Option 2 deals with publication of the notice of arbitration when the proceedings are initiated, before the constitution of the arbitral tribunal, and includes two variants.

Variant 1

28. Variant 1 provides that the notice of arbitration should be published, with redaction of information considered as confidential and sensitive by either party (A/CN.9/717, paras. 69 and 70). Variant 1 is also intended to clarify how information should be redacted at this early stage of the proceedings, in view of the fact that the procedure defined under article 7, paragraphs (3) and (4), which foresees a possible intervention of the arbitral tribunal, could not apply.

Variant 2

29. Variant 2 establishes the right of parties to oppose publication of the notice of arbitration, based on a suggestion made at the fifty-fourth session of the Working Group that there might be various reasons why a party would not wish to have information contained in the notice of arbitration made public at the early stage of the proceedings (A/CN.9/717, para. 71).

Means of publication in options 1 and 2

30. Both options contain variants within brackets regarding the means of publication: a first variant foresees publication of information through a repository (see A/CN.9/WG.II/WP.166/Add.1, paras. 8 and 9); the second variant envisages publication by the respondent, most probably the disputing State. The Working Group may wish to note that the same options are also found in article 3 (see below, paras. 32 and 38) and article 4 (see below, paras. 41 and 42).

Response to the notice of arbitration in option 2

31. Under the UNCITRAL Arbitration Rules, as revised in 2010, or under other possibly applicable arbitration rules, a response to the notice of arbitration is to be sent before the constitution of the arbitral tribunal. In case option 2 would be retained, the Working Group may wish to consider whether a reference to the publication of the response to the notice of arbitration should be added.

Article 3. Publication of documents

32. Draft article 3 — Publication of documents

Documents to be published

Option 1:

“Subject to the express exceptions set out in article 7, all documents submitted to, or issued by, the arbitral tribunal shall be made available to the public. If the tribunal determines that certain documents are not to be published because of the undue burden such publication would impose, those documents not published should be made available to third parties upon request.”

Option 2:

“Subject to the express exceptions set out in article 7, the arbitral tribunal shall decide which documents to make available to the public [in consultation with the disputing parties][unless [a][all] disputing part[y] [ies] object[s] to the publication].

Option 3:

“1. Subject to the express exceptions set out in article 7, [the following documents][the arbitral tribunal shall decide which of the following documents] shall be made available to the public: the notice of arbitration; pleadings, submissions, including their exhibits, to the tribunal by a disputing party; any submissions [by the non-disputing State Party(ies) to the treaty and] by third parties (amicus curiae); and orders by the tribunal.

“2. Subject to the express exceptions set out in article 7, the arbitral tribunal may order [in consultation with the disputing parties][unless any disputing party objects] publication of any documents provided to, or issued by, the tribunal.

“3. Subject to the express exceptions set out in article 7, third parties may request access to any documents provided to, or issued by, the arbitral tribunal, and the tribunal shall decide whether to grant such access [after consultation with the disputing parties].

Form and means of publication

Option 1: *“The documents to be published pursuant to [paragraph] [section] 1 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make the documents available to the public in a timely manner, in the form and in the language in which it receives them.”*

Option 2: *“The respondent shall make available to the public in a timely manner the documents to be published pursuant to [paragraph][section] 1, in their redacted form in accordance with article 7 if applicable, and in the language in which the documents have been issued.”*

Remarks**Documents to be published**

33. At the fifty-third session of the Working Group, different views were expressed on whether, and if so, which documents should be published (A/CN.9/712, paras. 40 to 42). The view was expressed that all documents submitted to, and issued by, the arbitral tribunal should be made available to the public. A contrary view was that not all documents would need to be published, in particular in view of the necessity to find the right balance between the requirements of public interest and the legitimate need to ensure manageability and efficiency of the arbitral procedure.

34. At the fifty-fourth session of the Working Group, different approaches emerged from the consideration of the matter (A/CN.9/717, paras. 87-92). Those approaches have been articulated as follows in article 3.

Option 1 — Publication of all documents

35. Under option 1, documents to be published are all documents submitted to, or issued by the arbitral tribunal, subject to article 7. If certain documents to be published cannot be made publicly available, third parties should have a right to access the information (A/CN.9/717, para. 89).

Option 2 — Publication of documents, at the discretion of the arbitral tribunal

36. Under option 2, the arbitral tribunal shall decide which documents to publish (A/CN.9/717, para. 88). Questions for consideration under option 2 are whether the arbitral tribunal should consult the parties on that matter and whether a disputing party could oppose the publication of documents. At the fifty-fourth session of the Working Group, it was pointed out that, under the UNCITRAL Arbitration Rules, the arbitral tribunal might order publication of documents if it considered it appropriate without any party having a right to oppose (A/CN.9/717, para. 88).

Option 3 — List of documents to be published

37. Under a third option, the provision on publication of documents would contain a list of documents that could be made available to the public (A/CN.9/717, paras. 90 and 91). Questions for consideration are whether: (1) the arbitral tribunal shall decide which of the documents listed should be made available to the public; (2) the arbitral tribunal shall have the ability to order publication of a document not listed in the provision; and (3) disputing parties should be consulted or be given the right to object to publication. The Working Group may wish to note that matters regarding publication of awards and of minutes or transcripts of hearings are dealt with under articles 4 and 6, respectively, and therefore, those documents are not contained in the list under option 3.

Form and means of publication

38. Two options are proposed for the consideration of the Working Group regarding the question of form and means of publication (see above, para. 30).

Manageability of the arbitral proceedings

39. At its fifty-fourth session, the Working Group had said that the manageability of the arbitral proceedings was an important aspect to take into account when designing rules on transparency, because rules on transparency should also aim at preserving the disputing parties' right of effective access to justice (A/CN.9/717, para. 145). However, concerns were expressed that a general rule on manageability of the arbitral proceedings would contribute to a significant erosion of transparency (A/CN.9/717, para. 146). After discussion, the Working Group considered that the right balance might well need to be found in relation to each provision in the rules on transparency, rather than as part of the exceptions to transparency set out in article 7 (A/CN.9/717, para. 147).

40. The Working Group may wish to consider whether the drafting proposals properly address those concerns (see, for instance, under the section on “documents to be published”: in option 1, the words “because of the undue burden”; in option 2, the decision on which documents to publish is left to the arbitral tribunal’s discretion; and in option 3, a limitative list of documents is provided).

Article 4. Publication of arbitral awards

41. Draft article 4 — Publication of arbitral awards

“1. Subject to the express exceptions set out in article 7, all arbitral awards shall be published.”

Option 1: *“2. Arbitral awards shall be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, where applicable, in their redacted form in accordance with article 7. The repository shall make the arbitral awards available to the public in a timely manner, in the form and in the language in which it receives them.”*

Option 2: *“2. The respondent shall make arbitral awards available to the public in a timely manner, in their redacted form in accordance with article 7 if applicable, and in the language in which it receives them. The arbitral tribunal shall be responsible for redacting confidential and sensitive information from the awards.”*

Remarks

42. At the fifty-fourth session of the Working Group, broad support was expressed for a simple provision whereby awards would be made publicly available, with those delegations which had expressed reservations in that respect requesting that the Working Group ensured adequate protection of confidential and sensitive information (A/CN.9/717, para. 100). To address that concern, paragraph (1) provides that arbitral awards shall be published, subject to the provisions of article 7. Paragraph (2) contains two options that deal with the question of form and means of publication (see para. 30 above).

Article 5. Submissions by third parties (“amicus curiae”) in arbitral proceedings

43. Draft article 5 — Submissions by non-disputing parties

Option 1:

“The arbitral tribunal may accept and consider amicus curiae submission from a person or entity that is not a party to the dispute.”

Option 2:

“Submission by third parties

“1. After consulting the parties, the arbitral tribunal may allow a person or entity that is not a party to the dispute and not a non-disputing State Party to the treaty (a “third party”) to file a written submission with the tribunal regarding a matter within the scope of the dispute.

“2. A third party wishing to make a submission shall apply to the arbitral tribunal, and provide the following written information in a language of

the arbitration[, in a concise manner, within the limit of [5 typed pages]]: (a) description of the applicant, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant); (b) disclosure whether or not the applicant has any affiliation, direct or indirect, with any disputing party; (c) information on any government, person or organization that has provided any financial or other assistance in preparing the submission; (d) description of the nature of the interest that the applicant has in the arbitration; and (e) identification of the specific issues of fact or law in the arbitration that the applicant wishes to address in its written submission.

“3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration (a) whether the third party has a significant interest in the proceeding and (b) the extent to which the submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

“4. The submission filed by a non-disputing party shall: (a) be dated and signed by the person filing the submission; (b) be concise, and in no case longer than [as authorized by the arbitral tribunal] [20 typed pages, including any appendices]; (c) set out a precise statement of the applicant’s position on issues; and (d) only address matters within the scope of the dispute.

“5. The arbitral tribunal shall ensure that the submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the submission by the third party.

“Submission by a non-disputing State Party to the investment treaty

“[2] [6]. The arbitral tribunal may accept or request submission from a non-disputing State Party to the treaty, provided that such submission shall be restricted to issues of law and of treaty interpretation and shall not include submission on the factual aspects of the dispute.”

Remarks

44. At the fifty-third session of the Working Group, many delegations had expressed strong support for allowing amicus curiae submissions on the ground that they could be useful for the arbitral tribunal in resolving the dispute and promoting the legitimacy of the arbitral process (A/CN.9/712, para. 46).

45. At its fifty-fourth session, the Working Group discussed various drafting options for a provision on submissions to the arbitral tribunal by third parties. During the discussion, it was said that any provision on that matter should clarify that there would not be an automatic entitlement for amici to have their submissions accepted (A/CN.9/717, paras. 117-123). The Working Group may wish to consider whether that clarification has been adequately addressed by the requirements for admission of an amicus submission.

Option 1

46. Option 1 is based on a provision used in certain investment agreements, which was said to reflect an evolution in practice (A/CN.9/717, para. 118). It deals only with the principle that *amicus curiae* submissions should be permitted, and leaves discretion to the arbitral tribunal regarding the procedure for allowing such submissions.

Option 2

47. Option 2 corresponds to a suggestion that guidance should be provided to third parties and the arbitral tribunal, taking account of the fact that a number of States have little experience in that field (A/CN.9/717, paras. 119 and 120). It reflects the proposal to draft a provision along the lines of Rule 37 (2) of the ICSID Arbitration Rules, as complemented by elements dealt with under paragraph B.2 of the NAFTA Free Trade Commission's "Statement of the Free Trade Commission on non-disputing party participation of 7 October 2004" (A/CN.9/717, para. 122).

48. Option 2 includes in its paragraph (1) the provision that the arbitral tribunal shall consult the parties, as discussed by the Working Group (A/CN.9/717, paras. 120 and 125). It provides for a detailed procedure regarding: information to be provided regarding the third party that wishes to make a submission (para. (2)); matters to be considered by the arbitral tribunal (paras. (3) and (5)); and the submission itself (para. (4)).

Intervention of the non-disputing State(s) Party(ies) to the investment treaty

49. At the fifty-third session of the Working Group, it was observed that another State Party to the investment treaty that was not a party to the dispute could also wish, be invited, or have a treaty right to make submissions. It was noted that such State(s) often had important information to provide, such as information on the *travaux préparatoires*, thus preventing one-sided treaty interpretation (A/CN.9/712, para. 49). The Working Group agreed to bring that matter to the attention of the Commission and ask its guidance on whether that matter should be made part of the scope of its current work (A/CN.9/712, para. 103, A/CN.9/717, para. 124).

50. At its forty-fourth session, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. It was said that whether the legal standard on transparency should deal with such a right of intervention, and if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group (see above, para. 2).⁷

51. The proposed draft paragraph on that matter reflects a provision contained in Chapter 11 of NAFTA (article 1128), and is meant to limit non-disputing State intervention to issues of law and matters of interpretation. This limited scope of intervention is meant to address concerns raised that an intervention by a non-disputing State, of which the investor was a national, could raise issues of diplomatic protection (A/CN.9/712, para. 49).

⁷ Report of the Commission on the work of its forty-fourth session, paras. 204 and 205.

Article 6. Hearings and publication of transcripts of hearings

52. Draft article 6 — Hearings and transcripts of hearings

Hearings

Option 1: “1. Subject to article 6, paragraphs 2 and 3, hearings shall be [public] [held openly] [, unless a disputing party objects thereto].

Option 2: “1. The arbitral tribunal shall decide whether to hold [public] [open] hearings. Where the tribunal decides to hold [public] [open] hearings, the hearings shall be [public] [held openly] subject to article 6, paragraphs 2 and 3.

Mandatory exceptions to public hearings

“2. Where a hearing is to be [public] [held openly] and there is a need to protect confidential and sensitive information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements for all or part of the hearing to be [held in private][closed].

Logistical arrangements and discretionary exception to public hearings

“3. The arbitral tribunal may make logistical arrangements to facilitate the public’s right of access to hearings (including where appropriate by organising attendance through video links or such other means as it deems appropriate) and may [hold the hearings in private][close the hearings] where this is or becomes necessary for logistical reasons.

Transcripts of hearings

“4. Save where [the arbitral tribunal has decided not to hold [public] [open] hearings under article 6, paragraph 1 and where] a hearing has been [held in private] [closed] for mandatory reasons under article 6, paragraph 2, transcripts of hearings shall be made available to the public. [The repository referred to under article 8][The respondent] shall publish transcripts of hearings in the form and in the language in which it receives them from the arbitral tribunal.

“5. Transcripts of [closed] hearings [held in private] shall be made available pursuant to paragraph 4 in all cases where the decision to close the hearings was taken only for logistical reasons under article 6, paragraph 3, and not for mandatory reasons under article 6, paragraph 2.”

Remarks

Paragraph (1) — Hearings

53. At the fifty-fourth session of the Working Group, various views were expressed regarding public/open hearings (A/CN.9/717, paras. 102-111). As a matter of drafting, the Working Group may wish to decide which of the words “public” — “open/openly”, and the words “closed hearings” — “hearings held in private”, in article 6 would be the most appropriate.

Options 1 and 2

54. Option 1 reflects the view that, in principle, hearings shall be public/open, and contains within brackets the provision that each disputing party has a right of veto in that regard. At the fifty-fourth session of the Working Group, questions were raised as to whether such a veto would contribute to implementing transparency and whether such a provision was compatible with the mandate of the Working Group (A/CN.9/717, paras. 104, 105 and 114).

55. Option 2 leaves the decision on public hearings to the arbitral tribunal, subject to guidance under article 6, paragraphs (2) and (3)

Paragraphs (2) and (3) — Exceptions to public/open hearings

56. Paragraphs (2) and (3) are intended to provide guidance on the exceptions to the rule of public/open hearings. Paragraph (2) refers to the exceptions contained in article 7. Paragraph (3) addresses the concerns expressed in the Working Group that hearings may have to be held close for practical reasons (A/CN.9/717, para. 109).

Paragraphs (4) and (5) — Transcripts of hearings

57. Paragraphs (4) and (5) address the matter of publication of transcripts of hearings and provide guidance on that matter in cases where hearings were held in private. It may be recalled that, at the fifty-fourth session of the Working Group, some delegations questioned whether the decision to be made regarding transcripts should depend upon the solution adopted in respect of public access to hearings. It was agreed to further consider that matter in conjunction with the various drafting proposals that would be prepared by the Secretariat (A/CN.9/717, para. 115). The Working Group may wish to note that the language in the first bracket in paragraph (4), that read “[the arbitral tribunal has decided not to hold [public] [open] hearings under article 6, paragraph 1 and where]” is meant to reflect option 2 under paragraph (1). That text would be deleted in case the Working Group would decide that that option should not be retained.

(A/CN.9/WG.II/WP.166/Add.1) (Original: English)

**Note by the Secretariat on settlement of commercial disputes:
preparation of a legal standard on transparency in treaty-based investor-State
arbitration, submitted to the Working Group on Arbitration and Conciliation
at its fifty-fifth session**

ADDENDUM**CONTENTS**

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**B. Draft rules on transparency in treaty-based investor-State
arbitration (*continued*)**

Article 7. Exceptions to transparency

1. Draft article 7 — Exceptions to transparency

Exceptions to transparency

“1. The rules set out in articles 2 to 6 are subject to the following express exceptions:

“(a) A party shall not be under any obligation to publish any confidential and sensitive information, as defined in article 7, paragraph 2, and the tribunal shall make arrangements to protect such information from publication; and

“(b) The arbitral tribunal shall be entitled to restrain the publication of information where such publication would jeopardise the integrity of the arbitral process, including where such publication could hamper the collection or production of evidence or lead to the intimidation of witnesses, lawyers acting for the parties, or members of the arbitral tribunal.

Definition of confidential and sensitive information

“2. Confidential and sensitive information consists of:

“(a) confidential business information;

“(b) information which is protected against disclosure under the treaty or the applicable law; and

“(c) information that may be designated as confidential and sensitive by the arbitral tribunal in any order on confidentiality for any of the aforementioned reasons.

Procedure for identifying and protecting confidential and sensitive information

“3. A disputing party that provides information shall clearly designate whether it contends that the information is of a confidential and sensitive nature at the time it submits the information to the arbitral tribunal and shall, at the time it submits a document containing such information, submit a redacted version of the document that does not contain the information.

“4. Where the opposing party disputes that any or all of such information is confidential and sensitive, it shall so indicate within 30 days of receipt of the redacted document from the other party, identifying with precision the portions of the document that it contends ought not to be redacted. The arbitral tribunal shall then rule on any such objection to the designation or redaction of confidential and sensitive information.

Procedure for protecting the integrity of the arbitral process

“5. The arbitral tribunal may, at its own initiative or upon the application of a disputing party, take appropriate measures to restrain the publication of information where such publication would jeopardise the integrity of the arbitral process, including where such publication could hamper the collection or production of evidence or lead to the intimidation of witnesses, lawyers acting for the parties, or members of the tribunal.”

Remarks

Paragraph (1) — Exceptions to transparency

2. Paragraph (1) limits the exceptions to transparency to the protection of confidential and sensitive information and the protection of the integrity of the arbitral process (A/CN.9/717, paras. 129-143).

Paragraph (2) — Confidential and sensitive information

3. The Working Group may wish to consider the definition of “confidential and sensitive information” contained in paragraph (2). That proposal is based on corresponding provisions usually found in investment treaties as well as on the definition of confidential and sensitive information provided by arbitral tribunals in

confidentiality orders in NAFTA cases under the UNCITRAL Arbitration Rules.¹ The “information supplied by third parties that those third parties are entitled to regard as confidential” is often mentioned as part of the definition of sensitive and confidential information in such provisions. The Working Group may wish to consider whether that category should be added to the definition under paragraph (2).

4. It may also be noted that under some treaties “confidential and sensitive information” has been defined in general terms as “any sensitive factual information that is not available in the public domain” (A/CN.9/712, para. 67). Such a definition can be found in article 10.22.4 of the Australia-Chile Free Trade Agreement (“FTA”).² Under that FTA, there are additional exceptions for (i) information which would impede law enforcement, and (ii) information otherwise protected from disclosure by the law of a Party (signatory to that FTA).

Paragraphs (3) and (4) — Procedure for identifying and protecting confidential and sensitive information

5. Paragraphs (3) and (4) reflect a proposal made at the fifty-fourth session of the Working Group that the parties should agree on the determination of confidential and sensitive information and that only in case an agreement could not be found, the arbitral tribunal would make that decision (A/CN.9/717, para. 134).

Paragraph (5) — Procedure for protecting the integrity of the arbitral process

6. The Working Group recalled that, at its fifty-third session, it had been generally recognized that the question of protection of the integrity of the arbitral process should be taken into account as part of the discussion on limitations to transparency (A/CN.9/712, para. 72). At its fifty-fourth session, it was felt in the Working Group that the term “integrity of the arbitral process” would need to be defined, as it could otherwise become an overly broad category, and exceptions to transparency should be concisely defined (A/CN.9/717, para. 137). After discussion, the Working Group agreed that the questions for further consideration on that matter would include (A/CN.9/717, para. 143): (i) whether a provision on protection of the integrity of the arbitral process should be in the form of a general formulation or should contain specific instances that were meant to be specifically addressed;

¹ *UPS v. Canada*, Procedural Directions and Order of the Tribunal, 4 April 2003, pp. 3-9, available at www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentiality_Order-en.pdf; *Chemtura v. Canada*, Confidentiality Order, 21 January 2008, available at www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentialityorder.pdf; *Merrill & Ring Forestry v. Canada*, Confidentiality Order, 21 January 2008, available at www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ConfidentialityOrderTribunal21Jan08.pdf; *V. G. Gallo v. Canada*, Confidentiality Order, 4 June 2008, available at www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ConfidentialityOrder2008-06-04.pdf; *Claytons/Bilcon of Delaware v. Canada*, Procedural Order No. 2 (Confidentiality Order), 4 May 2009, available at www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrderNo2-May42009.pdf; *Mobil Investments v. Canada*, Minutes of the First Session of the Arbitral Tribunal with the Parties, Annex 3 (Confidentiality Order), 6 May 2009, pp. 38-44, available at www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Mobil-Minutes-FirstSession2009-07-29.pdf.

² Australia-Chile Free Trade Agreement of 2008, available at www.dfat.gov.au/fta/aclfta/FTA_Text.html.

(ii) the interplay between the protection of the integrity of the arbitral process and the provisions in the UNCITRAL Arbitration Rules already dealing with that issue; and (iii) how to determine the threshold for a limitation to transparency based on the ground of the need to protect integrity of the arbitral process.

7. The power of the arbitral tribunal to protect the integrity of the arbitral process is expressed in generic terms in arbitration rules,³ and has been used to deal with specific issues by arbitral tribunals. A number of cases illustrate how that inherent power has been used by arbitral tribunals: they have in certain instances issued provisional measures in order to protect the integrity of the arbitral proceedings,⁴ “in particular the access to and integrity of the evidence.”⁵

Article 8. Repository of published information (“registry”)

8. Draft article 8 — Repository of published information

“----- shall be in charge of making available to the public information [and other services] pursuant to the Rules on transparency.”

Remarks

9. At its fifty-fourth session, the Working Group discussed the issue whether establishing a neutral registry should be seen as a necessary step in the promotion of transparency in treaty-based investor-State arbitration (A/CN.9/717, paras. 148-151). The prevailing view was that the existence of a registry would be crucial to provide the necessary level of neutrality in the administration of a legal standard on transparency. General support was expressed for the idea that, should such a neutral registry be established, the United Nations Secretariat would be ideally placed to host it. It was also recalled that, should the United Nations not be in a position to take up that function, the Permanent Court of Arbitration at The Hague and ICSID had expressed their readiness to provide such registry services (A/CN.9/717, para. 148). Also, it was generally felt that it might be premature to attempt designing the detailed features of such a registry until decisions had been made by the Working Group as to the precise functions it would fulfil (A/CN.9/717, para. 150).

³ For instance, article 15 (1) of the 1976 UNCITRAL Arbitration Rules and article 17 (1) of the 2010 UNCITRAL Arbitration Rules; article 15 of the ICC Rules; article 19 of the SCC Arbitration Rules (Arbitration Institute of the Stockholm Chamber of Commerce). The Working Group may wish to note other texts that also reflect that principle, such as the Code of Ethics for Arbitrators in Commercial Disputes of the American Arbitration Association.

⁴ For instance, *Biwater Gauff v. Tanzania*, Procedural Order No. 3 (ICSID 29 September 2006), at para. 163. *Libananco Holdings Co. Ltd. v. Turkey*, No. ARB/06/S, Decision on jurisdiction (ICSID 23 June 2008), at 78.

⁵ *Quiborax S.A. v. Plurinational State of Bolivia*, No. ARB/06/2, Decision on Provisional Measures (ICSID 26 February 2010), at para. 141. The tribunal concluded that “[C]laimants have shown the existence of a threat to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses,” (No. ARB/06/2, Decision on Provisional Measures (ICSID 26 February 2010), at para. 141); *Methanex Corp. v. United States*, Final Award (ICSID 3 August 2005), at PI. II, ch. I, para. 54.

III. Applicability of the legal standard on transparency to the settlement of disputes arising under existing investment treaties

A. General remarks

10. At the fifty-fourth session of the Working Group, views were expressed in favour of pursuing further the option to prepare an instrument that, once adopted by States, could make the legal standard on transparency applicable to existing treaties. That question was said to have an important practical impact as there were more than 2,500 investment treaties in force to date (A/CN.9/712, para. 85 and A/CN.9/717, paras. 33-35).⁶ In that context, the Working Group discussed the options of making the legal standard on transparency applicable to existing treaties by either a recommendation urging States to make the legal standard applicable in the context of treaty-based investor-State dispute settlement, or a convention, whereby States could express consent to apply the legal standard on transparency to arbitration under their existing investment treaties (see below, section B). Such convention, however, would make the legal standard applicable only to investment treaties between such States parties that were also parties to the convention (A/CN.9/717, para. 42). Also, it was said that the options of making the legal standard on transparency applicable to existing treaties by joint interpretative declarations pursuant to article 31 (3) (a) Vienna Convention on the Law of Treaties (the “Vienna Convention”), by amendment or modification pursuant to articles 39-41 Vienna Convention (see below, section C) were interesting and practically possible options, which should be further explored (A/CN.9/717, para. 45).

11. The Secretariat was requested to further explore the options of making the legal standard on transparency applicable to existing treaties and to prepare possible wording to facilitate continuation of the discussion regarding the various options considered at the fifty-fourth session of the Working Group (A/CN.9/717, para. 46).

B. Possible UNCITRAL instruments

1. Recommendation on the application of a legal standard on transparency

12. The Working Group may wish to consider a recommendation urging States to apply the legal standard on transparency to existing and future treaties as a means to further the application of a legal standard on transparency to investment treaties. The purpose of the recommendation would be to highlight the importance of transparency in the context of treaty-based investor-State arbitration. The recommendation leaves it to States to decide on the means of implementing the legal standard on transparency in the context of both existing and future treaties. It aims at encouraging States and investors to apply the legal standard to their arbitration, to the extent this is consistent with the existing investment treaty.

⁶ For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 20 July 2011 at www.unctadxi.org/templates/Startpage____718.aspx.

13. The Working Group may wish to consider the following wording for a possible recommendation regarding the application of the legal standard on transparency to treaty-based investor-State arbitration initiated under the UNCITRAL Arbitration Rules.

“The United Nations Commission on International Trade Law,

“Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 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,

“Also recalling the General Assembly resolutions 31/98 of 15 December 1976 and 65/22 of 10 January 2011 recommending the use of the UNCITRAL Arbitration Rules,

“Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the wide 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,

“Further recognizing that some States have adopted high transparency standards in certain treaties providing for the protection of investments (“investment treaty”),

“Bearing in mind that the UNCITRAL Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes,

“Noting that the preparation of the Rules on Transparency was the subject of due deliberation in UNCITRAL and that it benefitted from extensive consultations with Governments and interested intergovernmental and international non-governmental organizations,

“Believing that the Rules on Transparency would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international [investment] disputes,

“Believing further that, in connection with the modernization of the UNCITRAL Arbitration Rules as revised in 2010, adoption of the Rules on Transparency is particularly timely,

“Noting the great number of investment treaties already in force, and the practical importance of promoting the application of the Rules on Transparency to arbitration under those already concluded investment treaties,

“1. Recommends that, subject to any provision in the relevant investment treaty that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated under the UNCITRAL Arbitration Rules, pursuant to an investment treaty concluded before the date of adoption of the Rules on Transparency, to the extent such application is consistent with those treaties;

“2. Also recommends that the Rules on Transparency be used or referred to by Governments, inter alia, in formulating necessary amendments or modifications to such treaties.”

14. Should the Working Group decide that the legal standard on transparency would apply irrespective of the applicable set of arbitration rules, a possible recommendation might read as follows.

“The United Nations Commission on International Trade Law,

“Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 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,

“Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the wide 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,

“Further recognizing that some States have adopted high transparency standards in certain treaties providing for the protection of investments (“investment treaty”),

“Noting that the preparation of the Rules on Transparency was the subject of due deliberation in UNCITRAL and that it benefitted from extensive consultations with Governments and interested intergovernmental and international non-governmental organizations,

“Believing that the Rules on Transparency 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 investment treaties already in force, and the practical importance of promoting the application of the Rules on Transparency to arbitration under those already concluded investment treaties,

“1. Recommends that, subject to any provision in the relevant investment treaty that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to an investment treaty concluded before the date of adoption of the Rules on Transparency, to the extent such application is consistent with those treaties;

“2. Also recommends that the Rules on Transparency be used or referred to by Governments, inter alia, in formulating necessary amendments or modifications to such treaties.”

2. Possible draft convention on transparency in treaty-based investor-State arbitration

15. With a view to promoting application of a legal standard on transparency to investment treaties, a suggestion was made at the fifty-third and fifty fourth sessions of the Working Group that an international convention on transparency in treaty-based investor-State arbitration could be prepared whereby States would express consent or agree to apply a legal standard on transparency (A/CN.9/712, para. 93, A/CN.9/717, paras. 42-46).

16. The option of a convention in the form of a general statement of applicability as proposed in this note would not incorporate the contents of the legal standard on transparency currently developed by the Working Group, but reflect the agreement of the Contracting States to apply the legal standard to arbitrations under their investment treaties existing at the date of entry into force of the convention or concluded thereafter. Should the Working Group decide to pursue the option of drafting a convention, further questions would require consideration, including the relation between the convention and the legal standard on transparency.

17. The proposed wording of the draft convention below does not include provisions which would be typically found in a convention, including the preamble and final provisions, such as the depositary, signature, ratification, acceptance, approval, accession, reservations, entry into force, revision and amendments, and denunciation. Those provisions could be drafted at a later stage if the Working Group considers that the option of a convention should be pursued.

18. The Working Group may wish to note that the proposed wording of the draft convention below has been chosen to be as generic as possible, to make the draft convention applicable to as many investment treaties as possible. As mentioned in a remark under article 1, paragraph (1) on the scope of the rules on transparency, the wording of draft convention clarifies that the term “a treaty providing for the protection of investments” should be understood in a broad sense, including free trade agreements, bilateral and multilateral investment treaties, so long as they contain provisions on the protection of an investor and its right to resort to investor-State arbitration (A/CN.9/WG.II/WP.166, para. 22).

19. Should the Working Group decide that a convention should be prepared, possible provisions might read as follows.

“Article 1. Scope of application

“1. This Convention shall apply to investor-State arbitration [under the UNCITRAL Arbitration Rules] conducted on the basis of a treaty providing for the protection of investments between Contracting States to this Convention.

“2. The term “treaty providing for the protection of investments” means any investment agreement between Contracting States, including a bilateral or multilateral investment agreement or free trade agreement, so long as it contains provisions on investment protection and a right to resort to investor-State arbitration.

“Article 2. Interpretation

“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.

“Article 3. Use of the UNCITRAL Rules on Transparency

“Each Contracting State agrees to apply the UNCITRAL Rules on Transparency to investor-State arbitration [under the UNCITRAL Arbitration Rules] conducted on the basis of a treaty for the protection of investments between Contracting States to this Convention. Nothing in this agreement prevents Contracting States from applying standards that provide a higher degree of transparency than the Rules on Transparency.”

C. Possible actions by States

20. At its fifty-third and fifty-fourth sessions, the Working Group considered the possible actions that could be undertaken by States to ensure applicability of a legal standard on transparency to existing multilateral or bilateral investment treaties (A/CN.9/712, paras. 85-86, A/CN.9/717, paras. 42-46). At the fifty-fourth session of the Working Group, joint interpretative declaration by States Parties pursuant to article 31 (3) (a) Vienna Convention as well as amendment or modification to treaties according to article 39 ff. Vienna Convention were mentioned as possible instruments to ensure application of the transparency standard to existing investment treaties (A/CN.9/717, paras. 42-45).

21. As requested by the Working Group, models of such instruments are proposed below. The drafting options have been attempted to be as simple as possible to only provide an illustration of such instruments. They have also been drafted in a very generic form, so that they could be applied with the necessary adaptations to a diversity of investment agreements.

22. Possible draft models of joint interpretative declarations pursuant to article 31 (3) (a) Vienna Convention could read as follows.

[Model I]

“Understanding of Government of [__] and Government of [__] on the interpretation and application of certain provisions of the __ [name of the investment treaty]

“The provision[s] of articles [__] of the __ [name of the investment treaty] permitting an investor from a Contracting State to initiate an arbitration against another Contracting State [under the UNCITRAL Arbitration Rules] in the context of the __ [name of investment treaty] shall be understood as including the application of the UNCITRAL Rules on Transparency. The Governments of the Contracting States [listing the names] have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant treaty provisions.”

[Model 2]

“The [Governments of the Contracting States to the [name of the investment treaty] share the understanding that the term ‘UNCITRAL Arbitration Rules’ as used in [specific articles] of the [name of the treaty] includes the UNCITRAL Rules on Transparency.”

23. Possible draft models of amendment or modification pursuant to article 39 ff. Vienna Convention on the Law of Treaties could read as follows.

[Model 1]

“Agreement on an Amendment to the ____ [name of the investment treaty] between the Government of [____] and the Government of [____]

“The Government of [____] and the Government of [____] agreed to make the following amendments to the ____ [name of the investment treaty]

“Article ____ [number to be inserted] of the Agreement is amended as follows:

“() The UNCITRAL Rules on Transparency shall apply to arbitrations initiated [under the UNCITRAL Arbitration Rules] on the basis of the [name of the investment treaty].”

[Model 2]

“Protocol Amending the [name of the investment treaty] between the Government of [____] and the Government of [____], signed on [date]

“The Government of [____] and the Government of [____],

“Considering:

“That a ____ [name of the investment treaty] between the two Governments was signed on ____ [date],

“That, during the period of validity of the Agreement, there has arisen the need to introduce certain amendments to achieve transparency in investor-State disputes arising under the Agreement,

“Agree:

“To conclude the following Protocol amending the [name of the investment treaty] between the Government of [____] and the Government of [____], signed on [date].

“Article ____ [number to be inserted]

“Article ____ [number to be inserted] of the Agreement is amended as follows

“() The UNCITRAL Rules on Transparency shall apply to arbitrations initiated [under the UNCITRAL Arbitration Rules] on the basis of the [name of the investment treaty].”

**C. Note by the Secretariat on settlement of commercial disputes:
Transparency in treaty-based investor-State arbitration — Comments by the
International Centre for Settlement of Investment Disputes (ICSID), submitted to
the Working Group on Arbitration and Conciliation at its fifty-fifth session
(A/CN.9/WG.II/WP.167)**

[Original: English]

In preparation for the fifty-fifth session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to continue its work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration, the International Centre for Settlement of Investment Disputes (ICSID) provided, on 5 August 2011, information to the Secretariat regarding its rules and practices in the field of transparency. The text of the ICSID comments is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex — ICSID Comments

1. The International Centre for Settlement of Investment Disputes (ICSID) herein provides a description of its practice with transparency in treaty-based investor-State arbitration in light of the Secretariat's document A/CN.9/WG.II/WP.166 and its addendum.¹
2. ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention). Currently, there are 147 ICSID Contracting States. The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the Administrative Council of the Centre and comprise the Administrative and Financial Regulations, the Rules of Procedure for the Institution of Proceedings, the Rules of Procedure for Conciliation Proceedings and the Rules of Procedure for Arbitration Proceedings (the Arbitration Rules).
3. Under the ICSID Convention, the Centre provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The Administrative Council of the Centre has also adopted Additional Facility Rules (the AF Rules) authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention. These rules may be used when one of the parties is not a Contracting State or a national of a Contracting State (such as Canada or Mexico for example) or when at least one of the parties is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.
4. ICSID also administers arbitration proceedings governed by the UNCITRAL Arbitration Rules on an *ad hoc* basis such as in the context of NAFTA.

¹ Dated 29 July 2011.

1. Initiation of arbitral proceedings

5. In accordance with Regulation 22(1) of the Administrative and Financial Regulations (the Regulations) “[t]he Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.”

6. Similarly, pursuant to Regulation 23(1), “[t]he Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration. In these he shall enter all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.”

7. In accordance with the above, upon registration of a request for conciliation, arbitration, an application for post-award remedies under the ICSID Convention or upon granting access to the Additional Facility Rules, the Centre indicates on its website² the date of registration of the request or application, the name of the parties and the subject matter of the dispute. The Centre updates information as required by Regulation 23 throughout the proceedings. Updates are made daily. The Centre also opens a register for each case which contains similar information that is now available on its website. (See Annex 1 to this document for an actual example of available procedural details and information available for a proceeding on the ICSID website.)

2. Publication of documents and arbitral awards

8. Pursuant to Regulation 22(2), “[i]f both parties to a proceeding consent to the publication of: (a) reports of Conciliation Commissions; (b) arbitral awards; or (c) the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.”

9. Regarding documents submitted by the parties to the arbitral tribunal, minutes or records of proceedings, the Centre does not post those documents on its website unless both parties have agreed to do so.³

10. Regarding documents issued by the arbitral tribunal, Article 48(5) of the ICSID Convention provides that “[t]he Centre shall not publish the award without the consent of the parties” and Arbitration Rule 48(4) specifies that “[t]he Centre shall not publish the award without the consent of the parties. The Centre shall,

² INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org>. All of the decisions, orders and awards referred to herein are available on the ICSID website, unless otherwise specified.

³ See *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, in which the parties’ submissions in the arbitration proceedings were posted on the ICSID website upon their request although the respondent had reserved its right to redact its submissions for purposes of deleting sensitive information before publication.

however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.” AF Arbitration Rule 53(3) contains a similar provision.

11. On that basis, the practice of the Centre is to request the parties’ advance consent to publication at the time of the first session. If the parties do not consent, ICSID requests their consent when a tribunal issues a specific decision or an award. This practice has also been extended in some cases to procedural orders. If a party does not consent to the publication by the Centre, ICSID will publish excerpts of the legal reasoning of the award, any decision deemed to be part of the award and decisions concluding post-award remedies proceedings. These are published in the *ICSID Review—Foreign Investment Law Journal* and on the website.

12. ICSID commenced a project in 2010 to make more ICSID “jurisprudence” publicly available. The purpose of the publication project is to provide access to as much ICSID case law as possible, including procedural and substantive rulings. To that end, the Secretariat has been contacting parties in concluded cases to seek their authorization to publish decisions, orders and awards not yet published by the Centre. This case law is posted on the Centre’s website if both parties agree to publication. ICSID is aware that parties may view some information as confidential, in which case it seeks their consent to publish the rulings with appropriate extracts and a general description of the relevant information, in lieu of the full text of the ruling. With the consent of the parties, the Centre was thus able to publish more awards, decisions, and orders on its website.

13. The above provisions that are applicable to the Centre do not prevent a disputing party from releasing case-related documents that are not subject to any confidentiality agreement or to a confidentiality order.⁴ There is no prohibition *per se* against the parties’ releasing such information as the Convention and the AF Rules do not contain any general requirement of confidentiality or privacy as might be found in other arbitration rules. Conversely, there is no requirement of transparency. Generally speaking, a practice has emerged in cases according to which the parties enter into confidentiality agreements whereby they agree that some documents be considered confidential and/or ought to be redacted for the purpose of the proceedings and/or ought not to be made public. When the parties do not agree, the tribunal may rule on the matter if requested.⁵ There have been instances where a party has asked a tribunal to prevent the other party from releasing information and case documents so as not to prejudice the integrity of the proceeding or to exacerbate the dispute. Some tribunals dealing with such a request

⁴ For Additional Facility cases and the practice of Canada and the USA, see UNCITRAL, Settlement of commercial disputes, Transparency in treaty-based investor-State arbitration, Comments of the Governments of Canada and of the United States of America on transparency in treaty-based investor-State arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA), Fifty-fourth session, New York, (Feb. 7-11, 2011), United Nations Document A/CN.9/WG.II/WP.163 (Dec. 7, 2010).

⁵ See, e.g., *Giovanna a Beccara and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural order No. 3 (Confidentiality Order) (Jan. 27, 2010) [“*Giovanna a Beccara Order*”].

have directed the parties not to publicly release case documents, while others have allowed such publication.⁶

14. Finally, in accordance with ICSID Arbitration Rule 6(2) and AF Arbitration Rule 13(2), arbitrators are bound to keep confidential all information coming to their knowledge as a result of their participation in the proceedings, including the content of the award. In accordance with ICSID Arbitration Rule 16(1) and AF Arbitration Rule 23(1), deliberations of the tribunal are secret.

3. Submissions by non-disputing parties (“*amicus curiae*”) in arbitral proceedings

15. A provision on submissions by non-disputing parties was introduced to the ICSID Arbitration Rules and AF Arbitration Rules by a 2006 amendment.⁷ Prior to that date, there was no express provision in the Rules allowing *amicus curiae* but some tribunals had allowed such submissions.

16. The first *amicus* request was submitted in *Methanex v. USA*, in which the Tribunal accepted such submissions in early 2001 notwithstanding the Claimant’s objections.⁸ This NAFTA case was administered by ICSID and governed by the 1976 UNCITRAL Arbitration Rules. The Tribunal relied on UNCITRAL Arbitration Rule 15(1), allowing a tribunal to conduct a proceeding in the manner it considers appropriate. This approach was adopted the same year by the Tribunal in *UPS v. Canada*.⁹ These cases were later followed by the issuance of guidelines by the NAFTA Free Trade Commission in October 2003 confirming a tribunal’s discretion to accept non-disputing party submissions.¹⁰

17. In proceedings under the ICSID Convention, the question of submissions by non-disputing parties was first raised in *Aguas del Tunari v. Bolivia* in 2002, in which the Tribunal rejected a request to file non-disputing party submissions holding that it did not have such power in the absence of consent by the parties.¹¹ However, in *Suez et al. v. Argentina*, the Tribunal held that it was entitled to do so

⁶ See, e.g., *Biwater Gauff Tanzania (Ltd.) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural order No. 3 (Sept. 29, 2006) (in which the Tribunal decided finally to order the parties to refrain from disclosing minutes of hearings, document produced in the proceedings, memorials and procedural correspondence.) *But see*, *Giovanna a Beccara* Order, *supra* note 5, para. 73 (in which the Tribunal decided the matter on a case by case basis trying “to achieve a solution that balances the general interest for transparency with specific interest for confidentiality of certain information and/or documents.”).

⁷ See Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations*, 21 ICSID REV.—FILJ 427 (2006). For a discussion on non-disputing party submissions and practical considerations, see Eloïse Obadia, *Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*, 22 ICSID REV.—FILJ 349 (2007).

⁸ *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* (Jan. 15, 2001) available at US DEPARTMENT OF STATE, www.state.gov/s/l/c5818.htm.

⁹ *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL (NAFTA), Decision on *Amici Curiae* (Oct. 17, 2001) available at FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, www.international.gc.ca/trade-agreements-accords-commerciaux/diff-parcel.aspx?lang=en.

¹⁰ For more recent applications, see United Nations Document A/CN.9/WG.II/WP.163, *supra* note 4.

¹¹ *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, para. 17 (Oct. 21, 2005).

based on its inherent powers under Article 44 of the ICSID Convention and because the case was deemed to involve matters of public interest.¹² In 2005, five NGOs filed amicus briefs in that case, notwithstanding the Claimants' objections.¹³ The same reasoning was applied in another case against Argentina in March 2006.¹⁴

18. It is also worth noting that Article 10.20.3 of CAFTA (2004) provides for non-disputing party submissions.¹⁵

19. In 2006, ICSID introduced a new provision in Arbitration Rule 37(2) which reads as follows:

"After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

20. A similar provision was introduced under Article 41(3) of the ICSID Additional Facility Arbitration Rules.

21. Between 2006 and June 30, 2011, there have been 6 ICSID cases involving amicus applications¹⁶ and two CAFTA cases in which invitations were made for

¹² *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, paras. 10-23 (May 19, 2005) ["Suez Order 2005"].

¹³ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an *Amicus Curiae* Submission (Feb. 12, 2007) ["Suez Order 2007"].

¹⁴ *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae* (March 17, 2006) ["Aguas Order"].

¹⁵ Dominican Republic-Central America-United States Free Trade Agreement (Jan. 28, 2004), 43 I.L.M. 514 (2004) at art. 10.20.3 ("The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party."). Article 10.20 CAFTA establishes a distinction between a non-disputing party, *i.e.* a contracting State Party to CAFTA which may make oral and written submissions to the tribunal regarding the interpretation of the Agreement but that is not a disputing party to the dispute, and a non-disputing party.

applications, *inter alia* through postings on the ICSID website, and in which submissions were filed.¹⁷ Recently, the following announcement was posted on the ICSID website:

"In accordance with Article 10.20.3 of the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA-US) and ICSID Arbitration Rule 37(2), the Tribunal invites any person or entity that is not a Disputing Party in these arbitration proceedings or a Contracting Party to DR-CAFTA-US to make a written application to the Tribunal for permission to file submissions as an amicus curiae.

All such written applications should:

(1) be emailed to ICSID at icsidsecretariat@worldbank.org by Wednesday, 2 March 2011;

(2) in no case exceed 20 pages in all (including the appendix described below);

(3) be made in one of the languages of these proceedings, i.e. English or Spanish;

(4) be dated and signed by the person or by an authorized signatory for the entity making the application verifying its contents, with address and other contact details;

(5) describe the identity and background of the applicant, the nature of any membership if it is an organization and the nature of any relationships to the Disputing Parties and any Contracting Party;

(6) disclose whether the applicant has received, directly or indirectly, any financial or other material support from any Disputing Party, Contracting Party or from any person connected with the subject-matter of these arbitration proceedings;

(7) specify the nature of the applicant's interest in these arbitration proceedings prompting its application;

(8) include (as an appendix to the application) a copy of the applicant's written submissions to be filed in these arbitration proceedings, assuming permission is granted by the Tribunal for such filing, such submissions to address only matters within the scope of the subject-matter of these arbitration proceedings; and

*(9) explain, insofar as not already answered, the reason(s) why the Tribunal should grant permission to the applicant to file its written submissions in these arbitration proceedings as an amicus curiae."*¹⁸

22. The process to submit a non-disputing party's brief is divided into two stages by ICSID Arbitration Rule 37(2): an application to the tribunal for leave to file a

¹⁶ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22; *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19; *AES Summit Generation Limited v. Republic of Hungary*, ICSID Case No. ARB/01/4; and *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12.

¹⁷ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17.

¹⁸ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Procedural Order Regarding Amici Curiae (Feb. 2, 2011), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement81>.

brief under the conditions described above; and the actual submission, if the tribunal has granted the non-disputing party's application. In its decision on granting the requested leave to file, the tribunal is guided, among other things, by the criteria set forth in Rule 37(2). In some instances, the actual submission is attached to the application to file. This may be allowed under specific rules applicable to the particular case, such as respective rules on non-party submissions under NAFTA and CAFTA. A tribunal sometimes establishes requirements or guidelines for the non-disputing party's submission after agreeing to the application. Procedural safeguards are also put in place by tribunals when a non-disputing party is allowed to file a submission in order to preserve the integrity of the proceedings.¹⁹ Disputing parties are usually allowed to provide observations on the non-disputing parties' applications and submissions.²⁰ The tribunal's powers to be the judge of the admissibility of any evidence adduced in the case and of its probative value under Arbitration Rule 34(1) extend to the non-disputing party's written submission. Therefore, it is within the tribunal's discretion to admit into evidence the non-disputing party's written submission once filed and whether to rely on it in its final determination of the case.

23. The right to submit amicus briefs does not grant any other procedural rights.²¹ Hence, there is no automatic access to documents,²² nor is there automatic access to hearings.²³ There has been a case where both disputing parties agreed that an amicus could attend part of the hearing and might be called on to clarify its submission at the hearing. So far, the practice has been that the disputing parties bear the costs related to the amicus submissions.

¹⁹ See e.g., *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010), para. 28 (“the Tribunal must ensure that [the non-disputing party (NDP) participation] is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process.”).

²⁰ See e.g., *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (Feb. 2, 2007), paras. 60-61. See also *Foresti Award*, *supra* note 19, para. 29 (“the Tribunal decided that, in view of the novelty of the NDP procedure, after all submissions, written and oral, had been made the Tribunal would invite the parties and the NDPs to offer brief comments on the fairness and effectiveness of the procedures adopted for NDP participation in this case. The Tribunal would then include a section in the award, recording views (both concordant and divergent) on the fairness and efficacy of NDP participation in this case and on any lessons learned from it.”).

²¹ Or, in the words of the *Biwater Tribunal*, a “‘non-disputing’ party does not become a party to the arbitration by virtue of a tribunal’s decision under Rule 37, but is instead afforded a specific and defined opportunity to make a particular submission.” *Biwater Procedural Order No. 5*, *supra* note 20, para. 46.

²² Contrast *Suez Order 2007*, *supra* note 13, para. 25 (in which no access to documents was granted *inter alia* because “the role of an *amicus curiae* is not to challenge arguments or evidence put forward by the Parties”), to *Foresti Award*, *supra* note 19, para. 28 (in which the Tribunal asked the parties to provide the *amici* with redacted versions of their pleadings “to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues.”).

²³ *Suez Order 2005*, *supra* note 12, paras. 4-7, and *Aguas Order*, *supra* note 14, paras. 5-8 (both denying access to the non-disputing party upon the objection of the Claimants). *Biwater Procedural Order No. 5*, *supra* note 20, para. 72 (access denied upon the objection of the Claimant but the Tribunal noted that it “reserves the right to ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or evidence, which might assist in better understanding the Petitioners’ position, whether before or after the hearing.”).

4. Hearings

4.1 Hearings open to the public

24. Before 2006, there were no clear provisions in the ICSID Rules allowing persons other than the counsel and the parties to attend hearings. The tribunal would decide with the consent of both parties who could attend other than the representatives and counsel for the parties.

25. In 2006, it was made clear in ICSID Arbitration Rule 32(2) that the tribunal may allow other persons to attend or observe hearings unless either party objects. If one party objects, the tribunal cannot proceed to allow those persons to attend.²⁴ An initial proposal made by the Centre aimed at giving some discretion to the tribunal, but this encountered strong opposition. ICSID Arbitration Rule 32(2) reads:

“Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.”

26. A similar provision was introduced under Article 39(2) of the ICSID Additional Facility Arbitration Rules.

27. NAFTA and Article 10.21.2 of CAFTA provide for hearings open to the public. Open hearings are subject to appropriate logistical arrangements to limit disruption and protect confidential information. In practice, some hearings, usually in the context of NAFTA or CAFTA cases, were broadcast in a separate room with a closed-circuit television feed²⁵ or were webcast.²⁶ Television feed and webcast are interrupted whenever confidential information is discussed.

4.2 Publication of transcript of hearings

28. The publication of transcripts of hearings follows the provisions applicable to case documents as described under item 2 above.

²⁴ See *supra* note 23 for an illustration.



²⁵ See e.g., *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA).

²⁶ See e.g., the webcast available on the ICSID website of the hearing in *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Public Hearing (May 18, 2011), ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement89>. The webcast initiative is also part of the Centre’s continuing effort to promote a broader understanding of investment dispute settlement under the ICSID Convention, Rules and Regulations, and to further the development of international investment law.

Annex I

Procedural Details

Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12)

 ICSID International Centre for Settlement of Investment Disputes		Home Site Map Contact Us	
Home > Cases > Search ICSID Cases > Case Details			
About ICSID		Case Details	
Member States		Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12)	
Rules		Proceeding Decisions & Awards Procedural Details	
Cases		Original Arbitration Proceeding	
List of Cases		June 15, 2009 The Acting Secretary-General registers a request for the institution of arbitration proceedings.	
Search Cases		November 18, 2009 The Tribunal is constituted. Its members are: V.V. Veeder (British), President; Brigitte Stern (French); Guido Santiago Tawil (Argentine).	
Search Online Decisions and Awards		January 04, 2010 The Respondent files preliminary objections.	
How to File a Request		February 26, 2010 The Claimant files a response on preliminary objections.	
Schedule of Fees		March 31, 2010 The Respondent files a reply on preliminary objections.	
Documents		May 13, 2010 The Claimant files a rejoinder on preliminary objections.	
Publications		May 31, 2010 - June 01, 2010 The Tribunal holds a hearing on the Respondent's preliminary objections in Washington, D.C.	
		June 10, 2010 The Tribunal issues a procedural order concerning <i>Amicus Curiae</i> submissions on preliminary objections.	
		August 02, 2010 The Tribunal issues a decision on the Respondent's preliminary objections under CAFTA Articles 10.20.4 and 10.20.5.	
		September 27, 2010 The Tribunal issues a procedural order concerning production of documents.	
		October 15, 2010 The Respondent files a memorial on jurisdiction.	
		December 31, 2010 The Claimant files a counter-memorial on jurisdiction.	
		January 26, 2011 The Tribunal issues a procedural order concerning production of documents.	
		January 31, 2011 The Respondent files a reply on jurisdiction.	
		February 02, 2011 The Tribunal issues a procedural order concerning a non-disputing party submissions.	
		March 02, 2011 A non-disputing party files an application pursuant to ICSID Arbitration Rule 37(2). The Claimant files a rejoinder on jurisdiction.	
		March 12, 2011 The Tribunal issues a procedural order concerning production of documents.	
		March 23, 2011 The Tribunal issues a procedural order concerning the admissibility of new evidence. The Tribunal issues a procedural order concerning production of documents. The Tribunal issues a procedural order concerning a non-disputing party submission.	

March 31, 2011	The Tribunal issues a procedural order concerning production of documents.
May 02, 2011 - May 04, 2011	The Tribunal holds a hearing on the Respondent's preliminary objections in Washington, D.C.
June 10, 2011	The parties file post-hearing briefs and statement of costs.
June 24, 2011	Each party files observations on the other party's statement of costs.



**D. Report of the Working Group on Arbitration and Conciliation on the work of its
fifty-sixth session (New York, 6-10 February 2012)
(A/CN.9/741)**

[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 disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)¹ 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.²

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

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

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

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.³ Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State Party to the investment treaty should be regarded as falling within the mandate of the Working Group. Whether the legal standard on transparency should deal with such a right of intervention and, if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group.⁴

3. 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.168, paragraphs 5-12.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its fifty-sixth session in New York, from 6-10 February 2012. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Greece, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mauritius, Mexico, Nigeria, Norway, Pakistan, Philippines, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, South Africa, Spain, Thailand, Turkey, Uganda, Ukraine, 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: Bangladesh, Belarus, Belgium, Croatia, Cuba, Democratic Republic of the Congo, Ecuador, Finland, Indonesia, Iraq, Kuwait, Luxemburg, Mozambique, Myanmar, Netherlands, Nicaragua, Panama, Peru, Romania, Slovakia, Sweden and Switzerland.

6. The session was also attended by observers from Palestine and the European Union.

7. 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 Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Energy Charter Secretariat, Organisation for Economic Co-operation 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, American Arbitration

³ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

⁴ Ibid., para. 202.

Association (AAA), American Bar Association (ABA), Arab Association of International Arbitration (AAIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association droit et méditerranée (Jurimed), Association of the Bar of the City of New York (ABCNY), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIARB), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), Institute of International Commercial Law (IICL), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Arbitration Institute (IAI), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Court of Arbitration (ICC), International Federation of Commercial Arbitration Institutions (IFCAI), International Insolvency Institute (IIT), International Institute for Sustainable Development (IISD), London Court of International Arbitration (LCIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators, New York State Bar Association (NYSBA), Pakistan Business Council (PBC), Queen Mary University — London School of International Arbitration (QMUL), Swedish Arbitration Association (SAA), Swiss Arbitration Association (ASA), Tehran Regional Arbitration Centre (TRAC) and Union des Avocats Européens (UAE).

8. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. Shotaro Hamamoto (Japan)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.168); (b) a note by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.169 and its addendum); (c) a note by the Secretariat reproducing comments by arbitral institutions regarding the establishment of a repository of published information ("registry") (A/CN.9/WG.II/WP.170 and its addendum).

10. 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 legal standard 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

11. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.169 and its addendum; and A/CN.9/WG.II/WP.170 and its addendum). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

IV. Preparation of a legal standard on transparency in treaty-based investor-State arbitration

12. The Working Group recalled the mandate given by the Commission at its forty-third session, set out above under paragraph 1, and the importance of ensuring transparency in treaty-based investor-State arbitration was reiterated. The Working Group resumed discussions on the preparation of a legal standard on transparency in treaty-based investor-State arbitration on the basis of document A/CN.9/WG.II/WP.169 and its addendum, and the proposed draft rules on transparency contained therein.

A. Draft rules on transparency in treaty-based investor-State arbitration

1. Article 1 (1) — Applicability of the rules on transparency

13. The Working Group considered article 1 (1) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169.

Article 1 (1) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169

14. Article 1 (1) contained two options, and variants. Under option 1, the opt-out solution, the rules on transparency would apply as an extension of the UNCITRAL Arbitration Rules under investment treaties providing for arbitration under the UNCITRAL Arbitration Rules, unless the investment treaty provided that the rules on transparency did not apply. That option contained two variants. Variant 1 provided for the application of the rules on transparency in relation to treaties concluded after the date of adoption of the rules (referred to as “future investment treaties”). Variant 2 provided for the application of the rules on transparency to both future treaties and, in some instances, treaties concluded before the date of adoption of the rules (referred to as “existing investment treaties”). Under option 2, the opt-in solution, the rules on transparency would apply when High Contracting Parties (referred to as “Party (ies)”) to an investment treaty expressly consent to their application. Option 2 contained two variants. Variant 1 provided for an application of the rules on transparency to arbitration irrespective of the applicable arbitration rules. Variant 2 limited the scope of application of the rules on transparency to arbitration under the UNCITRAL Arbitration Rules.

15. It was pointed out that options 1 and 2 were establishing different policies. Option 1 provided, as a principle, application of the transparency rules unless the Parties to an investment treaty agreed differently, thereby putting the burden of negotiating exclusion of the transparency rules on the Party advocating exclusion. In contrast, option 2 provided for the application of the rules on transparency only in

case of express agreement of the Parties to an investment treaty, thereby putting the burden of negotiating application of transparency on the Party advocating for transparency.

16. A widely shared view was that, in light of the mandate given by the Commission to the Working Group, article 1 (1) should be drafted so as to permit a wide application of the rules on transparency. The view was expressed that that application must be in line with principles of international law that States could not be bound unless they consented. Diverging views were expressed as to the manner in which consent must be expressed.

Opt-out solution, future treaties (option 1, variant 1)

17. Views were expressed in favour of option 1, variant 1. It was clarified that the consent to apply the rules on transparency would be manifested when, in future investment treaties, parties would include a reference to the UNCITRAL Arbitration Rules, being on notice that the UNCITRAL Arbitration Rules included the rules on transparency (A/CN.9/736, para. 20). That solution was said to constitute the best means to carry out the mandate given by the Commission to the Working Group to foster transparency in treaty-based investor-State arbitration. It was further said that, while the rules on transparency would apply in conjunction with the UNCITRAL Arbitration Rules, nothing would preclude Parties to an investment treaty from applying those rules widely, irrespective of the applicable arbitration rules.

18. It was clarified that option 1, variant 1 was not intended to make the rules on transparency applicable to investment treaties concluded before the date of adoption of the transparency rules. With a view to clarifying that option 1, variant 1, would not apply to existing investment treaties, it was suggested to replace the bracketed language “[applicable version of the]” by a reference to the 2010 UNCITRAL Arbitration Rules.

Opt-out solution, future and certain existing treaties (option 1, variant 2)

19. Concerns were expressed that option 1, variant 1, did not contain a rule on the question of applicability of the rules on transparency to existing investment treaties. It was pointed out that option 1, variant 2, contained an additional sentence providing that “[T]he Rules on Transparency shall also apply (...), if the treaty provides for application of the version of the UNCITRAL Arbitration Rules as in effect at the date of commencement of the arbitration”. Those who underlined the importance of referring to existing investment treaties pointed out that approximately three thousand investment treaties were in force to date, and most investor-State arbitration in the coming years would arise under those treaties. It was said that variant 2 achieved the goal of wider application of the rules on transparency, and that it was in line with the mandate given by the Commission to the Working Group. It was also said that, as the rules on transparency would apply only where the existing investment treaty allowed for it, option 1, variant 2, would not carry with it any retroactive effect.

20. It was suggested that a reference in investment treaties to the “UNCITRAL Arbitration Rules” without any further indication of a version of the Rules could be interpreted as a “dynamic reference”, encompassing further possible evolution of the Rules. It was said that very few investment treaties included wording as

proposed under option 1, variant 2. Therefore, as a matter of drafting and to ensure wider application of the rules on transparency to arbitration under existing treaties, it was proposed to provide under option 1, variant 2, that the rules on transparency would apply where the investment treaty did not contain express reference to the 1976 version of the UNCITRAL Arbitration Rules.

21. However, reservations were expressed in relation to option 1, variant 2. It was said that the 1976 version of the UNCITRAL Arbitration Rules did not contain a provision on their possible evolution. In that context, it was noted that article 1 (2) of the UNCITRAL Arbitration Rules, as revised in 2010, provided for a presumption that the 2010 Rules would apply to an arbitration agreement concluded after 15 August 2010, but that that presumption would not apply where the arbitration agreement had been concluded by accepting after 15 August 2010 an offer made before that date.

22. Further, it was said that, in order to ensure application of the transparency rules to existing investment treaties, it might be necessary to include a reference to the transparency rules in the UNCITRAL Arbitration Rules. It would not be certain that arbitral tribunals would apply the transparency rules in particular in cases where the existing treaties would refer to the “1976 UNCITRAL Arbitration Rules”, since arbitral tribunals might consider that the 1976 UNCITRAL Arbitration Rules were different from the 1976 UNCITRAL Arbitration Rules amended in, for instance, 2013, to incorporate the rules on transparency.

23. Therefore, for existing investment treaties, it was suggested that solutions such as those described in paragraphs 15 to 23 of document A/CN.9/WG.II/WP.166/Add.1 should be further considered.

Opt-in solution

24. Views were expressed in favour of option 2 for the reason that that approach would ensure that States had taken the conscious decision to apply those rules. It was recalled that the deliberations on the basis of rules had been agreed to by those initially in favour of a legal standard in the form of guidelines on the understanding that the rules on transparency would only apply where there was clear and specific reference to them (opt-in solution) (see A/CN.9/717, paras. 26 and 58).

25. It was also said that the opt-in solution complied with public international law and practice. It was pointed out that conclusion of investment treaties resulted in obligations by States authorized through the necessary domestic process. Those obligations could not be subsequently modified by merely including an appendix to the UNCITRAL Arbitration Rules.

Opt-in solution, applicability irrespective of the selected arbitration rules (option 2, variant 1)

26. In support of option 2, variant 1, it was said that application of the rules on transparency irrespective of the selected arbitration rules would lead to a broader application of the rules and, therefore, would best fulfil the mandate given to the Working Group to foster transparency in treaty-based investor-State arbitration.

Opt-in solution, applicability limited to the UNCITRAL Arbitration Rules (option 2, variant 2)

27. Views were expressed in favour of option 2, variant 2 on the basis that transparency rules should be drafted in line with the fundamental principle of public international law that States Parties to investment treaties should not be bound unless they explicitly consented in the investment treaty. To those delegations, option 2, variant 2 would also provide for consistency and predictability.

Proposals

28. After discussion, the Working Group noted that, at its current session, option 1 received more support than at its fifty-fifth session (A/CN.9/736, para. 30), and that option 2 also received support. With a view to reconcile the two approaches, various proposals were made.

29. It was proposed to prepare both an appendix to the UNCITRAL Arbitration Rules and a stand-alone text on transparency. The proponents of that approach said that it would promote wide application of the rules on transparency. It was clarified that broad discretion had been left by the Commission to the Working Group regarding the form that the legal standard on transparency could take, including taking the form of an annex to the UNCITRAL Arbitration Rules.⁵ In support of the form of a stand-alone text, it was further said that arbitral institutions referred to in document A/CN.9/WG.II/WP.170 and Add.1 had commented that the rules on transparency, in their current form, could operate in conjunction with their own institutional rules. It was questioned whether preparing two separate instruments was necessary, as the parties would always be free to opt into the transparency regime whether that regime was set out in stand-alone rules or in an appendix to the UNCITRAL Arbitration Rules.

30. It was suggested to include in the transparency rules a provision encouraging arbitral tribunals to use them as guidelines for the conduct of the proceedings. Questions were raised about the necessity of such a provision.

31. A further proposal was made to combine both options along the following lines: “[T]he Rules on Transparency shall apply to investor-State arbitration commenced under a treaty providing for the protection of investments or investors where the Parties have agreed that the Rules on Transparency shall apply either expressly in the treaty, whether originally or by an amendment of the treaty, or reciprocal declarations by the Parties to the treaty, or otherwise, subject to such modification as the Parties may agree or have agreed. If the arbitration is conducted under the UNCITRAL Arbitration Rules, and the Parties agree that the 2010 UNCITRAL Arbitration Rules shall apply, that shall be considered to incorporate also the Rules on Transparency”.

32. After discussion, the following approach had emerged. Article 1 (1) could contain a provision emphasizing first the consensual application of the rules on transparency, by providing that they would apply when agreed to by the Parties to an investment treaty or agreed to by the disputing parties. In addition, regarding future investment treaties, the transparency rules would apply if such treaties

⁵ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 314.

contained a reference to the UNCITRAL Arbitration Rules, unless the Parties to the treaty agreed otherwise. It was further understood that an express reference to the 1976 or 2010 versions of the UNCITRAL Arbitration Rules would not carry any presumption that the rules on transparency applied. Regarding existing investment treaties, views diverged on whether article 1 (1) should contain language preserving application of the rules on transparency where the investment treaty permitted application of the most up-to-date version of the UNCITRAL Arbitration Rules, or whether article 1 (1) should remain silent on that matter.

Revised draft of article 1 (1) (“the revised proposal”)

33. With a view to reflecting the discussions of the Working Group, the following revised draft of article 1 (1) was proposed: “Subject to applicable international law rules on treaty interpretation: (1) These Rules shall apply to investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors (“treaty”) when (a) the Parties to the treaty have agreed to their application; or (b) the disputing parties have agreed to their application. (2) In particular, in a treaty concluded after [date of adoption of the Rules on Transparency], a reference in the treaty to the UNCITRAL Arbitration Rules shall be presumed to include the Rules on Transparency, unless the Parties to the treaty have agreed otherwise, such as through a reference to a particular version of the UNCITRAL Arbitration Rules that does not include the Rules on Transparency”.

34. The Working Group considered the substance of the proposal as contained above in paragraph 33 (referred to as “the revised proposal”).

Paragraph (1) of the revised proposal — Agreement of Parties to an investment treaty or of disputing parties

35. Paragraph (1) of the revised proposal provided that the rules on transparency applied when the Parties to an investment treaty or the disputing parties agreed to their application. It permitted application of the rules on transparency to arbitration widely, as it did not limit the application of the transparency rules to arbitration under the UNCITRAL Arbitration Rules.

36. It was proposed that paragraph 1 (a) of the revised proposal be amended to refer to the express consent of Parties to the investment treaty, instead of merely consent, in order to provide an unambiguous rule as to how the consent of Parties should be expressed. In that context, the view was expressed that the chapeau of the revised proposal, which read “subject to applicable international law rules on treaty interpretation:” was not desirable as it could provide a basis for interpretation by the arbitral tribunal that Parties to an investment treaty had given consent where they had not. It was proposed to delete the chapeau.

37. It was suggested that paragraph 1 (b) of the revised proposal, which aimed at permitting application of the transparency rules by the disputing parties where they so agreed, should be deleted for the reason that it might lead to confusion as to the scope of application of the rules on transparency. Further, it was questioned whether the disputing parties could decide to apply the rules on transparency where the Parties to the investment treaty themselves had not agreed to apply them.

38. It was also noted that paragraph (1) of the revised proposal did not include any time frame, and questions were raised regarding the impact of that provision on existing investment treaties (see below, paragraphs 47 to 53).

Paragraph (2) of the revised proposal — Application to future investment treaties

39. Paragraph (2) of the revised proposal provided that, for future investment treaties, a reference to the UNCITRAL Arbitration Rules in such treaties would be understood as including a reference to the rules on transparency. It clarified that, if the parties referred to the 2010 version of the UNCITRAL Arbitration Rules, the rules on transparency would not apply.

40. It was said that the presumption in paragraph (2) that the transparency rules would apply when the investment treaty contained a reference to the UNCITRAL Arbitration Rules raised questions as to the form that the transparency rules would take. It was said that such a presumption implied that the UNCITRAL Arbitration Rules be amended in order to include the transparency rules. It was questioned whether amending the UNCITRAL Arbitration Rules was part of the mandate of the Working Group. In response, it was clarified that the Commission, when it agreed that the issue of transparency should be addressed by future work, stated that the preparation of such an instrument might include preparation of an annex to the UNCITRAL Arbitration Rules.⁶

41. It was suggested that the question of the form the transparency rules would take, i.e., stand-alone rules or appendix to the UNCITRAL Arbitration Rules, should be considered before undertaking work premised on the rules on transparency being incorporated into the UNCITRAL Arbitration Rules, as a first and separate issue. In response, the view was expressed that that issue was intrinsically linked with the general issue dealt with in article 1 (1).

Reference to existing investment treaties in article 1 (1)

42. The Working Group turned its attention to the question whether article 1 (1) should deal with the question of the application of the rules on transparency to existing investment treaties. It was recalled that, regarding existing investment treaties, views diverged on whether article 1 (1) should contain language preserving application of the rules on transparency where the investment treaty permitted application of the most up-to-date version of the UNCITRAL Arbitration Rules (referred to in the discussions as the “dynamic interpretation of investment treaties”), or whether article 1 (1) should remain silent on that matter (see above, paragraph 20). Diverging views were expressed, that fell into three categories: those in favour of including a provision to the effect that the transparency rules would not apply to existing treaties by a dynamic interpretation of those investment treaties; those expressing preference for permitting application of the rules on transparency to existing investment treaties, where so permitted, by a dynamic interpretation of the investment treaties; and lastly, those in support of not providing any rules on that matter.

⁶ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, paras. 313-314.

-Application to future investment treaties only

43. Views were expressed in favour of limiting the scope of application of the rules on transparency to future investment treaties only. It was recalled that, for existing investment treaties, the Working Group had agreed to explore a number of solutions, including recommendations or a convention, and that the transparency rules should not apply to existing investment treaties, unless consent would be expressed by Parties to the treaty to that effect. It was said by those in favour of the opt-in solution, that they accepted to consider paragraph (2) of the revised proposal on the basis that the scope of application of the rules on transparency would be limited to future investment treaties.

44. In support of limiting the application of the transparency rules to future investment treaties, it was said that States could not be put in a situation where they would have to reopen negotiations or issue declarations on interpretation of each of their existing investment treaties to indicate whether or not the rules on transparency would apply.

45. In that context, it was seen as important to indicate in the scope of the rules on transparency how those rules would come into play. It was pointed out that where the rules on transparency would be used in conjunction with the UNCITRAL Arbitration Rules, article 1 (2) of the UNCITRAL Arbitration Rules (as revised in 2010) would apply. It was suggested that a provision similar to article 1 (2) should be also included in the rules on transparency in order to avoid that both texts had a different rule on temporal application. If the rules on transparency were to take the form of stand-alone rules, that might limit the possibility of their application in the context of existing investment treaties. However, it was said that, even if the rules were to take the form of a stand-alone text, they could be considered by arbitral tribunals as part of the most up-to-date regime of UNCITRAL arbitration, and be applied.

46. In order to avoid application of the transparency rules to existing investment treaties without express consent of the parties, a suggestion was made to provide that the rules on transparency would not apply unless, after the date of their coming into effect, the parties expressly agreed that they applied.

-Future and existing investment treaties

47. Contrary views were expressed that, in consideration of the number of investment treaties already concluded, the rules should apply to existing investment treaties, where those treaties permitted such application.

48. With respect to the revised proposal, it was observed that paragraph (1) did not exclude a dynamic interpretation of a reference to the UNCITRAL Arbitration Rules in existing investment treaties, as it only referred to the agreement of the parties to apply the rules on transparency. It was said, however, that the second paragraph of the revised proposal might be seen as ruling such dynamic interpretation out by excluding the application of the rules on transparency in case reference was made to a particular version of the UNCITRAL Arbitration Rules that did not include the rules on transparency. It was also said that dynamic interpretation was well recognized under public international law and the example of the jurisprudence of the International Court of Justice relating to the Continental Shelf was given. It was further said that allowing such dynamic interpretation was a policy decision and that

it would be regrettable not to allow such dynamic interpretation, which would best further the mandate of the Working Group.

49. To address concerns raised, it was said that implied consent was recognized under public international law and the examples of forum prorogatum with respect to jurisdiction and article 20 of the Vienna Convention on the Law of Treaties (1969)⁷ were given. In response, it was stated that those examples were not relevant to the issues being discussed by the Working Group.

-No specific provision on existing investment treaties

50. The Working Group was cautioned not to provide for any rule of interpretation on the scope of application of the transparency rules in relation to existing investment treaties. It was said that that matter would be better dealt with by means such as those referred to in paragraphs 15 to 23 of document A/CN.9/WG.II/WP.166/Add.1. It was said that a provision in the transparency rules on their application to existing investment treaties would be deprived of any legal effect, as that was a matter of treaty interpretation, which depended on the specific terms of each treaty.

51. It was suggested that the text of the rules on transparency should be directed at future investment treaties only, but that nothing in the text should be interpreted to preclude application of the rules on transparency to existing investment treaties if Parties to those treaties agreed that the rules on transparency should apply. Therefore, it was further suggested to not address that matter in the rules on transparency.

52. In response, it was said that it was the mandate of the Working Group to provide for a clear scope of application, in order to avoid uncertainties giving rise to disputes on interpretation. The determination of the scope of application of the rules on transparency should be done in a manner that would leave no ambiguity, and it was clarified that the efforts of the Working Group aimed at identifying the most widely acceptable rule of application, taking account of the divergence of views on the desired impact of the transparency rules on existing investment treaties.

53. It was said that, in deliberating that issue, terminology that suggested that States could be bound to a rule unless they took action to opt-out should best be avoided as it could raise unnecessary concerns on the part of States and polarized the debate.

General remarks on article 1 (1)

54. After discussion, it was noted that many delegations had moved from their original positions in a spirit of finding a solution and indicated their willingness to further work towards a compromise solution. In that light, the Working Group was invited to consider the following approach. For investment treaties concluded after the date on which the rules on transparency would come into force (future treaties), a reference to the UNCITRAL Arbitration Rules would include a reference to the rules on transparency unless the State Parties agreed otherwise, which they would be able to do by choosing an earlier version of the UNCITRAL Arbitration Rules (i.e. the 2010 Rules). For existing investment treaties, the rules on transparency would only apply where the parties had expressly consented thereto, with wording

⁷ United Nations, *Treaty Series*, vol. 1155, p. 331.

being used to make it clear that there could be no dynamic interpretation of existing investment treaties which would make the transparency rules applicable to them.

55. Delegations carefully further considered the proposal contained in paragraph 54 above, which was seen as reflecting the majority view. It was said that, during the session, views had been fully expressed on the scope of application of the rules on transparency, a complex matter with important policy implications. It was noted that the positions on that matter, which were polarized on (i) whether an opt-in or opt-out approach was preferable and (ii) whether the possibility of dynamic interpretation for existing treaties should be left open, had evolved towards a compromise, whereby delegations with a strong view contrary to the majority view would make concessions in return for obtaining their preferred solution on other issues. That was the basis for the proposal in paragraph 54 above.

56. Some diverging views were reiterated as follows: on the one hand that article 1 (1) should leave open the possibility of legal application of the transparency rules to existing investment treaties, or that nothing in the rules should prohibit such an application and, on the other hand, that an opt-in approach was preferable, with the rules on transparency taking the form of a stand-alone text.

57. The Working Group entrusted the Secretariat with the preparation of a single revised version of article 1 (1) which would encapsulate the proposal contained in paragraph 54. Those delegations who found it difficult to agree with the proposal were invited to reflect on whether they could find that compromise acceptable in advance of the next session of the Working Group. It was also noted that some delegations had expressed the concern that it might be difficult to exclude the possibility of any dynamic interpretation (as was sought to be done) if the transparency rules were presented as an appendix to the UNCITRAL Arbitration Rules. The Secretariat was accordingly requested to provide an analysis of the implications of presenting the transparency rules in the form of an appendix to the UNCITRAL Arbitration Rules, or as a stand-alone text.

58. A few delegations still opposed to combine the transparency rules with the UNCITRAL Arbitration Rules, and insisted that stand-alone rules would guarantee Parties conscious and explicit consent to the rules on transparency. Those delegations felt that that would avoid that, through dynamic interpretation, the rules on transparency be made applicable to existing investment treaties without express consent of the Parties to the treaty. A few delegations reiterated that dynamic interpretation was legally possible and that they were not ready to accept a “blanket prohibition” that would preclude the effective implementation of provisions in investment treaties that envisaged the Parties benefiting from the most up-to-date provisions of the UNCITRAL Arbitration Rules in arbitrations under those treaties, which in that case would be the rules on transparency.

59. It was clarified that it would be open to those delegations, who would find it difficult to agree with the proposal articulated above in paragraph 54 and still wished to propose another solution (whether in favour of an opt-in or in favour of a dynamic interpretation), to do so at the next session of the Working Group on the basis of the proposals in paragraph 8 of document A/CN.9/WG.II/WP.169. It was noted that some delegations had indicated that it might be possible to find wording which would give those States that wished to exclude any possibility of dynamic interpretation of their treaties certainty in that respect, while preserving the

possibility of such dynamic interpretation for other States. Those delegations were invited to coordinate their efforts and to communicate drafting suggestions in that respect to the Secretariat for consideration by the Working Group.

2. Article 1 (2) — Application of rules on transparency by the disputing parties

60. The Working Group considered article 1 (2) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169, which prohibited disputing parties from opting out of, or diverging from, the rules on transparency once adopted by the Parties to the investment treaty (A/CN.9/736, paras. 32-36). The Working Group was reminded that, in treaty-based investor-State arbitration, there were two levels of legal relationships: the first level concerned the legal relationship between the Parties to the investment treaty and the second level concerned the legal relationship between the parties to disputes, i.e., the investor and the State.

Article 1 (2) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169

61. It was explained that the purpose of paragraph (2) was to prohibit derogation by the disputing parties from the offer for transparent arbitration for the policy reason that it would not be appropriate for the disputing parties to reverse a decision made by Parties to the investment treaty on that matter. In addition, the rules on transparency were meant to benefit not only the investor and the host State but also the general public, with the consequence that it was not for the disputing parties to renounce transparency provisions adopted by the Parties to the investment treaty.

62. Comments were made regarding the interplay of paragraph (2) with treaty provisions and with the UNCITRAL Arbitration Rules.

63. A suggestion was made that paragraph (2) should be deleted for the reason that it was redundant as the question it dealt with was usually covered under the investment treaty. In response, it was said that, where the rules on transparency would operate in conjunction with the UNCITRAL Arbitration Rules, article 1 (1) of those Arbitration Rules would apply and permit parties to modify any provisions. Therefore, it would be necessary to indicate that the rules on transparency, because they were meant to address the need to protect public interest, could not be altered by the disputing parties.

64. Another proposal was made to include in paragraph (2) the words “unless the treaty provides otherwise”, in order to clarify that the provisions of the investment treaty would prevail in case of conflict, and that the rule contained in paragraph (2) could be overridden by a treaty provision. It was questioned whether such an addition was needed.

65. It was also questioned how the transparency rules would operate in connection with article 1 (3) of the UNCITRAL Arbitration Rules (as revised in 2010), which provided that the mandatory provisions of the applicable law prevailed. It was further questioned how the disputing parties could be compelled to comply with transparency rules, in instances where those rules would be contrary to the applicable law. It was said that one possible effect could be that parties chose, as the place of arbitration, jurisdictions where mandatory legislation would not favour transparency.

66. As a matter of drafting, it was pointed out that paragraph (2) dealt with the disputing parties, but did not refer to the arbitral tribunal. Attention was called to article 17 (1) of the 2010 UNCITRAL Arbitration Rules, which provided that the arbitral tribunal might conduct the arbitration in such manner as it considered appropriate. It was suggested to clarify whether, and the extent to which, arbitral tribunals would be allowed to deviate from, or mitigate the effect of, the rules on transparency when such rules would operate in conjunction with the UNCITRAL Arbitration Rules.

67. Paragraph (2), it was further said, contained a certain degree of inflexibility, which might not be desirable with regard to the need to ensure efficiency of arbitral proceedings. In that respect, it was proposed to authorize the arbitral tribunal to vary from the rules on practical issues, such as the adjustment of a time period. With respect to the manner in which the arbitral tribunal could be authorized to make such variations, it was proposed to either include such rule in paragraph (2), or to tailor each provision of the rules accordingly. A proposal was made to add the following sentence at the end of paragraph (2): “Upon a request by [the disputing parties][a disputing party], the arbitral tribunal may exercise its discretion to decide not to apply or apply with modification specific provisions of these Rules on Transparency where it finds that a strict application would lead to excessive costs in relation to the amount in dispute, or would disrupt or unduly burden the arbitral proceedings, or would unfairly prejudice any disputing party”.

68. A comment was made that deviations from the rules on transparency might be needed for other reasons, such as public policy. Therefore, the ability of the arbitral tribunal to deviate from the rules on transparency should not be limited. In response and in order to avoid erosion of the transparency rules that could result from such a broad approach, it was suggested to instead identify matters where deviations from the rules would not be permitted. A question was raised whether it was feasible to exhaustively identify all matters where deviations from the rules would not be permitted.

69. A further suggestion was made to retain paragraph (2) and to address the matter of deviation from the rules under article 1 (3) of the transparency rules, which provided guidance on how the arbitral tribunal should exercise discretion. In response, it was said that deviation from the transparency rules would require a higher threshold than merely exercising discretion where permitted under the rules. The purpose of article 1 (3) was to determine how the arbitral tribunal would exercise the discretionary powers expressly provided in the rules, which was seen as different from the issue of defining the conditions for departing from the rules.

70. A further proposal was made to permit such variations from the rules by the disputing parties, instead of the arbitral tribunal, provided all disputing parties agreed. In that context, the view was expressed that the role of the arbitral tribunal was to decide on disputes between the disputing parties. According to that view, the arbitral tribunal had no role when the parties had no disputes, such as where they both agreed to vary or derogate from the rules on transparency. According to that proposal, paragraph 2 could be deleted.

71. It was suggested that, instead of providing for a discretionary power of the arbitral tribunal to deviate from the rules on transparency, the arbitral tribunal should be given discretion to adapt the rules to the needs of the specific case.

72. The view was expressed that the proposals, aimed at allowing deviations from the rules, carried the risk of eroding the rules by creating opportunities to depart from them. It was said that, while it might be advisable to provide the arbitral tribunal with the power, for instance, to adjust time periods where needed, it would not be in favour of transparency to provide in general terms for full discretion of the arbitral tribunal to alter the rules.

73. After discussion, the following approach emerged. Article 1 (2) should be retained, and some flexibility should be crafted, based on the principle that the provision would not allow derogation from the rules, but adaptation of them by the arbitral tribunal, in circumstances that would need to be further considered by the Working Group.

Revised draft proposal of article 1 (2)

74. In that light, it was proposed to revise article 1 (2) as follows: “In any arbitration in which these Rules on Transparency apply pursuant to a treaty or to an agreement by the parties to that treaty, (a) the disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty; (b) the arbitral tribunal shall have the power, apart from its discretionary authority under certain provisions in these Rules on Transparency, to adapt the requirements of any specific provision of these Rules to the particular circumstances of a case if this is necessary to achieve the Rules’ transparency objective in a practical manner”. The Working Group considered the revised draft proposal of article 1 (2).

Chapeau

75. To a question whether the words “pursuant to a treaty or to an agreement by the parties to that treaty,” contained in the chapeau of the revised draft proposal of article 1 (2), were needed, it was explained that the rules might come into play in the context of treaty-based investor-State arbitration, and also in the context of commercial arbitration. It was considered necessary to clarify that the disputing parties should not be entitled to derogate from the rules in the context of treaty-based investor-State arbitration only.

76. It was said that the reference to the application of the rules on transparency pursuant “to an agreement by the parties to [the] treaty” in the chapeau was redundant and should be deleted. In response, it was explained that that reference had been included in order to capture subsequent agreements by the Parties to an investment treaty to apply the rules on transparency to disputes arising under a treaty. Further, in response to the view that such subsequent agreement would constitute a modification of the treaty, being part of it, and the reference was not needed, it was said that article 31 (3)(a) of the Vienna Convention on the Law of Treaties distinguished a treaty from a subsequent agreement regarding the interpretation of the treaty. Therefore, it was suggested to retain the chapeau.

Subparagraph (a)

77. It was said that subparagraph (a) of the revised draft proposal of article 1 (2) permitted departure from the rules on transparency only if the investment treaty permitted so. For the sake of consistency with subparagraph (b), it was suggested to

add, at the end of subparagraph (a), the following words: “or if this is approved by the arbitral tribunal”. It was said that if subparagraph (a) would not include those words, it should then be clarified in subparagraph (b) that the disputing parties were entitled to depart from the rules on transparency if so authorized by the arbitral tribunal. To address that concern, it was suggested to provide under subparagraph (b) that the arbitral tribunal should have the power, either at its own initiative or at the request of the parties, to adapt the rules.

Subparagraph (b)

78. With regard to subparagraph (b) of the revised draft proposal of article 1 (2), it was suggested to clarify that it was the responsibility of the arbitral tribunal to ensure application of the rules on transparency. To that end, it was suggested to include, at the beginning of subparagraph (b), wording along the following lines: “The arbitral tribunal shall ensure the application of the Rules on Transparency. In so doing,”. That proposal found broad support. As a matter of drafting, it was suggested to refer in subparagraph (b) to the transparency objectives embodied in the rules. The drafting suggestion received support.

79. Another proposal made was to include wording similar to that contained in article 1 (3) of the transparency rules, in order to indicate that the arbitral tribunal should exercise its discretion to adapt the rules, with a view to ensure a fair and efficient resolution of the dispute. That proposal did not receive support.

80. A few delegations were not in favour of including a provision on the mandatory nature of the rules on transparency and proposed deleting paragraph (2), on the basis that the rules on transparency were procedural rules and, as such, in line with established principles of arbitration, the disputing parties should be allowed to derogate therefrom without any authorization from the arbitral tribunal. One delegation said that it would be counterproductive not to include the assumption that both disputing parties might request the arbitral tribunal to adapt the rules on transparency and that the arbitral tribunal could not reject the request from the disputing parties.

81. After discussion, the proposal under paragraph 74, with the modifications proposed in paragraph 78, was found acceptable with some delegations maintaining their position in favour of deleting paragraph (2) or reserving their position until all substantive matters in the transparency rules had been discussed.

3. Article 1 (3) — Discretion of the arbitral tribunal

82. The Working Group considered article 1 (3) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169, which provided that the arbitral tribunal should exercise discretion where so permitted under the rules, taking into account the need to balance (a) the public interest in transparency in treaty-based investor-State arbitration and of the particular arbitral proceedings and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute (A/CN.9/736, paras. 38-40).

83. The proposal to include a specific reference to the human right of information under subparagraph (a) did not receive support.

84. Several drafting suggestions were made. It was proposed to delete the comma following the word “discretion”. Various proposals were made to replace the

opening words of paragraph (3) by either of the following phrases: “[W]here the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the exercise of that discretion shall take into account”; “[W]here the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account”, or “[W]hen exercising discretion granted under these Rules, the arbitral tribunal shall take into account”.

85. After discussion, the Working Group agreed to adopt the substance of paragraph (3) and requested the Secretariat to prepare a revised draft of paragraph (3), taking account of the aforementioned proposals.

4. Article 1 (4) — Relationship between the rules on transparency and any transparency provisions in the investment treaty

86. Article 1 (4), as contained in paragraph 8 of document A/CN.9/WG.II/WP.169 clarified that the rules on transparency would not supersede a provision in the relevant investment treaty that actually required a higher level of transparency (A/CN.9/736, para. 31).

87. A question was raised as to how, under paragraph (4), the level of transparency would be assessed to determine which of the treaty provisions or the transparency rules would apply. It was proposed that paragraph (4), instead of providing for an assessment of the level of transparency, should deal with the prevalence of the treaty provisions in case of conflict with the transparency rules. In favour of that proposal, it was said that a similar approach had been adopted in article 1 (3) of the 2010 UNCITRAL Arbitration Rules (or article 1 (2) of the 1976 UNCITRAL Arbitration Rules). It was clarified that, according to that proposal, if the investment treaty provided for a transparency regime less favourable than that of the transparency rules, the treaty provisions would nevertheless prevail.

88. In that context, various drafting proposals were made. It was suggested to include a provision along the lines of “[I]f a treaty provision is in conflict with the Rules, the treaty provision prevails”. Another proposal made was along the lines of “[T]o the extent that the substance matter is regulated in the treaty, the treaty prevails”. Following the same approach, it was also proposed to draft article 1 (4) as follows: “[T]he transparency provisions contained in a treaty shall prevail over other provisions when these are in conflict”.

89. After discussion, the prevailing view was that, regardless of the level of transparency, in case of conflict between the transparency rules and treaty provisions dealing with the same subject matter, the treaty provisions would prevail. However, the question remained whether there was a need to include a provision to deal with that issue in the transparency rules, as that was a matter of treaty interpretation, not necessarily a matter to be addressed in rules. Diverging opinions were expressed on that question.

90. Support was expressed for including a provision along the lines of the proposals under paragraph 88, in order to provide clarity, not only for the arbitral tribunal, but also for the parties. It was further observed that the matter was not about treaty interpretation, but about which procedure to apply.

91. However, it was pointed out that article 1 (4) of the transparency rules aimed at providing a rule of interpretation, and the attention of the Working Group was called on the difficulties to deal with such a matter. It was said that the analogy with article 1 (3) of the UNCITRAL Arbitration Rules (as revised in 2010) was questionable because article 1 (3) dealt with an issue of conflict between the Rules and mandatory applicable law, whereas article 1 (4) of the transparency rules dealt with the relationship between the rules as referred to in a treaty and other provisions in that treaty. That relationship was a matter of interpretation regulated by the Vienna Convention on the Law of Treaties (1969). The treaty provisions and the transparency rules would need to be interpreted by the arbitral tribunal which would apply them.

92. Diverging views were expressed on whether the treaty provisions, drafted by Parties on the one hand, and the rules on transparency, which would be incorporated by reference into the treaty on the other hand, would be interpreted in the same manner. According to a view, it would be inaccurate to consider that the rules on transparency would be incorporated by reference in a treaty. Diverging views were also expressed as to whether those questions were questions of policy or rather technical issues of law and of treaty interpretation.

93. It was noted that there were different approaches to interpretation of treaties, and that it would not be appropriate to seek to provide for a rule of interpretation in the transparency rules.

94. After discussion, the Working Group agreed that article 1 (4) should be deleted.

5. Article 1 (5) — Relationship between the rules on transparency and the applicable arbitration rules

95. The Working Group considered article 1 (5), as contained in paragraph 8 of document A/CN.9/WG.II/WP.169 which dealt with the relationship between the rules on transparency and the arbitration rules.

96. It was suggested to include at the end of paragraph (5) a provision similar to article 1 (3) of the 2010 UNCITRAL Arbitration Rules, in order to clarify that where any of the rules on transparency was in conflict with the law applicable to the arbitration from which the parties could not derogate, that provision should prevail. That proposal received support.

97. After discussion, it was noted that a large majority was in favour of article 1 (5), as contained in paragraph 8 of document A/CN.9/WG.II/WP.169, as complemented by a provision along the lines of that contained in article 1 (3) of the 2010 UNCITRAL Arbitration Rules (see above, paragraph 96). A few delegations reserved their position on paragraph (5), as they considered that paragraph (5) should be further considered in light of the scope of application of the rules.

6. Footnotes to article 1

- “investor-State arbitration”

98. The Working Group considered the first footnote under article 1, which aimed at clarifying that the rules on transparency would apply only to the settlement of

disputes arising under investment treaties between an investor and a Party to the treaty and not to the settlement of disputes between Parties to the treaty (A/CN.9/736, para. 37).

99. It was said that the reference in the footnote to “one or more Parties” was unusual. In response, it was clarified that the phrase was aimed at dealing with multilateral treaties, and should be kept.

100. It was proposed to delete the first footnote, as it was clear from the provisions in article 1 that investor-State arbitration would be initiated “under a treaty”, which itself was defined under the second footnote. That proposal was adopted by the Working Group.

- “a treaty providing for the protection of investments or investors”

101. The second footnote to article 1 aimed at clarifying the understanding that investment treaties to which the rules on transparency would apply should be understood in a broad sense.

102. As a matter of drafting, it was proposed to delete the word “intergovernmental” where it appeared after the word “integration”. Further, it was proposed to refer to the “protection of investments and investors” in a consistent manner under the footnote. The second footnote was adopted by the Working Group with the proposed modifications.

7. Article 2 — Publication of information at the commencement of arbitral proceedings

103. The Working Group considered article 2, as contained in paragraph 25 of document A/CN.9/WG.II/WP.169, which dealt with publication of information at an early stage of the arbitral proceedings, before the constitution of the arbitral tribunal. Article 2 contained two options. Under option 1, general information would be conveyed to the public, and the publication of the notice of arbitration (and of the response thereto) would be dealt with under article 3, after the constitution of the arbitral tribunal. Option 2 contained a procedure for the publication of the notice of arbitration and the response thereto before the constitution of the arbitral tribunal.

104. The Working Group had also before it a proposal to amend option 2, that read as follows: “1. Once the notice of arbitration has been received by the respondent, the disputing parties shall promptly communicate to the repository referred to under article 9 a copy of the notice of arbitration. Upon receiving the notice of arbitration from any disputing party, the repository shall then promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made. 2. Within [45] days of the receipt of the notice of arbitration by the respondent, each disputing party shall identify to the repository referred to under article 9 any portions of the notice of arbitration that it contends constitutes [confidential or sensitive][protected] information as defined under article 8, paragraph 2. [The repository referred to under article 9 shall then make available to the public in a timely manner those portions of the notice of arbitration that are not identified by any disputing party in accordance with the foregoing sentence.] 3. Within [45] days of the receipt of the response to the notice of arbitration by the claimant, each disputing party shall

identify to the repository referred to under article 9 any portions of the response to the notice of arbitration that it contends constitutes [confidential or sensitive][protected] information as defined under article 8, paragraph 2. [The repository referred to under article 9 shall then make available to the public in a timely manner those portions of the response to the notice of arbitration that are not identified by any disputing party in accordance with the foregoing sentence.] [Or as an alternative to the last bracketed sentence of paragraphs (2) and (3): The repository referred to under article 9 shall make available to the public at the same time the portions of the notice of arbitration and the response thereto that are not identified by any disputing party as containing [confidential or sensitive][protected] information as defined under article 8, paragraph 2.] 4. The tribunal, when constituted, shall rule on any disputes regarding the scope of information not made available to the public pursuant to paragraphs 2 and 3. If the tribunal rules that any such material is not [confidential or sensitive] [protected] information as defined under article 8, paragraph 2, the tribunal shall communicate such material to the repository referred to under article 9, which shall make such material available to the public in a timely manner”.

105. The proposal under paragraph 104 received support as it clarified that the arbitral tribunal would deal with any dispute regarding the publication of the notice of arbitration and the response thereto and as it provided a procedure for the parties to redact the information. It was suggested that that option should clarify that the publication of the notice of arbitration and the response thereto should be made simultaneously. In addition, it was said that paragraph (4) of the proposal provided appropriate legal protection for the institutions that would carry out the functions of a registry.

106. However, various concerns were expressed in relation to option 2. The time period provided for the publication of the notice of arbitration and the response thereto were said to be too short. It was pointed out that such publication at an early stage of the proceedings might impede a settlement of the dispute. In response to that concern, it was said that where a similar provision had been provided in investment treaties, it did not create difficulties.

107. A question was raised how to deal with the situation where a notice of arbitration would be sent by a claimant to the repository before the arbitral proceedings had commenced, i.e., before the notice of arbitration had been received by the respondent. The Working Group agreed to further consider that question.

108. The majority view was in favour of option 1, which left the question of the publication of the notice of arbitration and of the response thereto after the constitution of the arbitral tribunal.

109. After discussion, the delegations that had long been in favour of option 2, agreed, in a spirit of compromise, to option 1. The Working Group adopted option 1, with the following drafting modifications. It should be clarified in the text of option 1 that all disputing parties should have the obligation to send the notice of arbitration to the registry. The registry should publish the information once it received the notice of arbitration from either party. The registry should publish the names of the disputing parties, as well as information regarding the economic sector involved and the treaty under which the claim arose.

110. As a general remark on drafting, it was suggested to harmonize the language used in the rules with regard to publication of information or documents as, for instance, the words “published” or “made available to the public” were used. The Working Group requested the Secretariat to examine whether a different meaning was intended in the use of the various terms referring to publication and to further examine how a consistent approach could be achieved.

8. Article 3 — Publication of documents

111. The Working Group considered article 3 as contained in paragraph 29 of document A/CN.9/WG.II/WP.169, which reflected a proposal made at its fifty-fifth session that the provision on publication of documents should provide: (i) a list of documents to be made available to the public; (ii) discretionary power of the arbitral tribunal to order publication of additional documents; and (iii) a right for third persons to request access to additional documents (A/CN.9/736, paras. 54-66). Such a provision had been seen as establishing a good balance between the documents to be published and the exercise by the arbitral tribunal of its discretion in managing the process (A/CN.9/736, para. 58).

112. It was proposed to delete the reference to “exhibits” and “a table listing all exhibits” from the list of documents that should be made available to the public, as making public the exhibits could be too voluminous whilst, to the extent the second reference might require a party to draft a table listing all documents, that would add an unnecessary burden. Support was expressed for the deletion, as the publication of the exhibits and possibly requiring the creation of tables of exhibits were seen as too burdensome. Though acknowledging some additional burden, preference was expressed for the retention of exhibits in article 3 (1) as such publication was in the interest of transparency.

113. It was noted that the opening words of article 3 (1) to (3) referred to the exceptions set out in article 8 and that, in turn, article 8 (1) stated that it applied to articles 2-7. It was noted that such repetition was redundant and it was suggested to delete the reference to article 8 from those articles. It was said that, though repetitive, the reference might be preferable, as it provided for clarity.

114. It was further suggested to provide for the simultaneous publication of the notice of arbitration and the response to it.

115. It was also suggested that more flexibility should be provided with respect to the publication of documents in article 3, as article 3 (1) required automatic publication, whereas article 3 (2) permitted the arbitral tribunal to order, on its own motion or upon request from a disputing party, the publication of any other document. In that light, it was proposed to delete from article 3 (1) reference to “any further statements or written submissions”, “exhibits” and “orders and decisions of the arbitral tribunal”.

116. Due to lack of time, the Working Group could not complete consideration of article 3, and it was agreed that discussions on article 3 would continue at a future session of the Working Group.

**E. Note by the Secretariat on settlement of commercial disputes:
preparation of a legal standard on transparency in treaty-based investor-State
arbitration, submitted to the Working Group on Arbitration and Conciliation at its
fifty-sixth session
(A/CN.9/WG.II/WP.169 and Add.1)**

[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)¹ 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.²

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. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working

¹ *Official records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 314.

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

Group and a question with a great practical interest, taking account of the high number of such treaties already concluded.³

3. At its fifty-third (Vienna, 4-8 October 2010) and fifty-fourth (New York, 7-11 February 2011) sessions, the Working Group considered the matters of form, applicability and content of a legal standard on transparency in treaty-based investor-State arbitration.⁴ At its fifty-fifth session (Vienna, 3-7 October 2011), the Working Group completed a first reading of draft rules on transparency in treaty-based investor-State arbitration (as contained in document A/CN.9/WG.II/WP.166 and its addendum).⁵

4. In accordance with the decision of the Working Group at its fifty-fifth session,⁶ part II of this note contains a revised draft of rules on transparency (section B). Articles 1 to 8 of the draft rules on transparency are dealt with in this note and article 9 on the establishment of a repository of published information ("registry") is dealt with in the addendum to this note. Comments received from arbitral institutions on the establishment of a registry can be found in document A/CN.9/WG.II/WP.170 and its addendum. As requested by the Working Group,⁷ an overview on the interplay of the rules on transparency with arbitration rules can be found in section C in the addendum to this note. The question of applicability of the rules on transparency to the settlement of disputes arising under investment treaties concluded before the date of adoption of the rules on transparency is dealt with in part III in the addendum to this note, as well as in document A/CN.9/WG.II/WP.166/Add.1, part III.

II. Draft rules on transparency in treaty-based investor-State arbitration

A. General remarks

Form of the legal standard on transparency

5. At its fifty-fourth session, the Working Group had agreed to proceed with a discussion on developing the content of the highest standards on transparency, on the basis that the legal standard on transparency be drafted in the form of rules. That was done on the understanding that delegations that had initially proposed that the legal standard on transparency take the form of guidelines had agreed on the preparation of rules if those rules would only apply where there was an express reference to them (opt-in solution). It was said that the content of the rules on transparency might need to be reconsidered, and possibly diluted, in the event the Working Group would at a later stage decide that the application of the rules would be based on an opt-out approach (A/CN.9/717, paras. 26 and 58). That understanding was reiterated at the fifty-fifth session of the Working Group (A/CN.9/736, para. 41).

³ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 205.

⁴ Reports of the Working Group on the work of its fifty-third (A/CN.9/712) and fifty-fourth (A/CN.9/717) sessions.

⁵ Report of the Working Group on the work of its fifty-fifth session (A/CN.9/736).

⁶ Ibid., para. 11.

⁷ Ibid., para. 30.

Structure of the draft rules on transparency

6. Article 1 deals with the scope of application of the rules on transparency, and articles 2 to 7 with substantive issues on transparency. Article 8 addresses exceptions to transparency, which are limited to the protection of confidential or sensitive information as well as of the integrity of the arbitral process. Article 9 determines the means of conveying the information to the public (A/CN.9/736, para. 13).

7. At its fifty-fifth session, the Working Group considered the substance of the following text, as a possible preamble to the rules: “*The UNCITRAL Rules on Transparency have been developed to apply in treaty-based investor-State arbitrations [initiated under the UNCITRAL Arbitration Rules] in order to ensure transparency in treaty-based investor-State arbitration so as to enhance the legitimacy of, and to foster the public interest inherent in, treaty-based investor-State arbitration, in a way that is compatible with the disputing parties’ interest in a fair and efficient resolution of their dispute. These purposes shall guide disputing parties and arbitral tribunals in the application of these Rules.*” (A/CN.9/736, paras. 14-17). The Working Group may wish to note that the substance of that text is contained in article 1(3) of the rules (see below, paras. 8 and 20), and that the principles it contains may also be reflected in the decision of the Commission adopting the rules as well as in the text of the resolution of the General Assembly recommending their use. Therefore, the revised version of the rules does not include a preamble.

B. Content of draft rules on transparency in treaty-based investor-State arbitration

Article 1. Scope of application

8. Draft article 1 — Scope of application.

Option 1 (opt-out solution) for paragraph 1

Variant 1 (UNCITRAL Arbitration Rules, future treaties)

“1. The Rules on Transparency shall apply to investor-State arbitration initiated under the [applicable version of the] UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)** concluded after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply.”*

Variant 2 (UNCITRAL Arbitration Rules, future and certain existing treaties)

“1. The Rules on Transparency shall apply to investor-State arbitration initiated under the [applicable version of the] UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)** concluded after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply. The Rules on Transparency shall also apply to arbitration initiated after [date of adoption of the Rules on Transparency] under the UNCITRAL Arbitration Rules pursuant to a*

treaty, if the treaty provides for application of the version of the UNCITRAL Arbitration Rules as in effect at the date of commencement of the arbitration.”

Option 2 (opt-in solution) for paragraph 1

Variant 1 (applying irrespective of the selected arbitration rules, future and, possibly, existing treaties)

“1. The Rules on Transparency shall apply to investor-State arbitration initiated under a treaty providing for the protection of investments or investors (“treaty”) ** where the treaty expressly provides for the application of the Rules.”*

Variant 2 (UNCITRAL Arbitration Rules, future and, possibly, existing treaties)

“1. The Rules on Transparency shall apply to investor-State arbitration initiated under the [applicable version of the] UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”) ** where the treaty expressly provides for the application of the Rules.”*

Paragraphs 2-5

“2. Where the Rules on Transparency apply to an arbitration pursuant to paragraph 1, they shall be of mandatory effect between the parties to that arbitration (“the disputing party(ies)”), so that the disputing parties shall not be entitled to opt out thereof or derogate therefrom.

“3. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal shall exercise that discretion, taking into account the need to balance (a) the public interest in transparency in treaty-based investor-State arbitration and of the particular arbitral proceedings and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute.

“4. Where the treaty provides in any respect for a higher level of transparency than the Rules on Transparency, the relevant provision(s) of the treaty shall prevail, so that this higher level of transparency shall apply to the arbitration.

“5. The Rules on Transparency shall supplement the applicable [version of the UNCITRAL Arbitration Rules] [arbitration rules]. Where there is any conflict between the Rules on Transparency and the applicable [version of the UNCITRAL Arbitration Rules] [arbitration rules], the Rules on Transparency shall prevail.”

Footnotes to article 1, paragraph 1:

“ For the purpose of these Rules, “investor-State arbitration” shall mean any arbitration taking place between one or more investors and one or more Parties to a treaty providing for the protection of investments or investors pursuant to that treaty.*

*“** For the purpose of these Rules, a ‘treaty providing for the protection of investments or investors’ shall be understood broadly as encompassing any agreement concluded between or among States or regional integration inter-governmental organizations, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, that contain provisions on the protection of an investor and its right to resort to investor-State arbitration.”*

Remarks

Paragraph (1) — Applicability of the legal standard on transparency

9. Two options have been considered by the Working Group regarding the applicability of the rules on transparency under paragraph (1) (A/CN.9/736, paras. 18-30). Under the first option, the opt-out solution, the consent to apply the rules on transparency would be manifested when Parties provide in their investment treaties for investor-State dispute settlement under the UNCITRAL Arbitration Rules, being on notice that, as from the date of adoption of the rules on transparency by UNCITRAL, the UNCITRAL Arbitration Rules include the rules on transparency (A/CN.9/736, para. 20). Under the second option, the opt-in solution, the rules on transparency would apply when Parties to an investment treaty expressly consent to their application (A/CN.9/736, para. 25).

- Existing/future treaties

10. Under both options, the rules on transparency would apply to investor-State arbitration initiated under treaties concluded after the date of adoption by UNCITRAL of the rules on transparency.

11. For treaties concluded before the date of adoption by UNCITRAL of the rules on transparency, consent of Parties to apply the rules would need to be expressed through means described in document A/CN.9/WG.II/WP.166/Add.1, paras. 15 to 23. Also, if Parties to a treaty concluded before the date of adoption by UNCITRAL of the rules on transparency have consented to the application of the version of the UNCITRAL Arbitration Rules in force at the date of commencement of the arbitration, then, under option 1, variant 2, the transparency rules would apply. In such cases, if Parties wish to opt-out of the transparency rules, they would have to amend or modify their investment treaty pursuant to articles 39 ff. Vienna Convention on the Law of Treaties or issue a joint interpretative declaration pursuant to article 31 (3) (a) Vienna Convention on the Law of Treaties to that effect.

- Option 1: opt-out solution

12. Under the first option (opt-out solution), variant 1, the rules on transparency would apply as an extension of the UNCITRAL Arbitration Rules, unless States otherwise provide in the investment treaty concluded after the date of adoption of the transparency rules by opting out of the rules on transparency (A/CN.9/736, paras. 20-24). (For option 1, variant 2, see above, para. 11). The word “concluded” is proposed to be used under option 1, in replacement of the words “entered into force” used in the previous draft version of the rules, as it is at the time of

conclusion of the treaty (and not at the time of the coming into force of the treaty) that Parties may consent to the application of the transparency rules.

13. Under option 1, the rules on transparency would have to be integrated with the UNCITRAL Arbitration Rules, probably in the form of an appendix to the Arbitration Rules.

14. The Working Group may wish to discuss the formulation of an opting-out declaration so as to avoid any unintended impact of a decision to opt-out of the rules on transparency on the applicability of the UNCITRAL Arbitration Rules.

- *Option 2: opt-in solution*

15. Under the second option (opt-in solution), variant 1 provides that the rules on transparency shall apply in respect of arbitration initiated under any arbitration rules, while variant 2 limits the application of the rules to arbitration under the UNCITRAL Arbitration Rules. At the fifty-fifth session of the Working Group, the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration at The Hague (PCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the ICC International Court of Arbitration (ICC) confirmed that, as a matter of principle, application of transparency rules in conjunction with their institutional rules was unlikely to create problems (A/CN.9/736, para. 28). Some arbitral institutions have proposed to further identify how to practically apply the rules on transparency to arbitration cases administered under their arbitration rules (A/CN.9/WG.II/WP.169/Add.1, para. 35).

16. Under option 2, the rules on transparency could take the form of stand-alone rules.

- *“applicable version of the UNCITRAL Arbitration Rules”*

17. In relation to option 1 and option 2, variant 2, where a reference to the UNCITRAL Arbitration Rules is made, the Working Group may wish to consider whether the words in brackets “[applicable version of the]” would permit clarifying that the transparency rules may apply in conjunction with the applicable version of the UNCITRAL Arbitration Rules, including any future revision thereof.

18. An overview of the interplay between the rules on transparency and the UNCITRAL Arbitration Rules can be found in section C (A/CN.9/WG.II/WP.169/Add.1, paras. 13 to 34) (A/CN.9/736, para. 30).

Paragraph (2) — Application of the rules on transparency by the disputing parties

19. The Working Group may wish to consider paragraph (2) which prohibits disputing parties from opting-out of, or diverging from, the rules on transparency once adopted by the Parties to the treaty (A/CN.9/736, paras. 32-36).

Paragraph (3) — Discretion of the arbitral tribunal

20. Paragraph (3) reflects the discussions of the Working Group on the exercise by the arbitral tribunal of its discretion (A/CN.9/736, paras. 38-40).

Paragraph (4) — Relationship between the rules on transparency and any transparency provisions in the investment treaty

21. Paragraph (4) clarifies that the rules on transparency will not supersede a provision in the relevant investment treaty that actually requires a higher level of transparency (A/CN.9/736, para. 31).

Paragraph (5) — Relationship between the rules on transparency and the applicable arbitration rules

22. The rules on transparency will supplement and, in certain instances, amend the applicable arbitration rules in conjunction to which they will apply. The Working Group may wish to consider whether a provision should be included along the lines of paragraph (5) to clarify the relation between the two sets of rules. In light of possible future arbitration rules which might provide an even higher level of transparency than the rules on transparency, the Working Group may wish to consider including in paragraph (5) a rule for the prevalence of arbitration rules providing for more transparency. The interplay between the rules on transparency and the applicable arbitration rules is discussed under section C (A/CN.9/169/WG.II/WP.169/Add.1, paras. 13 to 35).

Footnotes to article 1 (1)

- “investor-State arbitration”

23. The Working Group may wish to consider the first proposed footnote to paragraph (1), which clarifies that the rules on transparency only apply to the settlement of disputes arising under investment treaties between an investor and a Party to the treaty and not to the settlement of disputes between Parties to the treaty (A/CN.9/736, para. 37).

- “a treaty providing for the protection of investments or investors”

24. The Working Group agreed that the term “a treaty providing for the protection of investments or investors” used under article 1 (1) should be clarified in order to delineate its scope of application. It is proposed to include a footnote to clarify the understanding that treaties to which the rules on transparency apply should be understood in a broad sense (A/CN.9/736, para. 37). Alternatively, the Working Group may wish to consider whether that provision should be placed in a separate paragraph of article 1 instead of a footnote.

Article 2. Publication of information at the commencement of arbitral proceedings

25. Draft article 2 — Publication of information at the commencement of arbitral proceedings.

Option 1

“Once the notice of arbitration has been received by the respondent, the disputing parties shall promptly communicate to the repository referred to under article 9 a copy of the notice of arbitration. The repository shall then promptly make available to the public information regarding the name of the

disputing parties, the economic sector involved, and the treaty under which the claim is being made.”

Option 2

“1. Once the notice of arbitration has been received by the respondent, the disputing parties shall promptly communicate to the repository referred to under article 9 a copy of the notice of arbitration. The repository shall then promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.

“2. Within [30] days of the receipt of the notice of arbitration by the respondent, the disputing parties shall indicate to the repository referred to under article 9 whether the notice of arbitration contains [confidential or sensitive] [protected] information as defined under article 8, paragraph 2, and they shall communicate to the repository the notice of arbitration in the form in which the parties agree that it should be published. [The repository referred to under article 9 shall then make the notice of arbitration available to the public in a timely manner, in the form and in the language in which it receives it from the disputing parties.]

“3. Within [30] days of the receipt of the response to the notice of arbitration by the claimant, the disputing parties shall communicate to the repository referred to under article 9 the response to the notice of arbitration in the form in which the parties agree that the response should be published. The disputing parties may redact from the response to the notice of arbitration [confidential or sensitive] [protected] information as defined under article 8, paragraph 2. [The repository referred to under article 9 shall then make the response to the notice of arbitration available to the public in a timely manner, in the form and in the language in which it receives it from the parties.] [Or as an alternative to the last bracketed sentence of paragraphs (2) and (3): The repository referred to under article 9 shall make the notice of arbitration and the response thereto available to the public at the same time, in the form and in the language in which it receives them from the disputing parties.]”

Remarks

26. The Working Group may wish to consider the title of article 2 which has been modified from the previous version (where it read “initiation of arbitral proceedings”), in order to better reflect the content of article 2.

Option 1 — Publication of general information

27. At its fifty-fifth session, the Working Group expressed general agreement on the need to provide information to the public at an early stage of the arbitral proceedings, as proposed under option 1 (A/CN.9/736, para. 43). It was agreed that the information should be published via a repository of published information (“registry”) and that information could be conveyed by any party (A/CN.9/736, para. 44). Under that option, the publication of the notice of arbitration (and of the response thereto) would be dealt with under article 3, after the constitution of the arbitral tribunal (see below, paras. 29-32 on publication of documents).

Option 2 — Publication of general information, of the notice of arbitration and of the response thereto

28. At the fifty-fifth session of the Working Group, with respect to the question of timing for the publication of the notice of arbitration and the response thereto (A/CN.9/736, paras. 47-52), the majority view was not in favour of publication before the constitution of the arbitral tribunal, while a minority favoured prompt publication as provided for under option 2 (A/CN.9/736, para. 53). Option 2 contains a procedure for the publication of the notice of arbitration and the response thereto before the constitution of the arbitral tribunal. It is possible that an arbitral tribunal is constituted before disputing parties agree on the information to be redacted from the notice of arbitration and the response. In case the Working Group would favour option 2, there would be a need to ensure consistency between articles 2 and 3 on that matter.

Article 3. Publication of documents

29. Draft article 3 — Publication of documents.

“1. Subject to the exceptions set out in article 8, the following documents shall be made available to the public: the notice of arbitration; the response to the notice of arbitration; the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; [a table listing all exhibits to the aforesaid documents] [exhibits]; witness statements and expert reports; any written submissions by the non-disputing Party(ies) to the treaty and by third persons; transcripts of hearings, where available; and orders and decisions of the arbitral tribunal.

“2. Subject to the exceptions set out in article 8, the arbitral tribunal may, on its own initiative or upon request from a disputing party, decide to order publication of any other documents provided to, or issued by, the arbitral tribunal. The said decision shall be taken in the exercise of the tribunal’s discretion after consultation with the disputing parties.

“3. Subject to the exceptions set out in article 8, a person that is not a disputing party may request access to any other documents provided to, or issued by, the arbitral tribunal, and the arbitral tribunal shall, in the exercise of its discretion and after consultation with the disputing parties, decide whether and how to grant such access.

“4. The documents made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 9 as they become available and, if applicable, in a redacted form in accordance with article 8. The documents made available [to the public] [to the person requesting access to them] pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 9 as they become available and, if applicable, in a redacted form in accordance with article 8. The repository shall make the documents available in a timely manner, in the form and in the language in which it receives them.”

Remarks

30. Article 3 reflects a proposal made at the fifty-fifth session of the Working Group that the provision on publication of documents should provide: (i) a list of documents made available to the public; (ii) discretionary power of the arbitral tribunal to order publication of additional documents; and (iii) a right for third persons to request access to additional documents (A/CN.9/736, paras. 54-66). Such a provision was seen as establishing a good balance between the documents to be published and the exercise by the arbitral tribunal of its discretion in managing the process (A/CN.9/736, paras. 58 and 65).

Paragraph 1 — List of documents

31. The Working Group may wish to consider the list of documents in paragraph (1) (A/CN.9/736, para. 65). Publication of awards is dealt with under article 4 and therefore, awards are not contained in that list. Minutes or transcripts of hearings have been included in that list following the consideration by the Working Group that the publication of transcripts should follow the same rules as publication of documents (instead of being dealt with under the provision on public hearings) (A/CN.9/736, para. 109). The Working Group may wish to consider whether the exhibits or a table listing all exhibits to documents should be published.

Paragraphs 2 to 4 — Further documents

32. Regarding the treatment under paragraph (4) of documents referred to under paragraph (3), the Working Group may wish to consider whether those documents would be made publicly available via the registry for the general public, or whether only the requesting third person would be granted access to such documents. The current draft of paragraphs (3) and (4) provides for discretion by the arbitral tribunal to decide how to deal with the request of access to additional documents by a third person. The arbitral tribunal may decide, after consultation with the parties, how to provide access taking into account the relevant circumstances, including the nature of the documents. For instance, the third person may have to travel to a certain location to view the documents; or access may be provided by sending a copy of the documents to the person requesting them. In case the Working Group would decide that documents referred to under paragraph (3) should all be published via the registry, the drafting of article 3 would then be simplified as follows: in the first sentence of paragraph 2, the words “or from any person that is not a disputing party” would be added after the words “disputing party”. Paragraph (3) and the second sentence of paragraph (4) would be deleted. References to article 3 in article 8, paragraphs (4) and (6), would be amended accordingly.

Article 4. Publication of arbitral awards

33. Draft article 4 — Publication of arbitral awards.

“1. Subject to the exceptions set out in article 8, all arbitral awards shall be made available to the public.

“2. Arbitral awards shall be communicated by the arbitral tribunal to the repository referred to under article 9 as they become available and, where applicable, in their redacted form in accordance with article 8. The repository

shall make the arbitral awards available to the public in a timely manner, in the form and in the language in which it receives them.”

Remarks

34. At the fifty-fifth session of the Working Group, broad support was expressed for article 4 (A/CN.9/736, para. 67).

Article 5. Submission by a third person

35. Draft article 5 — Submission by a third person.

“1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party and not a non-disputing Party to the treaty (“third person(s)”) to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

“2. A third person wishing to make a submission shall apply to the arbitral tribunal, and provide the following written information in a language of the arbitration, in a concise manner, and within such page limits as may be set by the arbitral tribunal: (a) description of the third person, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the third person); (b) disclosure whether or not the third person has any affiliation, direct or indirect, with any disputing party; (c) information on any government, person or organization that has provided any financial or other assistance in preparing the submission; (d) description of the nature of the interest that the third person has in the arbitration; and (e) identification of the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

“3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other things (a) whether the third person has a significant interest in the arbitral proceedings and (b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

“4. The submission filed by the third person shall: (a) be dated and signed by the person filing the submission; (b) be concise, and in no case longer than as authorized by the arbitral tribunal; (c) set out a precise statement of the third person’s position on issues; and (d) only address matters within the scope of the dispute.

“5. The arbitral tribunal shall ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

“6. The arbitral tribunal shall also ensure that the disputing parties are given an opportunity to present their observations on the submission by the third person.”

Remarks

36. Article 5 deals with submission by a third person, also known as *amicus curiae* submission. It reflects modifications agreed to by the Working Group at its fifty-fifth session (A/CN.9/736, paras. 70-77) and it provides for a detailed procedure on information to be provided regarding the third person that wishes to make a submission (paragraph (2)); matters to be considered by the arbitral tribunal (paragraphs (3), (5) and (6)); and the submission itself (paragraph (4)).

Article 6. Submission by a non-disputing Party to the treaty

37. Draft article 6 — Submission by a non-disputing Party to the treaty.

“1. The arbitral tribunal [shall] [may] accept or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

“2. The arbitral tribunal, after consultation with the disputing parties, may accept or invite submissions on [questions of law [or fact]] [matters within the scope of the dispute] from a non-disputing Party to the treaty. In exercising its discretion whether to accept or invite such submissions, the arbitral tribunal shall take into consideration, among other things, the factors referred to in article 5, paragraph 3.

“3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

“4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

“5. The arbitral tribunal shall also ensure that the disputing parties are given an opportunity to present their observations on any submission by a non-disputing Party to the treaty.”

Remarks

38. At its fifty-fifth session, the Working Group took note of the broad agreement for (i) dealing with submission by a non-disputing Party to the treaty in a provision distinct from the provision on third person's submission (A/CN.9/736, paras. 83, 84 and 97); (ii) providing that the arbitral tribunal should consult the disputing parties where the tribunal would exercise its discretion; and (iii) allowing disputing parties to present their observations on the submission (A/CN.9/736, para. 97). The matters referred to under paragraphs 39 and 40 were noted for further consideration.

Paragraph (1) — “[shall] [may]”

39. It was questioned whether the arbitral tribunal should enjoy discretion to accept submission by a non-disputing Party, and therefore whether the word “shall” before the word “accept” should be replaced by the word “may” (A/CN.9/736, paras. 90 and 98).

Paragraph (2) — “question of law [or fact] [matters within the scope of the dispute]”

40. The question whether, in addition to making submissions on matters of treaty interpretation, a non-disputing Party could also make submissions on questions of law or facts or on matters within the scope of the dispute was extensively discussed by the Working Group at its fifty-fifth session, and was considered an open question for further consideration (A/CN.9/736, paras. 85-89 and 98).

Article 7. Hearings

41. Draft article 7 — Hearings.

“1. Subject to article 7, paragraphs 2 and 3, hearings shall be public, unless otherwise decided by the arbitral tribunal, after consultation with the disputing parties.

“2. Where there is a need to protect [confidential or sensitive] information or the integrity of the arbitral process pursuant to article 8, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

“3. The arbitral tribunal may make logistical arrangements to facilitate the public’s right of access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate) and may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this is or becomes necessary for logistical reasons.”

Remarks

Paragraph (1) — Public hearings

42. Paragraph (1) reflects the proposal that hearings should, in principle, be public, unless otherwise decided by the arbitral tribunal after consultation with the disputing parties (A/CN.9/736, paras. 100 and 102). Paragraph (1) was seen as establishing a good balance and allowing the arbitral tribunal to exercise its discretionary powers in accordance with article 1 (3).

Paragraphs (2) and (3) — Exceptions to public hearings

43. Paragraphs (2) and (3) are intended to provide guidance on the exceptions to the principle that hearings shall be public. Paragraph (2) refers to the exceptions contained in article 8. Paragraph (3) addresses the concerns expressed in the Working Group that hearings may have to be held in private for practical reasons (A/CN.9/717, para. 109 and A/CN.9/736, para. 104).

Costs related to holding a public hearing

44. As requested by the Working Group at its fifty-fifth session (A/CN.9/736, para. 106), information on the costs related to holding public hearings has been provided by the International Centre for Settlement of Investment Disputes (ICSID), and is contained in document A/CN.9WG.II/WP.170/Add.1.

Article 8. Exceptions to transparency

45. Draft article 8 — Exceptions to transparency.

[Confidential or sensitive] [Protected] information

“1. *[Confidential or sensitive] [Protected] information, as defined in paragraph 2 below and as identified pursuant paragraphs 3 to 9 below, shall not be made available to the public or to non-disputing Parties pursuant to articles 2 to 7.*

“2 *[Confidential or sensitive] [Protected] information consists of:*

“(a) *Confidential business information;*

“(b) *Information which is protected against being made available to the public under the treaty;*

“(c) *Information which is protected against being made available to the public under the law of a disputing party or any other law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.*

“3. *When a document other than an order or decision of the arbitral tribunal is to be made available to the public pursuant to article 3, paragraph 1, the disputing party, non-disputing Party or third person who submits the document shall, at the time of submission of the document, indicate whether it contends that the document contains information which [is of a confidential or sensitive nature] [must be protected from publication] and shall, promptly or within the time set by the arbitral tribunal, submit a redacted version of the document that does not contain the said information.*

“4. *When a document other than an order or decision of the arbitral tribunal is to be made available to the public pursuant to a decision of the arbitral tribunal under article 3, paragraphs 2 and 3, the disputing party, non-disputing Party or third person who has submitted the document shall, within 30 days of the tribunal’s decision that the document is to be made available to the public, indicate whether it contends that the document contains information which [is of a confidential or sensitive nature] [must be protected from publication] and submit a redacted version of the document that does not contain the said information.*

“5. *Where a redaction is proposed under paragraph 3 or 4 above, any disputing party other than the person who submitted the document in question may object to the proposed redaction and/or propose that the document be redacted differently. Any such objection or counter-proposal shall be made within 30 days of receipt of the proposed redacted document.*

“6. *When an order, decision or award of the arbitral tribunal is to be made available to the public pursuant to article 3, paragraph 1 and article 4, the tribunal shall give all disputing parties an opportunity to make submissions as to the extent to which the document contains information which [is of a confidential or sensitive nature] [must be protected from publication] and to propose redaction of the document to prevent the publication of the said information.*

“7. The arbitral tribunal shall rule on all questions relating to the proposed redaction of documents under paragraphs 3 to 6 above, and shall determine, in the exercise of its discretion, the extent to which any information contained in documents which are to be made available to the public, should be redacted.

“8. If the arbitral tribunal determines that information should not be redacted from a document pursuant to paragraphs 3 to 5 above, the disputing party, non-disputing Party or third person that submitted the document may, within 30 days of the arbitral tribunal’s determination (i) withdraw all or part of the document containing such information from the arbitral proceedings [with the effect that it shall no longer be entitled to rely on such information for any purpose in the arbitral proceedings], or (ii) resubmit the document in a form which complies with the tribunal’s determination.

“9. Any disputing party that intends to use information which it contends to be [confidential or sensitive] [protected] information in a hearing shall so advise the arbitral tribunal. The arbitral tribunal shall, after consultation with the disputing parties, decide whether that information is [of a confidential or sensitive nature] [shall be protected] and shall make arrangements to prevent any [confidential or sensitive] [protected] information from becoming public in accordance with article 7, paragraph 2.

Integrity of the arbitral process

“10. Information shall not be made available to the public pursuant to articles 2 to 7 where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 11 below.

“11. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardise the integrity of the arbitral process (a) because it could hamper the collection or production of evidence, or (b) because it could lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or (c) in comparably exceptional circumstances.”

Remarks

46. The purpose of article 8 is to define the exceptions to transparency, which are limited to the protection of confidential or sensitive information (paragraphs 1 to 9) and the protection of the integrity of the arbitral process (paragraphs 10 and 11) (A/CN.9/717, paras. 129-147; A/CN.9/736, paras. 110-130). At its fifty-fifth session, the Working Group agreed that only those two categories should constitute exceptions to transparency provisions (A/CN.9/736, para. 111).

[Confidential or sensitive] [protected] information

47. The Working Group may wish to decide whether the words “sensitive or confidential” or the word “protected” should be used to characterize the information to be kept confidential (A/CN.9/736, para. 117).

Paragraph (2) — Definition of [confidential or sensitive] [protected] information

48. The Working Group may wish to consider the definition of “[confidential or sensitive] [protected] information” contained in paragraph (2), which is based on a proposal made at the fifty-fifth session of the Working Group (A/CN.9/736, para. 122).

49. It may be recalled that, at the fifty-fifth session of the Working Group, concerns were expressed regarding the ability of the arbitral tribunal to determine whether the law of a disputing party applied to the disclosure of information. It was stated that the arbitral tribunal should be under an obligation to apply the laws of a disputing party in that regard. The Working Group may wish to further consider that matter under paragraph 2 (A/CN.9/736, para. 127).

Paragraphs (3) to (8) — Procedure for identifying and protecting confidential and sensitive information

50. The procedure for identifying information to be protected is determined in paragraphs (3) to (8). Paragraphs (3) to (5) deal with the question of redaction of confidential or sensitive information in documents submitted by the disputing parties or by any person involved in the proceedings (A/CN.9/736, para. 129). Article 6 deals with the redaction of documents issued by the arbitral tribunal. In all cases, the arbitral tribunal shall oversee the process pursuant to paragraph (7) (A/CN.9/736, para. 129). Paragraph (8) contains a provision that is also found in certain investment treaties allowing a person that submits a redacted version of a document to withdraw all or part of information in that document in case it disagrees with the decision of the arbitral tribunal that certain information contained in the document should not be redacted.⁸ The Working Group may wish to note that paragraph (8) clarifies that the party that decides to withdraw information shall not rely during the proceedings on such withdrawn information (A/CN.9/736, para. 129).

51. Paragraph (9) aims at providing a procedure for protecting information during hearings consistent with article 7.

Procedure for protecting the integrity of the arbitral process

52. At the fifty-third session of the Working Group, it had been generally recognized that the question of protection of the integrity of the arbitral process should be taken into account as part of the discussion on limitations to transparency (A/CN.9/712, para. 72).

⁸ See for instance, Art. 15.20(4) of the United States of America-Singapore Free Trade Agreement (USSFTA) (www.fta.gov.sg/ussfta/chapter_15_us.pdf); Art. 29(4)(d) of the 2004 Model Bilateral Investment Treaty of the United States of America (www.state.gov/documents/organization/117601.pdf); Art. 10.21(4)(d) of the Central American Free Trade Agreement (CAFTA) (www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf); Art. 29(4)(d) of the “Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment”, (www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf).

53. Paragraphs 10 and 11 define a procedure for the protection of the integrity of the arbitral process. It provides that the arbitral tribunal should consult the parties where it decides, on its own motion, to restrain the publication of information. Further, the consultation would take place “if practicable”, to take account of the exceptional circumstances in which the arbitral tribunal may have to restrain publication (A/CN.9/736, para. 113). The arbitral tribunal may “delay” (and not only “restrain”) publication to allow publication once the threat that prohibited publication dissipates (A/CN.9/736, para. 130).

Time periods

54. The Working Group may wish to note that articles 2 and 8 of the rules on transparency contain references to time periods. The Working Group may wish to consider whether a provision on calculation of time periods should be included in the rules on transparency, or whether that matter should be left to be dealt with under the applicable arbitration rules.

(A/CN.9/WG.II/WP.169/Add.1) (Original: English)

Note by the Secretariat on settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration, submitted to the Working Group on Arbitration and Conciliation at its fifty-sixth session**ADDENDUM****CONTENTS**

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B. Content of draft rules on transparency in treaty-based investor-State arbitration (*continued*)**Article 9. Repository of published information**

1. Draft article 9 — Repository of published information.

Option 1

“----- shall be in charge of making available to the public information pursuant to the Rules on Transparency.” [Other services to be determined, such as storage of documents].”

Option 2

“1. If the arbitral proceedings are administered by an arbitral institution, that institution shall be in charge of making information available to the public pursuant to the Rules on Transparency. [Other services to be determined, such as storage of documents].”

“2. If the arbitral proceedings are not administered by an arbitral institution, the respondent shall designate an arbitral institution among the list of institutions in annex, which shall fulfil the functions referred to in paragraph 1.”

Remarks

2. At its fifty-fourth session, the Working Group discussed the issue whether establishing a neutral repository (“registry”) should be seen as a necessary step in the promotion of transparency in treaty-based investor-State arbitration (A/CN.9/717, paras. 148-151). The prevailing view was that the existence of a

registry would be crucial to provide the necessary level of neutrality in the administration of a legal standard on transparency. General support was expressed for the idea that, should such a neutral registry be established, the United Nations Secretariat would be ideally placed to host it. It was also recalled that, should the United Nations not be in a position to take up that function, the Permanent Court of Arbitration at The Hague (PCA) and the International Centre for Settlement of Investment Disputes (ICSID) had expressed their readiness to provide such registry services (A/CN.9/717, para. 148).

Options 1 and 2

3. At the fifty-fifth session of the Working Group, various proposals were made (A/CN.9/736, paras. 131-133). One was the establishment of a single registry as contained in option 1. Another proposal was in favour of a list of arbitral institutions that could fulfil the function of a registry as reflected under option 2 (A/CN.9/736, para. 131). Under option 2, it is proposed to annex to the rules on transparency a list of arbitral institutions that could fulfil the function of a registry. The Working Group may wish to consider whether and how the annex could be updated from time to time by UNCITRAL. It is proposed that the choice of the institution be made by the respondent.

4. The Working Group may wish to note that reference is made to the publication of “information” under article 9 of the draft rules on transparency, in order to capture the submission of information under article 2, publication of documents under article 3 and publication of awards under article 4. The rules on transparency do not foresee the publication of recordings of public hearings, but neither prohibit it.

Matters to be considered for the establishment of a repository of published information (“registry”)

- Interested arbitral institutions

5. It may be recalled that the PCA as well as ICSID have expressed their interest to act as a single registry, should that function not be fulfilled by the United Nations Secretariat. The PCA, ICSID, as well as the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) have expressed their interest to act as one of several participating organizations acting as registry (see above, paragraph 1, article 9, option 2).

- Questions for consideration where various arbitral institutions would act as registry providers

6. The Working Group may wish to consider the following questions if it decides that a range of arbitral institutions could provide the services of a registry, as proposed under article 9, option 2, of the rules on transparency:

- Whether, in view of establishing a common framework and having a coherent system in place, guidance should be provided by UNCITRAL to arbitral institutions with regard to issues surrounding the establishment and

functioning of registries, the determination of common features, such as security and access control issues, design of the system, format of information posted; and

- Whether, in view of enhancing public access to the information that may be found on the website of different organizations, it would be advisable to have a centralized collection of links to the different cases, which could be located at the website of UNCITRAL, maintained by the UNCITRAL Secretariat.

7. Further details on the various possibilities for establishing a registry where different institutions are involved, as suggested by arbitral institutions, can be found in document A/CN.9/WG.II/WP.170 and its addendum.

- *Costs*

8. At its fifty-fifth session, the Working Group invited interested arbitral institutions to provide information on the costs of establishing and maintaining a repository of information to be published in accordance with the rules on transparency (A/CN.9/736, para. 133). In pursuance to that decision, the Secretariat circulated a questionnaire to arbitral institutions that had expressed an interest in being associated to the current activities of the Working Group or that had been listed by UNCTAD as institutions administering treaty-based investor-State disputes.¹ The questionnaire and the replies received from arbitral institutions are reproduced in document A/CN.9/WG.II/WP.170 and its addendum.

9. If the United Nations Secretariat were to act as a unique registry provider, the estimated cost of establishing the online system would be 27,000 euros. The estimated cost of system maintenance, technical support and data hosting would be 7,000 euros per year.

10. The Working Group may wish to consider that management of the registry would, depending on the volume of cases, possibly require the full-time assignment of one staff member. At this point, it is not yet possible to determine whether that staff member could be assigned through reallocation of responsibilities or whether an additional staff member would be required.

11. Possible methods of covering the costs associated with the registry system could be determined once the parameters of the registry have been finalized by the Working Group. The Working Group, however, might wish to consider seeking guidance from the Commission at its forty-fifth session as to whether, in the case that the Secretariat were to act as registry under the rules on transparency, a cost recovery mechanism should be developed.

12. If other institution(s) were to act as registry providers, the Secretariat could maintain links to the various cases on the UNCITRAL website at no additional cost.

¹ See *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note No. 1 (2010), International Investment Agreements, p. 2; available on 28 November 2011 at www.unctad.org/en/docs/webdiaeia20103_en.pdf; see also document A/CN.9/WG.II/WP.160, para. 29.

C. Interplay between the rules on transparency and arbitration rules

1. Rules on transparency and UNCITRAL Arbitration Rules

13. At its fifty-fifth session, the Working Group requested the Secretariat to provide an analysis of issues that might arise in the application of the rules on transparency to arbitration under both the 1976 UNCITRAL Arbitration Rules (referred to in this section as the “1976 Arbitration Rules”) and their 2010 revised version (referred to in this section as the “2010 Arbitration Rules”) (both versions are being referred to in this section as the “UNCITRAL Arbitration Rules”) (A/CN.9/736, para. 30).

14. This section discusses the interplay of the UNCITRAL Arbitration Rules and the rules on transparency, when the two sets of rules apply in the context of treaty-based investor-State arbitration only (see article 1, paragraph (5), in A/CN.9/WG.II/WP.169, paras. 8 and 22).

15. The interplay between the rules on transparency and the UNCITRAL Arbitration Rules is threefold:

- The provisions of the rules on transparency regarding publication of arbitral awards and hearings would modify the corresponding provisions of the UNCITRAL Arbitration Rules;
- Other provisions of the rules on transparency would supplement the UNCITRAL Arbitration Rules; some of those rules supplementing the UNCITRAL Arbitration Rules, in particular those on submissions by third persons and non-disputing Parties to the treaty, are inspired from certain arbitral practices in treaty-based investor-State arbitrations;
- Articles 8 and 9 of the rules on transparency would not affect the UNCITRAL Arbitration Rules because they relate solely to the implementation of the rules on transparency.

a. Modifications to provisions of the UNCITRAL Arbitration Rules

Publication of arbitral awards — article 4 of the rules on transparency, modifying article 32, paragraph (5), of the 1976 Rules and article 34, paragraph (5), of the 2010 Arbitration Rules

16. Article 4 of the rules on transparency provides that all arbitral awards shall be published, subject to the exceptions defined in those rules. Article 4 would reverse the principle whereby awards may be made public with the consent of the parties, contained in article 32, paragraph (5), of the 1976 Arbitration Rules and article 34, paragraph (5), of the 2010 Arbitration Rules.

Hearings — article 7 of the rules on transparency, modifying article 25, paragraph (4) of the 1976 Arbitration Rules and article 28, paragraph (3), of the 2010 Arbitration Rules

17. Article 7 of the rules on transparency provides that “hearings shall be public, unless otherwise decided by the arbitral tribunal, after consultation with the disputing parties” (subject to the exceptions defined in the rules on transparency). Article 7 would reverse the provisions of article 25, paragraph (4), of the

1976 Arbitration Rules and article 28, paragraph (3), of the 2010 Arbitration Rules that provide for hearings to “be held in camera, unless the parties agree otherwise”.

b. Supplement to the UNCITRAL Arbitration Rules

18. Articles 1, 2, 3, 5 and 6 of the rules on transparency would supplement the UNCITRAL Arbitration Rules.

Scope of application — article 1 of the rules on transparency

Article 1, paragraph (1), of the rules on transparency and article 1, paragraph (2), of the 2010 Arbitration Rules: temporal and material applications

19. Both options under article 1, paragraph (1), referred to as the “opt-out” and “opt-in” solutions, provide for the application of the rules on transparency to the settlement of disputes arising under treaties concluded after the date of coming into effect of the rules on transparency. For the settlement of those disputes, the offer to arbitrate contained in the investment treaty would be made after 15 August 2010 (which is the date of coming into effect of the 2010 Arbitration Rules) and, in accordance with article 1, paragraph (2), of the 2010 Arbitration Rules, the 2010 Arbitration Rules would apply, in conjunction with the rules on transparency.

20. Parties to a treaty may decide that the rules on transparency should also apply to treaties concluded before the date of coming into effect of the rules on transparency (as well as before the date of coming into effect of the 2010 Arbitration Rules).

21. Under the opt-out solution, the rules on transparency would apply to the settlement of disputes arising under existing treaties if the treaties provide for the application of the UNCITRAL Arbitration Rules, as in effect at the date of commencement of the arbitration. In that case, the rules on transparency would be applied in conjunction with the 2010 Arbitration Rules.

22. Under the opt-in solution, Parties to a treaty may agree to apply the rules on transparency to their already concluded investment treaties. Depending on the consent expressed by the Parties, the rules on transparency may then apply in conjunction with the 2010 Arbitration Rules, the 1976 Arbitration Rules (or, depending on the variant retained under the opt-in solution, to arbitration irrespective of the arbitration rules applicable to the settlement of the dispute).

23. Under the various possible instruments available to Parties to investment treaties to declare the rules on transparency applicable to investment treaties concluded before the date of coming into effect of the rules on transparency (see A/CN.9/WG.II/WP.166/Add.1, paras. 10 to 23), the Parties may agree to declare the rules on transparency applicable either in conjunction with the 2010 Arbitration Rules, or the 1976 Arbitration Rules (or more generally to arbitration regardless of the arbitration rules applicable to the settlement of the dispute).

Article 1, paragraph (3), of the rules on transparency, supplementing article 15, paragraph (1), of the 1976 Arbitration Rules and article 17, paragraph (1), of the 2010 Arbitration Rules

24. Article 1, paragraph (3), of the rules on transparency provides standards for the exercise of discretion by the arbitral tribunal in a manner that is consistent with the principles underlying article 15, paragraph (1), of the 1976 Arbitration Rules and article 17, paragraph (1), of the 2010 Arbitration Rules.

Initiation of arbitration proceedings — article 2 of the rules on transparency, supplementing article 3 of the 1976 Arbitration Rules and 2010 Arbitration Rules, and article 4 of the 2010 Arbitration Rules

25. Article 2 of the rules on transparency would supplement article 3 of the UNCITRAL Arbitration Rules, as it establishes an obligation for the disputing parties to provide information to the registry once the notice of arbitration has been received. It would also supplement article 4 of the 2010 Arbitration Rules if a reference to the response to the notice of arbitration is included in article 2.

Publication of documents — article 3 of the rules on transparency, supplementing section III of the UNCITRAL Arbitration Rules

26. Article 3 of the rules on transparency provides that the arbitral tribunal shall communicate documents to the registry for publication. Such obligation is not dealt with under the UNCITRAL Arbitration Rules. Article 3 would supplement section III of the UNCITRAL Arbitration Rules on arbitral proceedings.

Submission by third persons — article 5 of the rules on transparency; Submission by non-disputing Party to the treaty — article 6 of the rules on transparency, supplementing section III of the UNCITRAL Arbitration Rules

27. The UNCITRAL Arbitration Rules are silent on submissions by third persons. Submissions by third persons have been accepted by arbitral tribunals in cases under the UNCITRAL Arbitration Rules, in general based on the discretion left in the UNCITRAL Arbitration Rules to the arbitral tribunal to “conduct the arbitration in such manner as it considers appropriate”.² Arbitral tribunals also considered that article 25, paragraph (4), of the 1976 Arbitration Rules (corresponding to article 28,

² See for instance, *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as “amici curiae”, 15 January 2001; see also, *United Parcel Service of America inc. v. Government of Canada*, “Decision of the tribunal on petitions for intervention and participation as amici curiae”, 17 October 2001, available at: <http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf>; *Glamis Gold, Ltd. v. The United States of America*, “Decision on application and submission by Quechan Indian Nation”, 16 September 2005, available at: www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Amicus-Decision--16-09-05.pdf. See also the comments of the United States of America in document A/CN.9/159/Add.3 on Transparency in treaty-based investor-State arbitration.

paragraph (3), of the 2010 Arbitration Rules), did not prevent the arbitral tribunal to receive written submissions.³

28. Articles 5 and 6 of the rules on transparency would therefore supplement section III of the UNCITRAL Arbitration Rules by codifying how, in treaty-based investor-State arbitration, the arbitral tribunal should handle submissions by third persons and non-disputing Parties to the treaty.

c. No effect on the UNCITRAL Arbitration Rules

Exceptions to transparency — article 8 of the rules on transparency

29. Article 8 deals with exceptions to the rules on transparency. It defines information that is considered as confidential or sensitive, and should be excluded from publication. There is no provision on confidential or sensitive information in the UNCITRAL Arbitration Rules. Article 8 also addresses the matter of protection of the integrity of the arbitral process, in the limited context of the impact of transparency on the arbitral process.

30. Article 8 would not affect the UNCITRAL Arbitration Rules, because it relates solely to the implementation of the rules on transparency.

Repository of published information — article 9 of the rules on transparency, and appointing authorities

31. Article 9 of the rules on transparency provides for the establishment of a repository of published information, which may consist of one institution or many institutions providing the service of a registry. The repository will, from the date the arbitral tribunal is constituted, mainly communicate with the arbitral tribunal for the publication of documents.

32. Option 2 of article 9 provides a list of arbitral institutions that may be chosen by the parties to act as registry. It may be noted that the UNCITRAL Arbitration Rules provide for the designation of an appointing authority, which may assist the parties in certain instances. It is likely that if the parties choose as appointing authority an institution also listed under article 9 (option 2), the same institution will act as both an appointing authority and a repository of published information for the case. However, option 2 of article 9 does not provide that if an appointing authority has been designated, that appointing authority will act as the registry for the reasons that an appointing authority may also be a physical person, and may be chosen by the parties at a late stage of the proceedings.

33. Article 9 is to be considered in conjunction with the articles of the rules on transparency only, as its purpose is to deal with the means of publication. It would not affect the UNCITRAL Arbitration Rules.

³ See for instance, *United Parcel Service of America inc. v. Government of Canada*, “Decision of the tribunal on petitions for intervention and participation as amici curiae”, 17 October 2001, paras. 65-68, available at: <http://naftaclaims.com/Disputes/Canada/UPS/UPSDDecisionReParticipationAmiciCuriae.pdf>.

Allocation of costs

34. The Working Group may wish to note that article 40, paragraph (1), of the 1976 Arbitration Rules, as well as article 42, paragraph (1), of the 2010 Arbitration Rules, provide that “the costs of arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.” The allocation of costs resulting from the application of the rules on transparency would be covered by those provisions of the UNCITRAL Arbitration Rules.

2. Arbitration rules of international arbitral institutions

35. Comments received from arbitral institutions on the interplay of the rules on transparency with their institutional rules will be published by the Secretariat as it receives them.

III. Draft convention on transparency in treaty-based investor-State arbitration

36. At its fifty-fifth session, the Working Group considered the text of a draft convention on transparency in treaty-based investor-State arbitration as contained in document A/CN.9/WP.166/Add.1, paragraph 19. The Working Group considered that a convention on the applicability of the rules was feasible and interesting, as that instrument was said to best fulfil the mandate of the Working Group to further transparency in treaty-based investor-State arbitration. The Working Group recalled its understanding that such a convention would make the rules on transparency applicable only to investment treaties between such States (or regional economic integration organizations) Parties that would also be parties to the convention on transparency (A/CN.9/736, para. 135).

37. The text of a draft convention on transparency in treaty-based investor-State arbitration could read as follows.

“Article 1. Scope of application

“1. This Convention shall apply to investor-State arbitration [under the UNCITRAL Arbitration Rules] conducted on the basis of a treaty providing for the protection of investments or investors between Contracting Parties to this Convention.

“2. The term “treaty providing for the protection of investments or investors” means any investment agreement between Contracting Parties, including a bilateral or multilateral investment agreement or free trade agreement, so long as it contains provisions on the protection of investments and a right for investors to resort to arbitration against Parties to the treaty.

“Article 2. Interpretation

“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.

“Article 3. Use of the UNCITRAL Rules on Transparency

“Each Contracting Party agrees to apply the UNCITRAL Rules on Transparency to investor-State arbitration [under the UNCITRAL Arbitration Rules] conducted on the basis of a treaty for the protection of investments or investors between Contracting Parties to this Convention. Nothing in this agreement prevents Contracting Parties from applying standards that provide a higher degree of transparency than the Rules on Transparency.”

Remarks

38. The Working Group may wish to consider the wording of the draft convention as set out above, in paragraph 37. The drafting takes account of the suggestion made at the fifty-fifth session of the Working Group that the opening words of article 3 of the draft convention be amended to read “Each Contracting Party agrees that the UNCITRAL Rules on Transparency shall apply [...]” for the reason that the language needed to be more specific (A/CN.9/736, para. 135). The definition of the term “treaty providing for the protection of investments or investors” has been modified to more closely follow the proposed definition of that term in article 1 of the rules on transparency (A/CN.9/WG.II/WP.169, paras. 8 and 23 to 24).

39. The option of a convention in the form of a general statement of applicability as proposed in this note does not incorporate the contents of the rules on transparency currently developed by the Working Group, but reflects the agreement of the Contracting Parties to apply these rules to arbitrations under their investment treaties existing at the date of entry into force of the convention. The Working Group may wish to consider further the question raised at its fifty-fifth session whether the convention should also include the text of the rules on transparency (A/CN.9/736, para. 135).

40. The draft convention does not include provisions which would be typically found in a convention, including the preamble and final provisions, such as the depositary, signature, ratification, acceptance, approval, accession, reservations, entry into force, revision and amendments, and denunciation. Those provisions could be drafted at a later stage if it is considered that the option of a convention should be pursued.

41. The Working Group may wish to note that the wording of the draft convention has been chosen to be as generic as possible, to make the draft convention applicable to as many investment treaties as possible.

**F. Note by the Secretariat on settlement of commercial disputes:
Transparency in treaty-based investor-State arbitration —
Comments by arbitral institutions regarding the establishment of
a repository of published information (“registry”), submitted to
the Working Group on Arbitration and Conciliation at its
fifty-sixth session**

(A/CN.9/WG.II/WP.170 and Add.1)

[Original: English]

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I. Introduction

1. In preparation for the fifty-sixth session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to continue its work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration, interested arbitral institutions were invited, at the fifty-fifth session of the Working Group, to provide information on the cost of establishing and maintaining a repository of information to be published in accordance with the legal standard on transparency (“registry”) (A/CN.9/736, para. 133). In accordance with the decision of the Working Group, the Secretariat circulated on 18 October 2011 a questionnaire to arbitral institutions that had expressed an interest in being associated to the current activities of the Working Group or that have been listed by UNCTAD as institutions administering treaty-based investor-State disputes.¹ The questionnaire is reproduced in section II below. The comments received from arbitral institutions are reproduced in section III of this note in the form in which they were received by the Secretariat.

¹ See *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note No. 1 (2010), International Investment Agreements, p. 2; available on 28 November 2011 at www.unctad.org/en/docs/webdiaeia20103_en.pdf; see also document A/CN.9/WG.II/WP.160, para. 29.

II. Questionnaire on costs of establishing and maintaining a repository of published information (“registry”)

2. The description of the role of a registry, and the assumptions regarding caseload in the questionnaire circulated by the Secretariat were as follows:

“Generally, the registry provider would be responsible for making publicly available via the internet information received from an arbitral tribunal in accordance with the rules on transparency. For the provider, this would consist primarily of publishing on its website:

- Information extracted from the notice of arbitration sent by any party; namely, the names of the parties, the field of activity concerned, and the investment treaty under which the claim arose; and
- Documents provided to or issued by the arbitral tribunal during the course of the arbitral proceedings, in the form received. The list of documents has not been determined yet, but it may include the notice of arbitration and response thereto, memorials, witness statements and expert reports, exhibits (or a table of contents thereof), submissions by third parties and non-disputing State Parties; and decisions and orders of the arbitral tribunal. The registry could foresee receiving documents in either paper or electronic format.

On that basis, the UNCITRAL Secretariat would appreciate receiving cost estimates from the [institution] on the assumption that, as a single registry provider,² it might be expected to publish information on some 50 cases per year or, as one of several participating organizations acting as registry providers, it might be expected to deal with up to 10 cases per year. The registry would be asked to provide unique web addresses for each dispute so that they may be linked to from the UNCITRAL website.”

3. The questions regarding the cost of establishing and maintaining a registry either as a unique provider [PCA and ICSID] or as one of several providers were as follows:

“(1) How much do you estimate it would initially cost your organization to put in place an online public registry system (either through tailoring existing electronic systems or developing a new system)?

(2) How much do you estimate the registry would cost your organization on an annual basis? Please, consider the costs of staff, electronic publication of case documents, data security, preservation of paper documents, server and system maintenance and any other recurrent expenses.

(3) How would your organization expect to cover the costs of the registry system (e.g., by charging a fee to parties to the dispute)?

(4) If your organization would expect to charge a fee to parties, how much do you estimate that fee would be?”

² The reference to “single registry provider” was included in the questionnaire sent to the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (“PCA”), only (see A/CN.9/717, para. 148).

III. Comments received from arbitral institutions

A. London Court of International Arbitration (“LCIA”)

Reply by the Director General

Date: 15 November 2011

I am pleased to confirm that the LCIA is, in principle, willing to serve as a registry provider in connection with the UNCITRAL rules on transparency in treaty-based investor-State arbitrations.

I would, therefore, respond to your four specific questions as follows.

Q1. How much do you estimate it would initially cost your organisation to put in place an online public registry system?

A1. We would propose to set up a dedicated website, with dedicated server; operated and maintained separately from our own website to ensure greater efficiency and ease of operation and access.

We estimate that the initial cost of setting up this system, including website design, and content and management systems (CMS), would be in the region of £10,000 (€11,700).

Q2. How much do you estimate the registry would cost your organisation on an annual basis?

A2. We estimate that the ongoing annual costs of maintaining the website, including hosting, support, and CMS administration, would be in the region of £4,000 (€4,700).

This includes staff time related only to the maintenance of the systems. As regards time spent on administrative tasks arising, see A3 and A4, below.

It is not possible to estimate the cost of storage of paper documentation at this time, as we have no indication of the likely volume of papers, as opposed to documents in electronic format. On the understanding, however, that any paper documents received would be scanned and uploaded to the dedicated website, and the papers themselves stored for a prescribed time, the cost of storage would be £0.41 (€0.48) per cubic foot, per month; £14.47 (€16.95) per cubic metre per month.

Ongoing annual costs of this kind would, of course, be subject to review and adjustment for inflation and other market factors.

Q3. How would your organisation expect to cover the costs of the registry system (e.g. by charging a fee to parties to the dispute)?

A3. The LCIA would expect to cover the costs of the registry system by charging the parties an initial registration fee of £1,000 (€1,170) plus time spent in administration on each case, at prevailing published rates; currently £225 (€263) per hour for the Registrar, Deputy Registrar and Counsel; and between £100 (€117) and £150 (€175) for other secretariat personnel, depending upon the activity.

The LCIA would, in addition, charge for all expenses incurred by it in connection with any referral, including the cost of any storage or archiving of paper documentation.

Q4. If your organisation would expect to charge a fee to parties, how much do you estimate that fee would be?

A4. Once again, it is not possible, without further information about the likely demands on administrative time or the anticipated typical volume of documentation to be processed, to provide the likely total charge to the parties per case. Nonetheless, this service would be akin to the administrative services, typically fundholding, that the LCIA now routinely provides in ad hoc arbitrations, and which is generally regarded as highly efficient and cost effective.

If there are any further details that UNCITRAL were able to add to their brief, we should be more than pleased to firm up on these estimates to the extent that such additional information allowed us better to assess the likely volume of work per case referred, and, therefore, the likely time to be spent by LCIA staff.

B. Cairo Regional Centre for International Commercial Arbitration (“CRCICA”)

Reply by the Director
Date: 17 November 2011

At the outset, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) is pleased to confirm its willingness to act as a registry provider.

After requesting tentative information relating to the costs of establishing, running and maintaining such service, we roughly estimate that the costs of putting on line a public registry system to be 25,000 USD in addition to annual costs ranging from 3,000 USD to 5,000 USD.

CRCICA expects to charge a fee to parties ranging from 3,000 to 5,000 USD depending on the size/format of the documents to be published.

C. Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”)

Reply by the Secretary General
Date: 25 November 2011

1. The below represents our preliminary assessment of the issues which may need to be addressed in connection with a potential registry service under a future set of UNCITRAL rules on transparency.

2. For the sake of clarity, the SCC would like to underline that none of the below should be seen as the SCC advocating a specific standard on transparency. The objective has been to outline potential solutions by which arbitral institutions such as the SCC can contribute to an efficient and modern application on the UNCITRAL rules on transparency, irrespective of the final details of their content. The SCC recognizes that the rules on transparency have not yet been finalized, and this reply is thus presented with the caveat of any necessary changes needed as a result of the final versions of the texts.

3. This paper outlines three potential scenarios by which a registry system could be implemented, described in the first section. In the second section, we address the specific questions of your letter of 18 October 2011.

4. The proposed provision in “Repository of published information (“registry”)” refers to “information” that shall be made available to the public — in contrast to the term “document” which has also been used. For the purpose of this letter, the SCC has assumed that that data to be published refers to the wider term “information”.

A. POSSIBLE SOLUTIONS. GENERAL REMARKS.

5. A number of different technical solutions could be used to create an online public registry system. Formal prerequisites as finally defined by the UNCITRAL Rules on Transparency, the anticipated use of its content, the desired level of user-friendliness and standards of security all represent decisive factors in any specification of such system, and consequently also to assess the costs associated with building and administrating the system.

6. An important aspect when deciding the technical solution is to ensure that the registry is implemented in a user-friendly manner, to provide the rules with any practical significance.

7. To further increase the public accessibility it may be worth exploring whether it would be possible and desirable if all information concerning treaty-based investor-State arbitration was made accessible in one common repository with one entry point, i.e. in one common web portal. The information in the portal could still be provided by several different institutions, but for the users there would merely be one point of access. Therefore, this paper outlines three different scenarios for the implementation of the registry: (a) a common repository for all participating institutes, (b) separate repositories for each institute, but with a common framework and a common collection of links to the different disputes, and (c) completely separate registry services for each institute.

8. Initially, however, some general remarks for all scenarios are addressed.

Security issues and statistics

9. Information security is an important issue to address in any potential registry service implementation. The credibility of the registry and the rules on transparency will be closely connected with the accuracy and reliability of the information published. Thus, when developing the registry the information security aspect and how to prevent the possibility for any unauthorized person to alter or delete information in the system must be carefully considered. Information that has been made public in the registry should only be allowed to be altered or deleted under certain well defined conditions to secure information security and reliability.

10. Possibly, recommendations and best practice in this context could be included in a future UNCITRAL recommendation, similar to the “1982 Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules”.

11. To ensure the secure handling of the information, it is probably well advised to use a well-developed document management system with security and access rights

control as well as tracking functionality. By security and access control it will be possible to prevent unauthorized access to the information. By adding a tracking functionality to the registry system it will further be possible to supervise the administration of the system and retrieve information on who has uploaded material, made alterations or deleted information.

12. From a security perspective it is furthermore well advised that it is always the final version of any information that is uploaded in the registry. In regard to sensitive information exempted from transparency, the information in the registry should then be the reduced document where such sensitive information has been disguised, never the original file without reductions. Instead, it is advised that each administrator keeps the original file in a separate internal document management system.

Information format

13. It is foreseen that data to be published in the registry refers to the wider term “information” in contrast to the term “document”. Thus, SCC assumes that data in the registry will not only consist of documents in Word or PDF format, but may also consist of information in other formats like webcasts or recordings from hearings. Ideally, the technical solution should have the flexibility to support all kinds of relevant formats and in a way that ensures that users can access the information easily via the web page of the registry.

14. An important consideration in this context is policies on how long the webcast or video recording should be made available, and with what functionality. It is well advised that web casts and video recordings are only made available via viewer functionality and not with any downloading possibilities. (For example at YouTube, videos may be viewed but not downloaded.)

15. To safeguard the necessary durability and to provide a standard format accessible (from a reader that all users can download for free), documents preferably should be uploaded as a PDF, in a format supporting free text searching. This is normally included in the standard functionality when using digital migration from Word to PDF, but if paper documents are scanned into the system, an OCR scanner must be used.

16. A question which needs to be addressed is whether it should be possible for users to download documents from the registry, or not. This means texts will either be published in an open PDF format or merely presented via secure view functionality.

Findable and accessible issues

17. Investor-State arbitrations are complex, time-consuming disputes, which often contain voluminous documentation. Against this background, it is questionable whether a solution by which materials are merely published (listed) on a website would sufficiently fulfil the transparency objective.

18. The volume aspect and how to make the information in practice easy accessible would therefore need to be carefully considered in the development and implementation of a registry service. Where the information is very extensive and unstructured, access to information in a relevant manner will be potentially

impeded. It may thus not be sufficient merely making the information publicly accessible, if the objectives of transparency shall be deemed to be met. Instead, the registry service may need to include tools facilitating not only access but actually making it possible to find relevant information, using modern search tools.

19. Preferably, information in the registry system would be searchable via a combination of structured searching and free text searching. If a modern document management system is used to structure the information, there will be a functionality making it possible to set up a structure about what information will be saved together with each file (“meta-data”). This could for example be information about date, information type (document, presentation, webcast etc.) and origin (one of the parties or a third party). This information can be used for filtering and searching in a structured manner.

20. In summary, an efficient search function structure will enhance access to the information.

Personal data aspects

21. An important issue which may need to be addressed is if the information in the registry would contain personal data that could be subject to the regulations under the EC Directive (95/46/EC) on data protection.

Language support

22. If assumed that all information in the registry system will be in English, the search function needs to support English language only. However, it is likely that the system will include information in other languages as well, and this aspect needs to be addressed in the development of the structure and the filtering possibilities of the registry system as well as in the implementation of an additional language support for searches.

Support for mobile access

23. To further increase the accessibility of the information in the registry it could be considered if a support for mobile devices, such as iPads, iPhones and Androids, should be implemented. Thereby a modern way of working and accessing information would be supported. If standard systems are used, there is often a built in support for mobile devices that could be used.

B. POSSIBLE SOLUTIONS. THREE SCENARIOS.

(a) Scenario 1: A common repository for all participating institutes

24. The first suggested scenario for the implementation of the registry is to create a common repository for all participating institutes. Thus, all information concerning treaty-based investor-State arbitration would be made accessible in one common repository with one entry point, i.e. in one common web portal. For the users, there would only be one system to get acquainted to, even if the content would be provided by several different institutions.

25. This common repository would provide a comprehensive overview of all treaty-based investor-State arbitration rather than scattered information depending on the appointed institute. A common high-standard secure back-up system for the

registry could be developed and hence applicable to all cases published under the rules on transparency, regardless of choice of arbitration rules or institution.

26. A possible technical solution and its administration are described below.

Possible solution

27. The objective of the registry system is to support the rules on transparency in treaty-based investor-State arbitration by making relevant information publicly accessible. If the online registry truly shall support this objective with any practical meaning, it will be important with a search functionality, structure and user interface that supports finding the right information.

28. Furthermore, the solution for the registry system needs to be able to manage security issues and a variation of information file formats. An additional element to take into account is the possibility to safeguard the sustainability of the system, with long-term maintenance and development.

29. To create a stable technical solution with all the required functionality for the registry system, it is advisable to use standard system solutions, rather than to develop a bespoke system.

30. The technical solution could consist of a combination of three standard system sections: (1) a web portal as public point of access; (2) separate web pages for each dispute; and (3) a document management system with a web-interface.

A potential technical solution

31. The basis for the registry could be a modern standard document management system.

32. A user-friendly approach to the system would include a web portal which is added as a layer on top of the document management system. The web portal in turn could consist of separate web pages for each dispute, which would all be accessed through the common entry point of the portal.

33. Each web page relating to a specific dispute would contain for example the following information:

- A brief description of the dispute as foreseen under the rules on transparency;
- Information on amendments and new material that has been added;
- A calendar for the dispute and the time plan, including for example information on upcoming webcasts with a direct link;
- A folder access point where all material in the digital file folder in the document management system is accessible via a web interface;
- Contact information to the administrating arbitral institution.

34. Each dispute could also be given a unique web address (URL). This would make it possible to link directly to the individual dispute from other websites, or even discussion forums where a case is being discussed (for example Kluwer Arbitration Blog and other forums). A possible — and modern — feature would be a track-back functionality to capture the discussions, analysis and other references made to any given dispute on other web pages, blogs and discussion forums. With a

track-back functionality, discussions relating to a specific case will be easily accessible from the dispute web page. It would be important to make very clear for reasons of neutrality, that any reference by means of track-back refers to comments made by third parties, and not by any institution administrating the dispute.

Implementation time and cost aspects

35. If the registry system is developed on basis of a cloud computing SaaS-model,³ costs could be evenly spread over time and standard well-developed software products could be used without any large up-front investment costs, which would reduce the costs of implementation.

36. It is not possible to estimate the total cost of a registry system at this time, given that this in the end will be very dependent on the specification or functions that this system is expected to demonstrate and perform. Potentially, and depending on the terms of the agreement with any third party provider for the system, the costs for development (only) could, in the experience of the SCC, range anywhere from 20,000 EUR to more than 150,000 EUR. Again, we emphasize that it is really not possible to foresee a cost at this time.

37. It is however possible to foresee that the costs for developing, implementing and administrating a registry system would comprise of the following three parts:

- i. Start-up costs for specifying the system requirements and developing the system in cooperation with the service supplier, implementation costs, costs for the back-up system and training of the administrators;
- ii. Recurrent expenses for licenses, system surveillance and maintenance;
- iii. Operative administrative costs.

38. Potentially, the initial costs for the implementation could be kept to a reasonable level and the total costs for the project can be spread over time if allocated between the participating institutes and parties.

Administrative organization and the different roles

39. If the registry system is built as one common repository for all registry providers, there are several different roles to consider.

40. There needs to be an owner of the system. This could be for example the UNCITRAL Secretariat, a constellation of the arbitral institutions, one specific institution, or any other third party deemed suitable. The owner would be responsible for deciding policies for the system, approving administrators to system, approving the implementation and any important changes onwards and have control of all information in the system.

41. The day-to-day management of the system requires a head of system management, with a responsibility for the system administration. This includes technical support, system surveillance, back-up and accessibility.

³ Software as a Service, i.e. a cloud-based technique for providing software applications without requiring the installation of the application on the computer. For further information and descriptions on cloud computing and SaaS, please see Gartner's SaaS definition at www.gartner.com/technology/it-glossary/saas.jsp.

42. There could be several administrators of the system. This would be the arbitral institutions administering treaty-based investor-State disputes where the UNCITRAL rules on transparency are applied.

Allocation of administrative costs

43. Following the initial start-up costs for the development and implementation of a registry system, there are two kinds of recurrent administrative costs, i.e.:

- i. Expenses for licenses, system surveillance and maintenance; and
- ii. Operational administrative costs for creating dispute pages and publishing information.

44. For the parties, the costs would be divided into (i) a set starting cost for the creation of a new dispute web page including folder and the right (license) to use the system and (ii) a cost that varies depending on the number of documents and other information that are published for each dispute.

45. The SCC assumes that the cost issue will be solved in a manner by which the administrator of the registry will be reimbursed for its cost by the parties. Possibly, an advance on cost will be required by the parties at the outset of the arbitration to cover the costs of the transparency mechanism.

Data security and back-up systems

46. Where the registry system is created as one common repository, only one back-up system needs to be implemented and monitored. In this scenario, the costs for the back-up system could be part of the cost for implementation and system maintenance, and hence divided among the participating institutes.

47. As pointed out above, it is important that the system maintains a high level of data security. Information in the registry must be reliable, and under no circumstances possible to alter by unauthorized users. It is assumed that long durability is desired, which in turn needs to be reflected in the format of the content. The use of a well-developed document management system is likely to properly address issues of security and access rights control and tracking functionality.

48. In addition, solid routines for back-ups need to be established.

(b) Scenario 2: Separate repositories for each institute, but with a common framework and a common collection of links to the different disputes

49. In this scenario, each registry, e.g. the SCC, develops a registry system on the same technical solutions as described above in Scenario 1.

50. Still, a common framework may be desirable. An UNCITRAL recommendation could serve this purpose, just as the “1982 Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules”, assists arbitral institutions acting as appointing authority. The framework would address issues such as back-up systems, structures, definitions and meta-data standards, information file format etc.

51. Also in this scenario, a common point of entry could be achieved by linking each separate registry systems from for example UNCITRAL.

(c) Scenario 3: Completely separate registry services for each institute

52. In this scenario it is assumed that it will be up to each participating institute to develop a registry service and to separately interpret how to implement the Rules on transparency in practice.

53. The disadvantage with this scenario of course is the loss of coordination and use of common framework for material assessments. Users would need to get acquainted to several different systems with different functionality and structure and the information on treaty-based investor-State arbitration would be scattered. There might also be different levels and standards on back-up systems, at the risk of varying degrees of information security.

C. THE QUESTIONS

1. *How much do you estimate that it would initially cost your organization to put in place an online public registry system?*

54. At this time it is not possible to estimate the total cost of a registry system, given that this in the end will be very dependent on the specification or functions that this system is expected to demonstrate and perform.

55. However, it is possible to foresee that in case the registry system is developed on basis of a cloud computing SaaS-model as described above, costs could be evenly spread over time and standard well-developed software products could be used without any large up-front investment costs, which would reduce the costs of implementation.

2. *How much do you estimate the registry would cost your organization on an annual basis?*

56. Please see the description on the administrative organization and the allocation of administrative costs above, for the factors which would affect such estimations.

3. *How would your organization expect to cover the costs for the registry system (e.g. by charging a fee to parties to the dispute)?*

57. Please see the general description above.

4. *If your organization would expect to charge a fee to parties, how much do you estimate that fee would be?*

58. Please know that this is not possible to estimate at this time, but will be entirely dependent on expectation regarding content and function of the system.

D. The Permanent Court of Arbitration (“PCA”)

Reply by the Deputy Secretary-General

Date: 25 November 2011

1. The Permanent Court of Arbitration (“PCA”) is pleased to reply to the UNCITRAL Secretariat’s letter of 18 October 2011, requesting cost estimates of acting as registry of information and documents disclosed under the Transparency Rules currently under consideration by the UNCITRAL Working Group II (“Rules”).

2. The PCA is willing to act as such a registry, either as a unique provider of registry services or as one of several organizations providing such services. The PCA's detailed responses to the questions posed in the UNCITRAL Secretariat's letter of 18 October appear below.

(1) How much do you estimate it would initially cost your organization to put in place an online public registry system (either through tailoring existing electronic systems or developing a new system)?

a. As a unique provider?

3. The PCA already publishes on its website information relating to cases conducted under its auspices,⁴ in accordance with directions it receives from the parties and/or the duly constituted tribunal in each case.⁵ Consequently, the establishment of an online public registry system would not entail additional infrastructure costs.

b. As one of several providers?

4. Please see response to 1(a) above.

(2) How much do you estimate the registry would cost your organization on an annual basis?

5. The requested cost estimate depends heavily on the amount of documents to be deposited per case. Since the UNCITRAL Secretariat's letter provides no information in this regard, we submit for your consideration four different cost scenarios. Each scenario takes into account the average processing time of a mix of electronic and hard copy documents,⁶ and assumes a certain level of disclosure per case (for example 1, 10, or 50 documents). The estimates below reflect the time required for PCA staff to process, post online and store electronically the information and documents, and any additional electronic storage space needed to do so. The scenarios do not reflect the cost of translating any of the disclosed documents or storing hard copies for any period of time. Estimating the cost of

⁴ The PCA's role as depository of case information and documents is foreseen in the PCA's founding conventions. According to Article 22 of the 1899 Convention for the Pacific Settlement of International Disputes, "an International Bureau, established at The Hague, serves as record office for the Court. This Bureau... has the custody of the archives and conducts all the administrative business." An identical provision is contained in article 43 of the 1907 Convention for the Pacific Settlement of International Disputes.

⁵ See, e.g., *Polis Fondi Immobiliare di Banche Popolare S.G.R.p.A (Italy) v. Int'l Fund for Agr. Dev. (IFAD)*, PCA Case No. 2010-8, available at <http://pca-cpa.org/showpage.asp?pag_id=1380>; *Chemtura Corp. (USA) v. Government of Canada*, PCA Case No. 2008-1, available at <http://pca-cpa.org/showpage.asp?pag_id=1278>; and *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. 2007-6, available at <http://pca-cpa.org/showpage.asp?pag_id=1339>; see also *The Government of Sudan v. The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, PCA Case No. 2008-7, available at <http://pca-cpa.org/showpage.asp?pag_id=1306>. In Abyei, the parties agreed to make public the pleadings, transcripts, decisions, awards and other case-related information, more than 50 documents in all.

⁶ In other words, under the various cost scenarios set out *infra*, documents would be submitted to the registry in either electronic or hard copy format. If the Rules required or the parties opted for submission in both formats, processing time and the corresponding costs would increase accordingly.

storing hard copy documents requires additional information, such as the volume of documents involved and the frequency of access required.⁷

6. We note that, even in scenarios where electronic storage-related expenditures would not be required during the first year or even the first few years of operation, over time such expenditures will become necessary for two reasons: first, because the accumulation of documents will require an upgrade of electronic storage space in the medium or long term; and second, because long-term electronic storage requires maintenance, which often entails transferring the files to new storage space to minimize the risk of equipment failure. The PCA's up-to-date infrastructure would contribute towards reducing such costs.

7. Finally, additional costs could be incurred due to increased processing time of electronic or hard copy files that are damaged, incomplete, or submitted in uncommon formats.

a. As a unique provider?

8. In accordance with the UNCITRAL Secretariat's letter, in determining the estimated cost in each scenario we assumed that 50 cases would be deposited with the PCA annually if it were to act as the sole provider of registry services under the Rules.

Scenario 1: The approximate annual cost of uploading case information (e.g., parties' names and nationalities) and one document per case for 50 cases would be EUR 1,000. No additional electronic storage costs would be incurred for at least five years.

Scenario 2: The approximate annual cost of uploading case information and 10 documents per case for 50 cases would be EUR 5,000. No additional electronic storage costs would be incurred for at least one year.

Scenario 3: The approximate cost of uploading case information and 50 documents per case for 50 cases would be EUR 15,000. An electronic storage upgrade cost, ranging between EUR 1,000 and EUR 2,000, would be incurred during the first year.

Scenario 4: Different levels of disclosure may apply to the cases submitted to the depository under the Rules, so it seems useful to explore a "composite" scenario. Assuming that 75 per cent of cases would fall under Scenario 1, 20 per cent under Scenario 2, and 5 per cent under Scenario 3, the estimated annual cost for 50 cases would be EUR 2,500. No additional electronic storage costs would be incurred for at least one year.

⁷ A certain amount of documents may be stored within the PCA premises at no charge; if necessary, additional space can become available at an annual cost of EUR 3.60 per box, with each box containing approximately five binders. Storage cost can also vary depending on the number of documents involved and the frequency and speed with which documents must be retrieved from the archive; for example, a single retrieval of up to 25 boxes within 24 hours can cost EUR 39. We remain available and willing to provide more specific information to the UNCITRAL Secretariat once additional operational parameters of the registry system become established.

b. As one of several providers?

9. In accordance with the UNCITRAL Secretariat's letter, in determining the estimated cost in each scenario we assumed that 10 cases would be deposited with the PCA annually if it were to act as one of several providers of registry services under the Rules.

Scenario 1: The approximate annual cost of uploading case information (e.g., parties' names and nationalities) and a single document per case for 10 cases would be EUR 200. No additional electronic storage costs would be incurred for at least five years.

Scenario 2: The approximate annual cost of uploading case information and 10 documents per case for 10 cases would be EUR 1,000. No additional electronic storage costs would be incurred for at least one year.

Scenario 3: The approximate annual cost of uploading case information and 50 documents per case for 10 cases would be EUR 3,000. An electronic storage upgrade cost, ranging between EUR 1,000 and EUR 2,000, would be incurred during the first year.

Scenario 4: Different levels of disclosure may apply to the cases submitted to the depository under the Rules, so it seems useful to explore a "composite" scenario. Assuming that 75 per cent of cases would fall under Scenario 1, 20 per cent under Scenario 2, and 5 per cent under Scenario 3, the estimated annual cost for 10 cases would be EUR 500. No additional electronic storage costs would be incurred for at least one year.

(3) How would your organization expect to cover the costs of the registry system (e.g., by charging a fee to parties to the dispute)?

10. In small cases with few documents, the PCA would maintain its discretion to charge no fee. The PCA would determine whether to charge a fee by considering the totality of circumstances surrounding the documents to be registered, including but not limited to the number and format of the documents.

(4) If your organization would expect to charge a fee to parties, how much do you estimate that fee would be?

a. As a unique provider?

11. Similar to its evaluation of whether to charge a fee at all, the PCA would determine the fee amount by considering the totality of circumstances surrounding the documents to be registered, including but not limited to the number and format of the documents.

b. As one of several providers?

12. Please see response to 4(a) above.

13. The PCA is also pleased to respond to the UNCITRAL Secretariat's questions related to the registry services that the PCA currently provides.

- How does the PCA charge for registry services?

14. The PCA follows an hourly rate system for registry services. The manner in which the PCA's registry fees are charged is negotiated on a case-by-case basis in

consultation with the parties and the tribunal. The PCA is usually successful in reaching agreement with the parties and the tribunal on application of the hourly rates set out in the PCA Schedule of Fees. The Schedule of Fees, which is available on the PCA website,⁸ appears below for your reference:

PCA Schedule of Fees for Registry Services

Secretary-General	€250/hour
Deputy Secretary-General	€250/hour
Senior Legal Staff	€175/hour
Junior Legal Staff	€125/hour
Secretarial/Clerical	€50/hour

- How does the PCA assure the authenticity of documents?

15. The PCA occasionally receives requests from parties for certified or legalized copies of documents emanating from PCA proceedings. The “certification” of documents refers to the process by which a member of the PCA staff certifies that a copy of a PCA document is true and accurate as compared to the document on file with the PCA. The “legalization” of documents refers to the process of endorsing the PCA staff member’s signature, for example by notarization, or the placement of an apostille. Any expenses associated with such requests, for example courier fees or notary/apostille fees are charged to the requesting party.

- In what form are the parties expected to submit documents?

16. The format in which documents are submitted to the PCA is subject to agreement by the parties or to directions issued by a duly constituted tribunal. The parties may decide, for example, that all materials be submitted in hard copy, accompanied by copies in electronic format. In recent cases, parties increasingly agree to submit documents only in electronic format. For purposes of hosting an online public registry system, the submission of documents in electronic format would be most efficient and cost-effective.

17. In view of the fact that the role of the registry is not yet fully defined, our responses are based in part on estimates and assumptions and should therefore be treated as indicative, but not binding on the PCA.

⁸ See <www.pca-cpa.org/showpage.asp?pag_id=1060>.

(A/CN.9/WG.II/WP.170/Add.1) (Original: English)

**Note by the Secretariat on settlement of commercial disputes:
Transparency in treaty-based investor-State arbitration -
Comments by arbitral institutions regarding the establishment of
a repository of published information (“registry”), submitted to
the Working Group on Arbitration and Conciliation at its
fifty-sixth session**

ADDENDUM**CONTENTS**

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III. Comments received from arbitral institutions**E. International Centre for Settlement of Investment Disputes (ICSID)**

Date: 8 December 2011

1. The International Centre for Settlement of Investment Disputes (ICSID or the Centre) herein provides a description of the potential costs of holding open hearings and creating a registry system in treaty-based investor-State arbitration.
2. ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention). Currently, there are 147 ICSID Contracting States. The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the ICSID Administrative Council and comprise Administrative and Financial Regulations, Rules of Procedure for the Institution of Proceedings, Rules of Procedure for Conciliation Proceedings, and Rules of Procedure for Arbitration Proceedings (Arbitration Rules).
3. Under the Convention, the Centre provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The ICSID Administrative Council also adopted Additional Facility Rules (AF Rules) authorizing the ICSID Secretariat to administer proceedings that fall outside the scope of the ICSID Convention, such as when one of the parties is not a Contracting State or a national of a Contracting State (e.g., Canada or Mexico) or when the proceedings are between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.

4. ICSID also administers arbitration proceedings governed by the UNCITRAL Arbitration Rules on an ad hoc basis, such as in the context of NAFTA and various BITs.

1. Registry

5. In accordance with Regulation 22(1) of the Administrative and Financial Regulations (the Regulations), “[t]he Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.”

6. Similarly, pursuant to Regulation 23(1), “[t]he Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration. In these he shall enter all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.”

7. In compliance with the above Regulations, the Centre has developed a practice to publish relevant information regarding arbitration proceedings on its website.¹ The Centre also publishes on its website decisions, awards, and sometimes parties’ submissions.²

8. In view of its experience, the Centre has been asked by the UNCITRAL Secretariat to provide cost estimates for the creation and maintenance of a “registry system” for UNCITRAL arbitration cases as discussed by the Working Group II on transparency. The purpose of the registry would be to centralize and make publicly available information concerning UNCITRAL investment arbitration cases. More specifically, the registry would provide basic information on every case (i.e., names of parties, field of activity, and investment treaty under which the claims arose) and would host documents provided to, or issued by, arbitral tribunals during the proceedings. Moreover, every case would have a unique URL, which would be posted on the UNCITRAL website. As a “unique” registry provider, ICSID would be expected to maintain and publish information in approximately 50 cases per year. As one of several registry providers, an option which is also being explored, the number of cases could be less than 10.³

9. In principle, and subject to obtaining relevant approvals, ICSID would be willing to serve as a registry provider.

¹ See ICSID Comments — United Nations document A/CN.9/WG.II/WP.167 (8 August 2011), para. 7.

² Id., paras. 8-14.

³ Letter dated 18 October 2011 — LA/TL 133(3-7) CM/CE/ota.

10. The Centre will now answer the questions put forward by the UNCITRAL Secretariat:

- (1) *“How much do you estimate it would initially cost your organization to put in place an online public registry system (either through tailoring existing electronic systems or developing a new system)?”*

ICSID would develop an external-facing website to host the registry using the World Bank’s web content management system. By leveraging this institutional platform, and by hosting the site in ICSID’s servers, development and operational costs could be relatively low. Initial costs could be reduced to a few days from a consultant to assist with the design of the site. Based on the brief description of the requirements provided to ICSID, these costs could range from US\$ 15,000 to US\$ 20,000.

- (2) *“How much do you estimate the registry would cost your organization on an annual basis?”*

Technical maintenance of the registry website would cost approximately US\$ 5,000 per year. This estimate does not include staff time required to administer the registry and which the Centre estimates to be a portion of the time of an administrative support staff and a legal counsel from its Secretariat, depending on the specific requirements of the project and the number of cases per year. Further, such staff costs might be covered by the flat fee the Centre would charge for the registry services (see below).

- (3) *“How would your organization expect to cover the costs of the registry system?”*

Pursuant to the ICSID Regulations, the direct expenses of ICSID proceedings are covered by the parties from funds which are advanced to the Centre periodically. The Centre also charges every case a flat fee to cover its costs in connection with the administration of the proceedings. This fee covers, among other things, registry-type services, including the maintenance of online case registers. In UNCITRAL cases administered by the Centre, including NAFTA cases, the Centre does not usually provide a website registry service since documents concerning these cases are typically published online by the disputing States.⁴

With respect to the UNCITRAL registry system, ICSID would propose to charge each case an annual flat fee for the duration of the case.

⁴ See the practice of Canada and the USA, see UNCITRAL, Settlement of commercial disputes, Transparency in treaty-based investor-State arbitration, Comments of the Governments of Canada and of the United States of America on transparency in treaty-based investor-State arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA), Fifty-fourth session, New York, (Feb. 7-11, 2011), United Nations document A/CN.9/WG.II/WP.163 (Dec. 7, 2010).

- (4) *“If your organization would expect to charge a fee to parties, how much do you estimate that fee would be?”*

Subject to a more detailed description of the requirements and the actual volume of documents, ICSID estimates that an annual fee of US\$ 1,800-2,000, payable to the Centre, would cover the costs to administer the registry.

11. Documents published on the ICSID website are usually submitted in pdf format and normally originate from tribunals. When the Centre is requested to publish documents originating from the parties, each party provides the documents to the Centre in pdf format.⁵

2. Hearings open to the public

12. Article 32(2) of the ICSID Arbitration Rule reads:

“Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.”

A similar provision was introduced under Article 39(2) of the ICSID Additional Facility Arbitration Rules.

13. Open hearings are subject to appropriate logistical arrangements. In practice, some hearings, usually in the context of NAFTA or CAFTA cases, have been either broadcast through closed-circuit television to a separate room⁶ or have been streamed live through webcasts over the Internet.⁷

14. There are thus two ways for a hearing to be open to the public through broadcast facilities: closed circuit television broadcast (side room open to the public where the hearing is broadcasted live), and webcast (i.e., live streaming/feed over the Internet).

15. As requested by the Delegations and the UNCITRAL Secretariat, and in order to share its experience, the Centre has prepared estimates of the costs related to holding an open hearing. These estimates are conservative and are based on certain standard requirements, as described below. They relate to costs incurred in Washington, D.C., for 8-hours per day hearings within the World Bank premises held during business hours. In addition, the Centre’s hypothesis is based on a hearing that would take place in one procedural language with no interpretation services, and no particular videoconferencing needs. The webcast estimations further include the costs of recording in order to be posted on a website.

⁵ See ICSID Comments — United Nations document A/CN.9/WG.II/WP.167, para. 9.

⁶ See, e.g., *Methanex v. the USA*.

⁷ See, e.g., the webcast available on the ICSID website of the hearing in *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) — Public Hearing — announcement dated May 18, 2011. See more recently, the announcement dated November 18, 2011, made in the case of *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) of a public hearing transmitted live via Internet feed, <http://icsid.worldbank.org>.

Live streaming (webcast)	Closed circuit broadcasting
<u>Estimate for 1 weekday</u> Standard set up: \$2,000 (one-time fee) Video Recording including technician: \$900 Audio Recording: \$250 Streaming weekday: \$1,200 Recording: \$400 <u>Total: \$4,750</u>	<u>Estimate for 1 weekday</u> Standard set up: \$2,000 (one-time fee) Video Recording including technician: \$900 Technician (overflow room): \$500 Audio Recording: \$250 Video Conferencing Services: \$500 Security costs: \$300 <u>Total: \$4,550</u>
<u>Estimate for 5 weekdays</u> Standard set up: \$2,000 Video Recording: \$900 x 5 days: \$4,500 Audio Recording: \$250 x 5 days: \$1,250 Streaming weekday: \$1,200 x 5 days: \$6,000 Recording: \$400 x 5 days: \$2,000 <u>Total: \$15,750</u>	<u>Estimate for 5 weekdays</u> Standard set up: \$2,000 Video Recording: \$900 x 5 days: \$4,500 Second Technician: \$500 x 5 days: 2,500 Audio Recording: \$250 x 5 days: \$1,250 Video Conferencing: \$500 x 5 days: \$2,500 Security: \$300 x 5 days: \$1,500 <u>Total: \$14,250</u>

F. International Court of Arbitration of the International Chamber of Commerce (ICC)

Reply by the Chairman

Date: 9 December 2011

As a preliminary point, I confirm that, in principle, the ICC is prepared to act as a repository of information to be published under the rules on transparency under preparation at UNCITRAL.

A number of factors have made it impossible to devote time to the preparation of answers to the questionnaire — mainly due to the introduction of the new ICC Rules of Arbitration on 1 January 2012.

In relation to the questionnaire, ICC needs to consider in particular:

- The costs attendant upon the acquisition of the necessary software
- Development costs
- Maintenance
- Data entry and site monitoring

I will ensure that it receives that attention as soon as we can apply the relevant human resource within the Secretariat and the ICC's IT department to the task.

**G. Note by the Secretariat on settlement of commercial disputes:
Recommendations to assist arbitral institutions and other interested
bodies with regard to arbitration under the UNCITRAL Arbitration
Rules, as revised in 2010**

(A/CN.9/746 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 had before it a note by the Secretariat on possible recommendations to arbitral institutions and other interested bodies with respect to the UNCITRAL Arbitration

Rules, as revised in 2010 (A/CN.9/705). The Commission recalled that, at its fifteenth session, in 1982, it had adopted “Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules”.¹ The preparation of the Recommendations had been undertaken by the Commission to facilitate the use of the 1976 UNCITRAL Arbitration Rules in administered arbitration and to deal with instances where the Rules were adopted as institutional rules of an arbitral body or when the arbitral body was acting as appointing authority or provided administrative services in ad hoc arbitration under the Rules. After discussion, the Commission agreed that similar recommendations to arbitral institutions and other relevant bodies should be issued with respect to the UNCITRAL Arbitration Rules, as revised in 2010, in view of the extended role granted to appointing authorities. It was said that the recommendations would promote the use of the Rules and that arbitral institutions in all parts of the world would be more inclined to accept acting as appointing authorities if they had the benefit of such guidelines. The Commission also agreed that the recommendations on the revised Rules should follow the same pattern as the Recommendations adopted in 1982. The Commission entrusted the Secretariat with the preparation of that document, for consideration by the Commission at a future session.²

2. At its forty-fourth session (Vienna, 25 June-8 July 2011), the Commission was informed that the recommendations were under preparation and the Secretariat was requested to prepare draft recommendations for consideration by the Commission at a future session, preferably as early as 2012.³

3. The present note contains under section II the text of draft recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010. The text has been prepared by the Secretariat after consultation with arbitral institutions, which included circulation to arbitral institutions in various parts of the world of a questionnaire on the use of the UNCITRAL Arbitration Rules, prepared in

¹ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* and corrigenda (A/37/17 and Corr.1 and 2), paras. 74-85 and annex I.

² *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 188 and 189.

³ *Ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 204.

cooperation with the International Federation of Commercial Arbitration Institutions (IFCAI).⁴

II. Draft recommendations to arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010

Introduction

The UNCITRAL Arbitration Rules, as revised in 2010

1. The UNCITRAL Arbitration Rules were originally adopted in 1976⁵ and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, commercial disputes administered by arbitral institutions, investor-State disputes and State-to-State disputes. They are recognized as one of the most successful international instruments of a contractual nature in the field of arbitration. They have also strongly contributed to the development of arbitration activities of many arbitral institutions in all parts of the world.

⁴ The following institutions have been involved in the overall consultation process: the American Arbitration Association (AAA), the Arbitration Court attached to the Commerce and Agricultural Chamber of the Czech Republic, the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Australian Centre for International Commercial Arbitration (ACICA), the Belgian Center for Arbitration and Mediation (CEPANI), the Board of Arbitration of the Central Chamber of Commerce of Finland, the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Centro de Arbitraje y Conciliación Cámara de Comercio de Bogotá, the Centro de Arbitraje y Mediación - Cámara de Comercio de Santiago (CAM Santiago), Chamber of Arbitration of the Milan Chamber of Commerce, China International Economic and Trade Arbitration Commission (CIETAC), the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, the Court of Arbitration at the Polish Chamber of Commerce, the Danish Institute of Arbitration (DIA), the Dubai International Arbitration Centre (DIAC), the Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia, the GCC Commercial Arbitration Centre, German Institution of Arbitration (DIS), the Hong Kong International Arbitration Centre (HKIAC), the Indian Council of Arbitration, the International Arbitration Court of the International Chamber of Commerce (ICC), the International Commercial Arbitration Court - Russian Federation Chamber of Commerce and Industry, the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, the Japan Commercial Arbitration Association (JCAA), the International Centre for Settlement of Investment Disputes (ICSID), the Korean Commercial Arbitration Board, the Kuala Lumpur Regional Centre of Arbitration (KLCA), the London Court of International Arbitration (LCIA), the Madrid Court of Arbitration, the Permanent Court of Arbitration at The Hague (PCA), the Mediation and Arbitration Center (CANACO), the Permanent Arbitration Court at the Croatian Chamber of Economy, the Permanent Arbitration Court of the Mauritius Chamber of Commerce and Industry, the Singapore International Arbitration Centre (SIAC), the Swiss Arbitration Association (ASA), the Tunis Center for Conciliation and Arbitration, the Venice Chamber of Arbitration, the Vienna International Arbitration Centre (VIAC), the Waren-Verein der Hamburger Börse e.V.

⁵ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57; UNCITRAL Yearbook, vol. VII: 1976, part one, chap. II, sect. A.

2. The UNCITRAL Arbitration Rules have been revised in 2010⁶ to better conform to current practices in international trade law and to meet changes in arbitral practice over the last thirty years. The revision was aimed at enhancing the efficiency of arbitration under the Rules and did not alter the original structure of the text, its spirit and drafting style. The UNCITRAL Arbitration Rules, as revised, have been effective since 15 August 2010.

Resolution 65/22 of the General Assembly

3. In 2010, the General Assembly of the United Nations, by its resolution 65/22, recommended the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations. This recommendation was based on the conviction that “*the revision of the Arbitration Rules in a manner that is acceptable to countries with different legal, social and economic systems can significantly contribute to the development of harmonious international economic relations and to the continuous strengthening of the rule of law.*”

4. The resolution also noted that “*the revised text can be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes.*”

Purpose of the Recommendations

5. These Recommendations are made with regard to the use of the 2010 UNCITRAL Arbitration Rules (for recommendations on the use of the 1976 UNCITRAL Arbitration Rules, see the “*Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules*”,⁷ adopted at the fifteenth session of UNCITRAL, in 1982). Their purpose is to inform and assist arbitral institutions and other interested bodies that envisage using the Rules as described in paragraph 6 below.

Different usages by arbitral institutions and other interested bodies

6. The UNCITRAL Arbitration Rules have been used in the following different manners by arbitral institutions and other interested bodies, including chambers of commerce and trade associations (“institution(s)”):

(i) They have served as a model for institutions drafting their own arbitration rules. The degree to which the UNCITRAL Arbitration Rules have been used as a drafting model ranges from inspiration to full adoption of the Rules (see below, section I);

(ii) Institutions have offered to administer disputes under the UNCITRAL Arbitration Rules, or to render administrative services in ad hoc arbitrations under the Rules (see below, section II);

⁶ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 13-187 and Annex 1.

⁷ *Ibid.*, *Thirty-seventh Session, Supplement No. 17 (A/37/17)*, annex I. The text of the Recommendations is also available on the Internet at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1982Recommendations_arbitration.html.

(iii) An institution (or a person) may be requested to act as appointing authority, as provided for under the UNCITRAL Arbitration Rules (see below, section III).

I. Adoption of the UNCITRAL Arbitration Rules as the institutional rules of arbitral institutions or other interested bodies

1. Appeal to leave the substance of the UNCITRAL Arbitration Rules unchanged

7. Institutions, when preparing or revising their institutional rules, may wish to consider adopting the UNCITRAL Arbitration Rules as a model.⁸ An institution that intends to do so should take into account the expectations of the parties that the rules of the institution will then faithfully follow the text of the UNCITRAL Arbitration Rules.

8. This appeal to follow closely the substance of the UNCITRAL Arbitration Rules does not mean that the particular organizational structure and needs of a given institution should be neglected. Institutions adopting the UNCITRAL Arbitration Rules as their institutional rules will certainly need to add provisions, for instance on administrative services or fee schedules. In addition, formal modifications, affecting very few provisions of the UNCITRAL Arbitration Rules, as indicated below in paragraphs 9 to 17, should be taken into account.

2. Presentation of modifications

a. A short explanation

9. If an institution uses the UNCITRAL Arbitration Rules as a model for drafting its own institutional rules, it may be useful for the institution to consider indicating where those rules diverge from the UNCITRAL Arbitration Rules. Such indication may be helpful to the readers and potential users who would otherwise have to embark on a comparative analysis to identify any disparity.

10. The institution may wish to include a text, for example a foreword, which refers to the specific modifications included in the institutional rules as compared to the UNCITRAL Arbitration Rules.⁹ The indication of the modifications could also

⁸ For example, see the arbitration rules of the Cairo Regional Centre for International Commercial Arbitration (“CRCICA”), available on the Internet at www.crcica.org or of the Kuala Lumpur Regional Centre of Arbitration (“KLRC”), available on the Internet at www.klrca.org.my.

⁹ For example, in the introduction of the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) in force as from 1 March 2011, it is provided that they “*are based upon the new UNCITRAL Arbitration Rules, as revised in 2010, with minor modifications emanating mainly from the Centre’s role as an arbitral institution and an appointing authority*” available on the Internet at www.crcica.org; the Arbitration Rules (as revised in 2010) of the Kuala Lumpur Regional Centre of Arbitration (KLRC) provide that the rules for arbitration of the institution shall be the “*UNCITRAL Arbitration Rules with the modifications as set out in the subsequent rules*”, available on the Internet at www.klrca.org.my.

come at the end of the text of the institutional rules.¹⁰ Further, it might be advisable to accompany the institutional rules with a short explanation of the reasons for the modifications.¹¹

b. *Effective date*

11. Article 1, paragraph (2), of the 2010 UNCITRAL Arbitration Rules defines an effective date for those Rules. Obviously, the institutional rules based on the UNCITRAL Arbitration Rules will have their own specific date of application. In the interest of legal certainty, it is recommended to refer in the arbitration rules to the effective date of application of the rules, so that the parties know which version is applicable.

c. *Communication channel*

12. Usually, when an institution administers a case, communications between the parties *before* the constitution of the arbitral tribunal would be carried out through the institution. Therefore, it is recommended to adapt articles 3 and 4 of the 2010 UNCITRAL Arbitration Rules relating to communication before the constitution of the arbitral tribunal. For example, in relation to article 3, paragraph (1):

(i) If the communications take place through the institution, article 3, paragraph (1) could be amended as follows:

Article 3 (Notice of arbitration)

"1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall communicate to [name of the institution] a notice of arbitration. [Name of the institution] shall communicate the notice of arbitration to the other party or parties (hereinafter called the "respondent") [without undue delay] [immediately]."

Or

*"1. The party(ies) initiating recourse to arbitration (hereinafter called the "claimant") shall file with [name of the institution] a notice of arbitration and [name of the institution] shall communicate it to the other party(ies) (hereinafter called the "respondent")."*¹²

¹⁰ For example, see the "PCA Optional Rules for Arbitration between International Organizations and Private Parties", of the Permanent Court of Arbitration at The Hague ("PCA"), (based on the 1976 version of the UNCITRAL Arbitration Rules), available on the Internet at www.pca-cpa.org/upload/files/IGO1ENG.pdf.

¹¹ For example, in the notes to the text of the "PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, the following note is inserted: "These Rules are based on the [1976] UNCITRAL Arbitration Rules, with the following modifications: Modifications to indicate the functions of the Secretary-General and the International Bureau of the Permanent Court of Arbitration: Article 1, para. 1 (added)..." the text of the "PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State" is available on the Internet at www.pca-cpa.org/upload/files/1STATENG.pdf.

¹² For example, this is the approach adopted in the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA).

(ii) If the institution receives copies of the communications, article 3, paragraph (1), would remain unchanged, and the following provision could be added:

“All documents transmitted pursuant to articles 3 and 4 of the UNCITRAL Arbitration Rules shall be served on [name of the institution] at the time of such transmission to the other party(ies) or immediately thereafter.”¹³

13. To address the matter of communications after the constitution of the arbitral tribunal, the institution may either:

- Modify each article in the UNCITRAL Arbitration Rules referring to communications; that would concern namely: article 5; article 11; article 13, paragraph (2); article 17, paragraph (4); article 20, paragraph (1); article 21, paragraph (1); article 29, paragraphs (1), (3) and (4); article 34, paragraph (6); article 36, paragraph (3); article 37, paragraph (1); article 38, paragraphs (1) and (2); article 39, paragraph (1); article 41, paragraphs (3) and (4); or

- Include in article 17 a provision along the lines of:

(if the institution decides to receive all communications for the purpose of notification) *“Except as otherwise permitted by the arbitral tribunal, all communications addressed to the arbitral tribunal by a party shall be filed with the [name of the institution] for notification to the arbitral tribunal and the other party(ies). All communications addressed from the arbitral tribunal to a party shall be filed with the [name of the institution] for notification to the other party(ies).”¹⁴*; or

(if the institution decides to receive copies of all communications for the purpose of information) *“Except as otherwise permitted by the arbitral tribunal, all communications between the arbitral tribunal and any party shall also be sent to [name of the institution].”*

14. In the interest of procedural efficiency, it might be appropriate for an institution to consider whether to require receiving copies of communications only *after* the constitution of the arbitral tribunal. If such requirement is adopted by the institution, it would be advisable to refer to the receipt of the copies in a manner that is technology neutral, in order not to exclude new and evolving technologies. To receive copies of communications through new technologies could also result in a desirable reduction of costs for the institution.

¹³ For example, a similar approach can be found in Rule 2 (1) of the Rules for Arbitration of the Kuala Lumpur Regional Centre of Arbitration (KLRCa).

¹⁴ For example, a similar provision is included in article 17 (5) of the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA).

d. Substitution of the reference to the “appointing authority” by the name of the institution

15. Where an institution uses the UNCITRAL Arbitration Rules as a model for its institutional rules, the institution typically carries out the functions attributed to the appointing authority under the Rules, and therefore should amend the corresponding provisions of the Rules, as follows:

- Article 3, paragraph (4)(a); article 4, paragraph (2)(b); article 6, paragraphs (1) to (4); and the reference to the designating authority in article 6, paragraph (5) should be deleted;
- The term “appointing authority” could be replaced by the name of the institution in the following provisions: article 6, paragraphs (5) to (7); article 7, paragraph (2); article 8, paragraphs (1) and (2); article 9, paragraphs (2) and (3); article 10, paragraph (3); article 13, paragraph (4); article 14, paragraph (2); article 16; article 43, paragraph (3); and, if the arbitral institution adopts the review mechanism to the extent compatible with its own institutional rules, also article 41, paragraphs (2) to (4). As an alternative, a rule clarifying that reference to the appointing authority shall be understood as a reference to the institution could be added, along the following lines: “*The functions of the appointing authority under the UNCITRAL Arbitration Rules are fulfilled by [name of the institution].*”

16. If the functions of an appointing authority are fulfilled by an organ of the institution, it is advisable to explain the composition of that organ and, if appropriate, the nomination process of its members, for example, in an annex. In the interest of certainty, it may be advisable for an institution to clarify whether the reference to the organ is meant to be to the function and not to the person as such (i.e. in case the person is not available, the function could be fulfilled by his or her deputy).

e. Fees and schedule of fees

17. Where an institution adopts the 2010 UNCITRAL Arbitration Rules as its own institutional rules:

- The provisions of articles 40 (f) would not apply;
- The institution may include the fee review mechanism as set out in article 41 of the Rules (as adjusted to the needs of the institution).¹⁵

II. Arbitral institutions and other interested bodies administering arbitration under the UNCITRAL Arbitration Rules or providing some administrative services

18. One measure of the UNCITRAL Arbitration Rules’ success in achieving broad applicability and in demonstrating their ability to meet the needs of parties in a wide range of legal cultures and types of disputes has been the significant number of

¹⁵ For example, such approach has been adopted by the Cyprus Arbitration and Mediation Centre, (“CAMC”), which based its arbitration rules on the 2010 UNCITRAL Arbitration Rules.

independent institutions that have declared themselves willing to administer (and that do administer) arbitrations under the UNCITRAL Arbitration Rules, in addition to proceedings under their own rules. Some arbitral institutions have adopted procedural rules for offering to administrate arbitrations under the UNCITRAL Arbitration Rules.¹⁶ Further, parties have also turned to institutions in order to receive some administrative services in contrast to having the arbitral proceedings fully administered by the arbitral institution.¹⁷

19. The following remarks and suggestions are intended to assist any interested institutions in taking the necessary organizational measures and in devising appropriate administrative procedures in conformity with the UNCITRAL Arbitration Rules when they either fully administer a case under the UNCITRAL Arbitration Rules or only provide certain administrative services in relation to arbitration under the UNCITRAL Arbitration Rules. It may be noted that institutions, while offering services under the 2010 UNCITRAL Arbitration Rules, are continuing to also offer services under the 1976 UNCITRAL Arbitration Rules.¹⁸

¹⁶ For example, the Permanent Court of Arbitration at The Hague (PCA) indicates on its website that “[I]n addition to the role of designating appointing authorities, the Secretary-General of the PCA will act as the appointing authority under the UNCITRAL Arbitration Rules when the parties so agree. The PCA also frequently provides full administrative support in arbitrations under the UNCITRAL Arbitration Rules.”; the London Court of International Arbitration (LCIA) indicates on its website that “[t]he LCIA regularly acts both as appointing authority and as administrator in arbitrations conducted pursuant to the UNCITRAL arbitration rules. Further information: Recommended clauses for adoption by the parties for these purposes; the range of administrative services offered; and details of the LCIA charges for these services are available on request from the Secretariat.”, available on the Internet at www.lcia.org; see also the “UNCITRAL Arbitration Rules Administered by the DIS” (German Institution of Arbitration), available on the Internet at www.dis-arb.de; the “Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules” by the Japan Commercial Arbitration Association (“JCAA”), available on the Internet at www.jcaa.or.jp; and the “Hong Kong International Arbitration Centre (“HKIAC”) Procedures for the Administration of International Arbitration”, available on the Internet at www.hkiac.org; (the Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules by the JCAA and the HKIAC Procedures for the Administration of International Arbitration are both, at the date of the Recommendations, based on the 1976 UNCITRAL Arbitration Rules).

¹⁷ For example, the Hong Kong International Arbitration Centre (“HKIAC”) adopted the “HKIAC Procedures for the Administration of International Arbitration”, effective from 31 May 2005, which state in their introduction that “Nothing in these Procedures shall prevent parties to a dispute under the UNCITRAL Rules from naming the HKIAC as appointing authority, nor from requesting certain administrative services from the HKIAC without subjecting the arbitration to the provisions contained in the Procedures. Neither the designation of the HKIAC as appointing authority under the Rules nor a request by the parties or the tribunal for specific and discrete administrative assistance from the HKIAC shall be construed as a designation of the HKIAC as administrator of the arbitration as described in these Procedures. Conversely, unless otherwise stated, a request for administration by the HKIAC will be construed as a designation of the HKIAC as appointing authority and administrator pursuant to these Procedures.”, available on the Internet at www.hkiac.org.

¹⁸ For an illustration, see the services offered under both versions of the UNCITRAL Arbitration Rules by the Arbitration Institute of the Stockholm Arbitration Institute (SCC), available on the Internet at <http://sccinstitute.com>.

1. Administrative procedures in conformity with the UNCITRAL Arbitration Rules

20. In devising administrative procedures or rules, the institutions should have due regard to the interests of the parties. Since the parties in these cases have agreed that the arbitration is to be conducted under the UNCITRAL Arbitration Rules, their expectations should not be frustrated by administrative rules that would conflict with the UNCITRAL Arbitration Rules. The modifications that the UNCITRAL Arbitration Rules would need to undergo to be administered by an institution are minimal and similar to those mentioned above in paragraphs 9 to 17. It is advisable that the institution clarify the administrative services it would render either by:

- Listing them; or
- Proposing to the parties a text of the UNCITRAL Arbitration Rules highlighting the modifications made to the Rules for the sole purpose of the administration of the arbitral proceedings; in that latter case, it is recommended to indicate that the UNCITRAL Arbitration Rules are “*as administered by [name of the institution]*” so that the user is notified that there is a difference to the original UNCITRAL Arbitration Rules.¹⁹

21. It is further recommended that:

- The administrative procedures of the institution distinguish clearly between the functions of an appointing authority as envisaged under the UNCITRAL Arbitration Rules (see below, section III) and other full or partial administrative assistance and the institution should declare whether it is offering both or only one of these types of services;
- An institution which is prepared either to fully administer a case under the UNCITRAL Arbitration Rules or to provide certain administrative services of a technical and secretarial nature describe in its administrative procedures the services offered; such services may be rendered upon request of the parties or the arbitral tribunal.

22. In describing the administrative services, it is recommended that the institution indicates:

- Which services would be covered by its general administrative fee and which would not, i.e., being billed separately;²⁰
- The services provided within its own facilities and those arranged to be rendered by others;
- That parties could also choose to have only particular service(s) rendered by the institution, without having the arbitral proceedings fully administered by the institution (see above, paragraph 18, and below, paragraphs 23 to 25).

¹⁹ See, as an illustration of such an approach, the UNCITRAL Arbitration Rules as administered by DIS (German Arbitration Institution), available on the Internet at www.dis-arb.de.

²⁰ For example, the Bahrain Chamber for Dispute Resolution (“BCDR”) Arbitration Rules state that “The fees described below do not cover the cost of hearing rooms, which are available on a rental basis. Check with the BCDR for availability and rates.” It is to note that the BCDR Arbitration Rules are from 2009 and based on the 1976 UNCITRAL Arbitration Rules.

2. Offer of administrative services

23. The following list of possible administrative services, which is not intended to be exhaustive, may assist institutions in considering and publicizing the services they may offer:

- (a) Maintenance of a file of written communications;²¹
- (b) Facilitating communication;²²
- (c) Providing necessary practical arrangements for meetings and hearings, including:
 - (i) Assisting the arbitral tribunal in establishing dates, time and place of hearings;
 - (ii) Meeting rooms for hearings or deliberations of the arbitral tribunal;
 - (iii) Telephone- and video-conference facilities;
 - (iv) Stenographic transcripts of hearings;
 - (v) Live streaming of hearings;
 - (vi) Secretarial or clerical assistance;
 - (vii) Making available or arranging for interpretation services;
 - (viii) Facilitating entry visas for the purposes of hearings when required;
 - (ix) Arranging accommodation for parties and arbitrators;
- (d) Providing fund holding services;²³
- (e) Ensuring that procedurally important dates are followed and advising the arbitral tribunal and the parties when not adhered to;

²¹ The maintenance of a file of written communications could include a full file of written correspondence and submissions to facilitate any inquiry arising and to prepare such copies as the parties or the tribunal may require at any time during the arbitral proceedings. In addition, the maintenance of such file could also include, automatically or only upon request by the parties, the forwarding of the written communications of a party or the arbitrators.

²² Facilitating communication could include ensuring that communications among parties, attorneys and the tribunal are kept open and up to date, and may also consist in merely forwarding written communications.

²³ Fund holding services usually consist of the receipt and the disbursement of funds received from the parties. It includes the setting up of a dedicated bank account, into which sums are paid by the parties, as directed by the tribunal. The institution typically disburses funds from that account to cover costs, accounting periodically to the parties and to the tribunal for funds lodged and disbursed. The institution usually credits the interests on the funds to the party which has lodged the funds at the prevailing rate of the bank where the bank account is kept. Fund holding services could also include more broadly the calculation and collection of a deposit as security for the estimated costs of arbitration. If the institution is fully administering the arbitral proceedings, then the fund holding services may extend to more closely monitoring the costs of the arbitration, in particular ensuring that fee and costs notes are regularly submitted and the level of further advances calculated in consultation with the tribunal, and by reference to the established procedural timetable.

(f) Providing procedural directions on behalf of the tribunal, if and when required;²⁴

(g) Providing secretarial or clerical assistance in other respects;²⁵

(h) Providing assistance for obtaining certified copies of any award, including notarized, where required;

(i) Providing assistance for the translation of arbitral awards;

(j) Providing services with respect to the storage of arbitral awards and files relating to the arbitral proceedings.²⁶

3. Administrative fee schedule

24. The institution, when indicating the fee it charges for its services, may reproduce its administrative fee schedule or, in the absence thereof, indicate the basis for calculating it.²⁷

25. In view of the possible categories of services an institution may offer (functioning as an appointing authority and/or providing administrative services, see above, paragraph 21), it is recommended that the fee for each category be stated separately (see above, paragraph 22). Thus, an institution may indicate its fees for:

(a) Acting as an appointing authority only;

(b) Providing administrative services without acting as an appointing authority; and/or

(c) Acting as an appointing authority and providing administrative services.

4. Draft model clauses

26. In the interest of procedural efficiency, institutions may wish to set forth, in their administrative procedures, model arbitration clauses covering the above services. It is recommended that:

- Where the institution fully administers arbitration under the UNCITRAL Arbitration Rules, such model clause read as follows: *“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules administered by [name of the institution]. [Name of the institution] shall act as appointing authority.”*

²⁴ Providing of procedural directions on behalf of the tribunal, if and when required, relates most typically to directions for advances on costs.

²⁵ The provision of secretarial or clerical assistance could include proofreading draft awards for correction of typographical and clerical errors.

²⁶ Storage of documents relating to the arbitral proceedings might be an obligation under the applicable law.

²⁷ See, for example, article 44 on administrative fees and the tables in the annex of the Arbitration Rules of the Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) on the administrative fees and the arbitrators' fees, according to which the provisions of its Section on the Costs of Arbitration (including administrative and arbitrators' fees) shall apply by default in case the parties to ad hoc arbitrations agree that CRCICA provides its administrative services to such arbitrations.

-
- Where the institution provides certain services only, the agreement as to the services which are requested be indicated: *“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. [Name of the institution] shall act as appointing authority and provide administrative services in accordance with its administrative procedures for cases under the UNCITRAL Arbitration Rules”*.
 - In both cases, as suggested in the UNCITRAL model arbitration clause in annex to the Rules, the following note be added: *“Note. Parties should consider adding: “(a) The number of arbitrators shall be --- (one or three); “(b) The place of arbitration shall --- (town or country); “(c) The language to be used in the arbitral proceedings shall be ---”*.

(A/CN.9/746/Add.1) (Original: English)

**Note by the Secretariat on settlement of commercial disputes:
Recommendations to assist arbitral institutions and other
interested bodies with regard to arbitration under the UNCITRAL
Arbitration Rules, as revised in 2010**

ADDENDUM

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III. Arbitral institution acting as appointing authority

27. An institution (or a person) may act as appointing authority under the UNCITRAL Arbitration Rules. It is noteworthy that article 6 of the 2010 UNCITRAL Arbitration Rules highlights the importance of the role of the appointing authority.¹ Parties are invited to agree on an appointing authority if possible at the time they conclude the arbitration agreement. In addition, the appointing authority could be appointed by the parties at any time during the arbitration proceedings.

28. Arbitral institutions are usually experienced with fulfilling functions similar to those required from an appointing authority under the Rules. For an individual, who takes on that responsibility for the first time, it is important to note that, once designated as appointed authority, he or she must be and remain independent and be prepared to act promptly for all purposes under the Rules.

29. An institution that is willing to act as appointing authority under the UNCITRAL Arbitration Rules may indicate in its administrative procedures the various functions of an appointing authority envisaged by these Rules. It may also describe the manner in which it intends to perform these functions.

30. The 2010 UNCITRAL Arbitration Rules foresee six main functions for the appointing authority: (a) appointment of arbitrators, (b) decision on challenge of arbitrators, (c) replacement of arbitrators, (d) assistance in fixing the fees of arbitrators, (e) participation in the review mechanism on the costs and fees and (f) advisory comments regarding deposits. The following paragraphs are intended to provide some guidance on the role of the appointing authority under the 2010 UNCITRAL Arbitration Rules based on the *travaux préparatoires*.

1. Designating and appointing authorities (article 6)

31. Article 6 was included as a new provision in the 2010 UNCITRAL Arbitration Rules to clarify for the users of the Rules the importance of the role of the appointing authority, particularly in the context of non-administered arbitration.²

a. Procedure for choosing or designating an appointing authority (article 6, paragraphs (1) to (3))

32. Article 6, paragraphs (1) to (3), determines the procedure to be followed by the parties in order to choose an appointing authority or to have it designated, in case of disagreement. Paragraph (1) expresses the principle that the appointing authority can be appointed by the parties at *any* time during the arbitration proceedings, and not only in some limited circumstances.³

b. Failure to act — substitute appointing authority (article 6, paragraph (4))

33. Article 6, paragraph (4), addresses the situation where an appointing authority refuses or fails to act within a time period provided by the Rules, or fails to decide

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 42.

² *Ibid.*, para. 42; A/CN.9/619, para. 46 and A/CN.9/665, para. 69.

³ A/CN.9/619, para. 46 and A/CN.9/665, para. 69.

on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so. Then, any party may request the Secretary-General of the PCA to designate a substitute appointing authority. The failure to act of the appointing authority in the context of the fee review mechanism under article 41, paragraph (4) of the Rules, does not fall under article 6, paragraph (4) ("except as referred to in article 41, paragraph (4)"), but is dealt with directly in article 41, paragraph (4) (see below, paragraph 58).⁴

c. Discretion in the exercise of its functions (article 6, paragraph (5))

34. Article 6, paragraph (5), provides that, in exercising its functions under the Rules, the appointing authority may require from any party and the arbitrators the information it deems necessary. That provision was included in the 2010 UNCITRAL Arbitration Rules to explicitly provide the appointing authority with the power to require information not only from the parties, but also from the arbitrators. The arbitrators are explicitly mentioned in the provision, as there are instances, such as a challenge procedure, in which the appointing authority, in exercising its functions, may require information from the arbitrators.⁵

35. It further provides that the appointing authority shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner the appointing authority considers appropriate. During the deliberations on the revisions to the Rules, it was agreed that the general principle should be included that the parties should be given an opportunity to be heard by the appointing authority.⁶ That opportunity should be given "in any manner" the appointing authority "considers appropriate", in order to better reflect the discretion of the appointing authority in obtaining views from the parties.⁷

36. Article 6, paragraph (5), determines that all such communications to and from the appointing authority shall be provided by the sender to all other parties. That provision is consistent with article 17, paragraph (4), of the Rules.

d. General provision on appointment of arbitrators (article 6, paragraphs (6) and (7))

37. Article 6, paragraph (6), provides that, when the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

38. Article 6, paragraph (7), provides that the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. To that end, paragraph 7 further recommends the appointment of an arbitrator of a nationality other than the nationalities of the parties (see also below, paragraph 44).

⁴ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 49.

⁵ A/CN.9/WGII/WP.157, para. 22.

⁶ A/CN.9/619, para. 76.

⁷ A/CN.9/665, para. 54.

2. Appointment of arbitrators

a. Appointment of a sole arbitrator (article 7, paragraph (2) and article 8)

39. The UNCITRAL Arbitration Rules envisage various possibilities concerning the appointment of an arbitrator by an appointing authority. Under article 8, paragraph (1), the appointing authority may be requested to appoint a sole arbitrator, in accordance with the procedures and criteria set forth in article 8, paragraph (2). The appointing authority shall appoint the sole arbitrator as promptly as possible, and shall intervene only at the request of a party. The appointing authority may use the list-procedure as defined in article 8, paragraph (2). It should be noted that the appointing authority has discretion pursuant to article 8, paragraph (2) to determine that the use of the list-procedure is not appropriate for the case.

40. Article 7, dealing with the number of arbitrators, provides, as a default rule, that in case parties do not agree on the number of arbitrators, three arbitrators should be appointed. However, article 7, paragraph (2) includes a corrective mechanism so that, if no other parties have responded to a party's proposal to appoint a sole arbitrator and the party(ies) concerned have failed to appoint a second arbitrator, the appointing authority may, at the request of a party, appoint a sole arbitrator, if it determines that, in view of the circumstances of the case, this is more appropriate. That provision has been included in the Rules to avoid situations where, despite the claimant's proposal in its notice of arbitration to appoint a sole arbitrator, a three-member arbitral tribunal has to be constituted due to the respondent's failure to react to that proposal. It provides a useful corrective mechanism in case the respondent does not participate in the process and the arbitration case does not warrant the appointment of a three-member arbitral tribunal. That mechanism is not supposed to create delays, as the appointing authority is requested to intervene in the appointment process. The appointing authority should have all relevant information or require information under article 6, paragraph (5), to make its decision on the number of arbitrators.⁸ Such information would include, in accordance with article 6, paragraph (6) copies of the notice of arbitration, and if it exists, any response thereto.

41. When an appointing authority is requested under article 7, paragraph (2) and article 8 to determine whether a sole arbitrator is more appropriate for the case, circumstances to be taken into consideration include the amount in dispute and the complexity of the case (including the number of parties involved),⁹ as well as the nature of the transaction and of the dispute.

42. In some cases, the respondent might not take part in the constitution of the arbitral tribunal, so that the appointing authority has before it the information received from the claimant only. Then, the appointing authority can make its assessment only on the basis of that information, being aware that it might not reflect all aspects of the proceedings to come.

⁸ Ibid., paras. 62-63.

⁹ For example, if one party is a State, whether there are (or will potentially be) counterclaims, or set-off claims.

b. Appointment of a three-member arbitral tribunal (article 9)

43. The appointing authority may be requested by a party, under article 9, paragraph (2), to appoint the second of three arbitrators in case of a three arbitrator panel. If the two arbitrators cannot agree on the choice of the third (presiding) arbitrator, the appointing authority can be called upon to appoint the third arbitrator under article 9, paragraph (3). That appointment would take place in the same manner as a sole arbitrator would be appointed under article 8. In accordance with article 8, paragraph (1), the appointing authority should act only at the request of a party.¹⁰

44. When an appointing authority is asked to appoint the presiding arbitrator pursuant to article 9, paragraph (3), factors to take into consideration include the experience of the arbitrator as well as his or her nationality, which is recommended to be different from that of the parties (see above, paragraph 38 on article 6, paragraph (7)).

c. Multiple claimants or respondents (article 10)

45. Article 10, paragraph (1) provides that, in case of multiple claimants or respondents, unless otherwise agreed, the multiple claimants, jointly, and the multiple respondents, jointly, should appoint an arbitrator. In the absence of such a joint nomination and where all parties were unable to agree on a method for the constitution of the arbitral tribunal, the appointing authority shall, upon the request of any party pursuant to article 10, paragraph (3), constitute the arbitral tribunal and designate one of the arbitrators to act as the presiding arbitrator.¹¹ An illustration of a case where parties on either side could be unable to make such an appointment is where the number of either claimants or respondents is very large or does not form a single group with common rights and obligations (for instance, cases involving a large number of shareholders).¹²

46. The power of the appointing authority to constitute the arbitral tribunal is broadly formulated in article 10, paragraph (3) in order to cover all possible failures to constitute the arbitral tribunal under the Rules,¹³ and is not limited to multiparty cases. Also, it is noteworthy that the appointing authority has the discretion to revoke any appointment already made and to appoint or reappoint each of the arbitrators.¹⁴ The principle in paragraph (3) that the appointing authority should appoint the entire arbitral tribunal when parties on the same side in a multiparty arbitration were unable to jointly agree on an arbitrator was included in the Rules as an important principle, in particular in situations like the one that had given rise to the case *BKMI and Siemens v. Dutco*.¹⁵ The decision in the *Dutco* case had been based on the requirement that parties receive equal treatment, which paragraph (3)

¹⁰ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 59.

¹¹ A/CN.9/614, paras. 62-63 and A/CN.9/619, para. 86.

¹² A/CN.9/614, para. 63.

¹³ A/CN.9/619, para. 88.

¹⁴ *Ibid.*, para. 89.

¹⁵ *BKMI and Siemens v. Dutco*, French Court of Cassation, 7 January 1992 (see *Revue de l'Arbitrage*, 1992, p. 470).

addresses by shifting the appointment power to the appointing authority.¹⁶ The *travaux préparatoires* of the 2010 UNCITRAL Arbitration Rules show that emphasis had been given to maintaining a flexible approach, and granting discretionary powers to the appointing authority in article 10, paragraph (3), in order to accommodate the wide variety of situations arising in practice.¹⁷

d. *Successful challenge and other reasons for replacement of an arbitrator (articles 12 and 13)*

47. The appointing authority may be called upon to appoint a substitute arbitrator under articles 12, paragraph (3), 13 or 14 (failure or impossibility to act, successful challenge and other reasons for replacement, see below, paragraphs 49-54).

e. *Note for the institutions acting as an appointing authority*

48. For each of these instances where an institution may be called upon under the UNCITRAL Arbitration Rules to appoint an arbitrator, the institution may indicate details as to how it would select the arbitrator. In particular, it may state whether it maintains a list of arbitrators, from which it would select appropriate candidates, and may provide information on the composition of such list. It may also indicate which person or organ within the institution would make the appointment (for example, the president, a board of directors, the secretary-general or a committee) and, in case of a board or committee, how that organ is composed and/or its members are elected.

3. *Decision on challenge of arbitrator*

a. *Articles 12 and 13*

49. Under article 12 of the UNCITRAL Arbitration Rules, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence. When such a challenge is contested (i.e., if the other party does not agree to the challenge or the challenged arbitrator does not withdraw within 15 days of the notice of the challenge), the party making the challenge may seek a decision on the challenge by the appointing authority pursuant to article 13, paragraph (4). If the appointing authority sustains the challenge, it may also be called upon to appoint the substitute arbitrator.

b. *Note for the institutions acting as an appointing authority*

50. The institution may indicate details as to how it would make the decision on such a challenge in accordance with the UNCITRAL Arbitration Rules. The institution may also wish to identify any code of ethics of its institution or other written principles which it would apply in ascertaining the independence and impartiality of arbitrators.

¹⁶ *Official records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 60.

¹⁷ A/CN.9/619, para. 90.

4. Replacement of an arbitrator

a. Article 14

51. In the event that an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced under article 14, paragraph (1). That procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

52. This procedure is subject to article 14, paragraph (2). Paragraph (2) provides the appointing authority with the power to determine, at the request of a party, whether it would be justified for a party to be deprived of its right to appoint a substitute arbitrator. If the appointing authority makes such a determination, it may, after giving an opportunity to the parties and the remaining arbitrators to express their views, (a) appoint the substitute arbitrator or (b) after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

53. It is noteworthy that the appointing authority should only deprive a party of its right to appoint a substitute arbitrator in exceptional circumstances. To that end, the wording “*the exceptional circumstances of the case*” in article 14, paragraph (2) was chosen to allow the appointing authority to take account of all circumstances or incidents which might have occurred during the proceedings.¹⁸ The *travaux préparatoires* of the 2010 UNCITRAL Arbitration Rules show that depriving a party of its right to appoint an arbitrator is a serious decision, which should be taken based on the faulty behaviour of a party to the arbitration, on a fact-specific inquiry, and should not be subject to defined criteria. Rather, the appointing authority should determine, in its discretion, whether the party has the right to appoint another arbitrator.¹⁹ Such exceptional circumstances could include cases of improper conduct of a party,²⁰ for example, if a party used dilatory tactics with respect to the replacement procedure of an arbitrator, or of an arbitrator in case the improper conduct of the arbitrator is clearly attributable to the party.

54. In determining whether to permit a truncated tribunal to proceed with the arbitration under article 14, paragraph (2)(b), the appointing authority must take into consideration the stage of the proceedings. If the hearings are already closed, it might be more appropriate for the sake of efficiency, to allow a truncated tribunal to make any decision or final award, than to proceed with the appointment of a substitute arbitrator. Other factors to be taken into consideration, to the extent feasible, in deciding whether to allow a truncated tribunal to proceed include the relevant applicable law (i.e. whether the law would permit or restrict such a procedure) as well as relevant case law on truncated tribunals.

¹⁸ A/CN.9/688, para. 78.

¹⁹ A/CN.9/688, para. 78; A/CN.9/614, para. 71.

²⁰ A/CN.9/665, para. 112.

5. Assistance in fixing fees of arbitrators

a. Articles 40 and 41

55. Pursuant to article 40, paragraphs (1) and (2)(a) of the 2010 UNCITRAL Arbitration Rules, the arbitral tribunal fixes its fees and expenses. Pursuant to article 41, paragraph (1), the fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case. In this task, the arbitral tribunal may be assisted by an appointing authority: if the appointing authority applies or has stated that it will apply a schedule or particular method for determining the fees of arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case (article 41, paragraph (2)).

b. Note for the institutions acting as an appointing authority

56. An institution willing to act as appointing authority may indicate, in its administrative procedures, any relevant details in respect of assistance in fixing the fees. In particular, it may state whether it has issued a schedule or particular method for determining the fees for arbitrators in international cases as envisaged under in article 41, paragraph (2) (see also above, [in document A/CN.9/746] paragraph 19).

6. Review mechanism

a. Article 41

57. Article 41 addresses the fees and expenses of arbitrators and foresees a review mechanism of the fees by a neutral body, the appointing authority. Notwithstanding that an institution might have its own rules on fees, it is recommended that the institution acting as appointing authority, should follow the rules embodied in article 41.

58. The review mechanism consists of two stages. At the first stage, article 41, paragraph (3) requires the arbitral tribunal to inform the parties promptly after its constitution on its proposal to determine its fees and expenses. Any party then has 15 days in order to request the appointing authority for review of that proposal. If the appointing authority considers the proposal of the arbitral tribunal to be inconsistent with the requirement of reasonableness in article 41, paragraph (1), it shall within 45 days make any necessary adjustments which are binding upon the arbitral tribunal. At the second stage, article 41, paragraph (4) provides that, after receiving the arbitrators' fees and expenses, any party has the right to request the appointing authority to review that determination. If the appointing authority fails to act, the review shall be made by the Secretary-General of the PCA. Within 45 days of the receipt of such referral, the reviewing authority shall make any adjustments to the arbitral tribunal's determination that are necessary to meet the criteria in paragraph (1) if the tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph (3) or is otherwise manifestly excessive.

59. The *travaux préparatoires* of the 2010 UNCITRAL Arbitration Rules show that the process for establishing the arbitrators' fees was regarded as crucial for the legitimacy and integrity of the arbitral process itself.²¹

60. The criteria and mechanism set out in article 41, paragraphs (1) to (4) had been chosen to provide sufficient guidance to an appointing authority and to avoid time-consuming scrutiny of fee determinations.²² Article 41, paragraph (4)(c) includes a reference to the notion of reasonableness of the amount of arbitrators' fees, an element to be taken into account by the appointing authority in its review. In order to clarify that the review process should not be too intrusive, the words "are manifestly inconsistent with" had been included in article 41, paragraph (4)(c).²³

7. Advisory comments regarding deposits

61. Under article 43, paragraph (3), of the 2010 UNCITRAL Arbitration Rules, the arbitral tribunal shall fix the amounts of any initial or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal it deems appropriate concerning the amount of such deposits and supplementary deposits, if a party so requests and the appointing authority consents to perform this function. The institution may wish to indicate in its administrative procedures its willingness to do so. Supplementary deposits may be required, if during the course of proceedings, it appears that the costs will be higher than anticipated, for instance if the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert. Though not explicitly mentioned in the UNCITRAL Arbitration Rules, appointing authorities have in practice also commented and advised on interim payments.

62. It should be noted that, under the UNCITRAL Arbitration Rules, this kind of advice is the only task relating to deposits which an appointing authority may be requested to fulfil. Thus, if an institution offers to perform any other functions (such as holding deposits, or rendering an accounting thereof), it should be pointed out that this would constitute additional administrative services, not included in the functions of an appointing authority (see above, paragraph 30).

(In addition to the information and suggestions set forth herein, assistance may be obtained from the Secretariat of UNCITRAL (International Trade Law Division, Office of Legal Affairs, United Nations, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria, email: uncitral@uncitral.org). The Secretariat could, for example, if so requested, assist in the drafting of institutional rules, administrative provisions or make suggestions in this regard.)

²¹ A/CN.9/646, para. 20.

²² A/CN.9/688, para. 23.

²³ *Ibid.*, para. 30.

**H. Settlement of commercial disputes: Recommendations to assist
arbitral institutions and other interested bodies with regard to
arbitration under the UNCITRAL Arbitration Rules, as revised
in 2010 — Compilation of comments by Governments**

(A/CN.9/747 and Add.1)

[Original: Spanish]

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission recalled that, at its fifteenth session, in 1982, it had adopted “Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules”.¹ The preparation of the Recommendations had been undertaken by the Commission to facilitate the use of the 1976 UNCITRAL Arbitration Rules in administered arbitration and to deal with instances where the Rules were adopted as institutional rules of an arbitral body or when the arbitral body was acting as appointing authority or provided administrative services in ad hoc arbitration under the Rules. After discussion, the Commission agreed that similar recommendations to arbitral institutions and other relevant bodies should be issued with respect to the UNCITRAL Arbitration Rules, as revised in 2010, in view of the extended role granted to appointing authorities. The Commission also agreed that the recommendations on the revised Rules should follow the same pattern as the Recommendations adopted in 1982. The Commission entrusted the Secretariat with the preparation of that document, for consideration by the Commission at a future session.²

2. In preparation for the forty-fifth session of the Commission (New York, 25 June-6 July 2012), the text of the draft Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010 (contained in document A/CN.9/746 and its Addendum), was circulated to all Governments for comment.

3. The present document reproduces the comments received by the Secretariat on the draft Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010, in the form in which they were received by the Secretariat. Comments

¹ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17 and corrigenda (A/37/17 and Corr.1 and 2), paras. 74-85 and annex I.*

² *Ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), paras. 188 and 189.*

received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments received from Governments

Spain

[Original: Spanish]
[Date: 11 May 2012]

Settlement of commercial disputes: Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010

The Kingdom of Spain thanks the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for the documents prepared in connection with the draft Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010 (A/CN.9/746 and Add.1). These documents will be extremely useful for arbitral institutions and the various functions that they may perform in accordance with the UNCITRAL Arbitration Rules.

The comments by the Kingdom of Spain refer to the proposed Spanish text of the draft model clause contained in document A/CN.9/746, paragraph 26. The English text is not affected.

In the view of the Kingdom of Spain, the proposed texts are not in conformity with the text of the model clause appearing in the annex to the UNCITRAL Arbitration Rules, as revised in 2010, inasmuch as there are some small linguistic divergences that should be avoided.

The Kingdom of Spain therefore proposes that the draft model clauses contained in document A/CN.9/746, paragraph 26, should be replaced by the following in the Spanish version:

“Todo litigio, controversia o reclamación que resulte del presente contrato o se refiera a su texto, o que resulte de su incumplimiento, su resolución o su nulidad, se resolverá por arbitraje de conformidad con el Reglamento de Arbitraje de la CNUDMI administrado por [nombre de la institución]. [Nombre de la institución] actuará como autoridad nominadora.”

“Todo litigio, controversia o reclamación resultante de este contrato o relativo a este contrato, su incumplimiento, resolución o nulidad, se resolverá mediante arbitraje de conformidad con el Reglamento de Arbitraje de la CNUDMI. [Nombre de la institución] actuará como autoridad nominadora y prestará servicios administrativos de conformidad con sus procedimientos administrativos en los casos en que se aplica el Reglamento de Arbitraje de la CNUDMI.”

“Nota. Las partes deberían estudiar la posibilidad de agregar lo siguiente:

a) El número de árbitros será de ... (uno o tres);

- b)* El lugar del arbitraje será ... (ciudad y país);
- c)* El idioma que se utilizará en el procedimiento arbitral será ...”

(A/CN.9/747/Add.1) (Original: English)

**Settlement of commercial disputes: Recommendations to assist
arbitral institutions and other interested bodies with regard to
arbitration under the UNCITRAL Arbitration Rules, as revised
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Thailand	

II. Comments received from Governments**Thailand**

[Original: English]

[Date: 14 June 2012]

Comments and suggested text (if any)**on document A/CN.9/746****Paragraph 9**

While it may be useful for the disputing parties if an arbitral institution were to indicate where its own text diverges from UNCITRAL Arbitration Rules, this may not be crucially necessary since the disputing parties are able to consider for themselves whether a certain set of institution rules are suitable. In addition, disputing parties may also agree among themselves to use different rules from that particular arbitral institution rules.

Paragraph 12 (i)

Where disputing parties wish to use an arbitral institution for their arbitration, the institution will act as the focal point between the disputing parties and the arbitral tribunal. Thus, any communication between the disputing parties is likely to be done via the arbitral institution. The claimant needs to file a notice of arbitration with the institution. Once received, the institution will forward a copy of the notification to the respondent. Therefore, the second alternative of the potential amendment to Article 3 (1) in paragraph 12 is preferred for its consistency with the actual practice of arbitration institution and its better accuracy to the first alternative.

Paragraph 13

The disputing parties may have stated in the arbitration provision in their agreement that an arbitration institution will manage their dispute. In which case, the arbitration institution will be the focal point in communicating documents, receiving and keeping statements and all kinds of documents in order to manage the dispute

efficiently during the arbitration process. There should therefore be a way for the arbitration institution to set the means of communications that it will use, without placing too much burden on the institution.

Article 17 should therefore be amended as follows (with the added text underlined):

“The arbitral tribunal, after having consulted with the parties, shall set the means of communications or telecommunications made by the parties. Except as otherwise permitted by the arbitral tribunal, all communications between the arbitral tribunal and any party shall also be sent to [name of the institution].”

Paragraph 15

This part facilitates the substitution of the reference to the “appointing authority” by the name of the arbitration institution. This will help reduce delays likely to occur where it is not clear in an arbitration institution’s rules that it also performs the functions of an appointing authority. Thus, it is an important matter that should be given thorough consideration. In addition, the person authorized to act on behalf of the arbitration institution in fulfilling the functions of an appointing authority should be stated in a provision or in the footnote of a particular rule rather than in the annex of the rules (see paragraph 16).

Paragraph 16

It should also be provided that the organ performing the functions of an appointing authority shall be impartial and shall have no interest in the particular dispute concerned.

Paragraph 23 (a) and its footnote

For greater certainty, the maintenance of a file of written communications should also include the maintenance of communications in electronic forms which is becoming increasingly common in practice among arbitration institutions. In addition, the period of time that such communications are to be kept by an arbitration institution AFTER a case has come to an end should also be considered in order to ensure that it does not become unnecessarily too cumbersome upon the institution. For example, an arbitration institution may state that it will keep documents communicated to the institution for a period of 5 years from the date that the case has come to an end, unless otherwise agreed by the disputing parties or suggested by the arbitral tribunal.

Paragraph 24

The institution may want to consider publishing its fees or expenses of costs for its services in a general dispute and/or its methods in calculating fees or expenses. This is so that the disputing parties may be able to estimate their potential costs before litigation or use the information as a basis to their considerations in employing a particular institution’s administrative service (in whole or in part). Additionally, Article 41 (4) of UNCITRAL Arbitration Rules 2010 should be referred to with regard to possible fees reviews.

Paragraph 25

The categorization is very useful as it means the disputing parties can now consider choosing an arbitration institution clearly on the basis of the fees for different types of services. Arbitration institution should also be able to review these fees. The basis for such review may include the cost and complexity of a certain dispute, as the arbitration institution may see fit.

Paragraph 26, first suggested model clause

An arbitration institution may fully administer any dispute under UNCITRAL Arbitration Rules 2010. It should therefore state clearly in the model arbitration clauses the particular rules that the institution shall adopt. For example, the model clause under paragraph 26 where the institution fully administers arbitration under the UNCITRAL Arbitration Rules should read (with the additional text underlined):

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force administered by [name of institution]. [Name of institution] shall act as appointing authority”.

on document A/CN.9/746/Add.1**Paragraphs 38 and 44**

Appointing authority should also consider informing the disputing parties, insofar as it is practicable, of the reasons for a particular arbitrator to be appointed. This is because the appointment of an arbitrator is one of the most important elements of the arbitration procedure.

Paragraph 49

An additional provision should be drafted for the consideration by the appointing authority regarding the refund of fees which have already been paid to an arbitrator who has been challenged or who has withdrawn — this should include whether such fees will be refunded and, if so, to what extent. Issues regarding the honesty of the challenged or withdrawn arbitrator may be called into question and awarding of damages, arising from such challenge or withdrawal, to disputing parties may also be considered.

Paragraph 58

The appointing authority and the Secretary-General of the Permanent Court of Arbitration may consider providing the general criteria that an arbitral tribunal may use in determining its fees and expenses in order to ensure that the requirement of reasonableness is adhered to.

Paragraph 61

In the event that the arbitral institution is also acting as an appointing authority, the arbitral institution may consider setting a criteria or guideline on how the amount of the deposits or supplementary deposits to be given by the disputing parties is

determined. Such criteria or guideline may be based upon the institution's existing rules and guidelines in general.

II. ELECTRONIC COMMERCE

A. Report of the Working Group on Electronic Commerce on the work of its forty-fifth session (Vienna, 10-14 October 2011)

(A/CN.9/737)

[Original: English]

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Introduction

1. At its fortieth session, in 2007, the Commission requested the Secretariat to continue to follow closely legal developments in the area of electronic commerce, with a view to making appropriate suggestions for future work in due course.¹ At its forty-second session, in 2009, the Commission requested the Secretariat to prepare studies on electronic transferable records in light of the proposals received at that session (documents A/CN.9/681 and Add.1, and A/CN.9/682).²

¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 195.

² *Ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 343.

2. In furtherance of those requests, a document on current and possible future work on electronic commerce (A/CN.9/692) was submitted to the Commission at its forty-third session, in 2010. At that session, the Commission requested the Secretariat to organize a colloquium on the relevant topics, namely, electronic transferable records, identity management and electronic commerce conducted with mobile devices and electronic single window facilities, and to report on the discussions held at that colloquium.³

3. At its forty-fourth session in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and A/CN.9/728/Add.1) summarizing the discussions at the colloquium on possible future work on electronic commerce (New York, 14-16 February 2011).⁴ At that session, the Commission agreed that Working Group IV (Electronic Commerce) should be reconvened to undertake work in the field of electronic transferable records,⁵ and that the deliberations could include certain aspects of the other topics discussed in documents A/CN.9/728 and A/CN.9/728/Add.1.⁶

II. Organization of the session

4. The Working Group, composed of all States members of the Commission, held its forty-fifth session in Vienna from 10 to 14 October 2011. The session was attended by representatives of the following States members of the Working Group: Australia, Austria, Brazil, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Italy, Japan, Kenya, Mexico, Nigeria, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

5. The session was also attended by observers from the following States: Belgium, Croatia, Dominican Republic, Indonesia, Panama, Peru, Romania and Slovakia.

6. The session was also attended by observers from Palestine and the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *Intergovernmental organizations*: World Customs Organization (WCO);

(b) *International non-governmental organizations*: Conseil des Notariats de l'Union Européenne (CUNE), European Multi-channel and Online Trade Association (EMOTA), Institute of Law and Technology (Masaryk University), International Technology Law Association (ITECHLAW) and New York State Bar Association (NYSBA).

³ Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.

⁴ Information about the colloquium is available at the date of this report from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

⁵ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

⁶ Ibid., para. 239.

8. The Working Group elected the following officers:
Chairman: Sr. D. Agustin MADRID PARRA (Spain)
Rapporteur: Ms. Surangkana WAYUPARB (Thailand)
9. The Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.114);
 - (b) A note by the Secretariat on legal issues relating to the use of electronic transferable records (A/CN.9/WG.IV/WP.115); and
 - (c) Legal aspects of electronic commerce — Proposal by the Government of Spain (A/CN.9/WG.IV/WP.116).
10. The Working Group adopted the following agenda:
 1. Opening of the session.
 2. Election of officers.
 3. Adoption of the agenda.
 4. Legal issues relating to the use of electronic transferable records.
 5. Work of other international organizations on legal issues relating to the use of electronic transferable records.
 6. Other business.
 7. Adoption of the report.

III. Deliberations and decisions

11. During the Working Group's discussion, the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations made a statement. Referring to UNCITRAL texts on electronic commerce, she noted that UNCITRAL had made significant contributions to the harmonization of international commercial law. She also took note of the significant challenges that the Working Group would face, given not only the legal but also technological complexity of the subject matter.

12. On behalf of the Secretary-General, the Legal Counsel stressed that work done by UNCITRAL, at both the Commission and the Working Group level, was highly recognized in the international business community, particularly in the current time of financial crisis and contraction in international commerce. Noting that the poor were often the most vulnerable, she stressed that enabling the use of new technologies through adoption of relevant legislation could foster economic development. She concluded her statement by highlighting UNCITRAL's role in providing international legal standards that could promote the free flow of trade and commerce, and by indicating that the availability of those standards was essential for trade law reform activities in developing economies and economies in transition.

13. The Working Group engaged in discussions on the legal issues relating to the use of electronic transferable records on the basis of

document A/CN.9/WG.IV/WP.115. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Legal issues relating to the use of electronic transferable records

A. Subject matter: electronic transferable records

14. At the outset, the Working Group proceeded with a general discussion on electronic transferable records. It was recognized that, at present, no internationally accepted, generalized and harmonized legal framework addressed the various issues involved in the use of electronic transferable records, which was deterring their use.

15. In that context, it was suggested that the Working Group should first identify issues arising from the use of transferable documents in the various business sectors and jurisdictions. It was further noted that that discussion should encompass not only possible future use of electronic transferable records but also existing practice.

16. It was also suggested that the Working Group should focus on the legal challenges and obstacles arising from the use of electronic transferable records, such as the creation, issuance, transfer and control of electronic transferable records, and the various methods for identification of the holder, including registries.

17. After discussion, it was generally agreed that the Working Group should proceed to identifying the legal obstacles to the use of electronic transferable records.

18. It was suggested that the Working Group should discuss the concept of electronic transferable records and consider how the relevant issues were addressed in different jurisdictions.

19. A question was raised whether documents entitling the holder to the payment of a sum of money (transferable instruments) should be dealt with separately from those entitling the holder to the delivery of goods (documents of title). In that respect, it was suggested that the Working Group should focus on the discussion of negotiable documents of title.

20. It was also suggested that the Working Group should clarify the differences between transferable instruments and documents of title as well as the differences between negotiable and non-negotiable documents. In that context, it was noted that there was no need to discuss transferable instruments that were non-negotiable, as the legal issues arising from them were currently addressed by existing UNCITRAL texts on electronic commerce.

21. On the other hand, a comprehensive approach encompassing also securities not yet fully dematerialized was suggested. In that respect, consideration of existing instruments, such as the Unidroit Convention on Substantive Rules for Intermediated Securities, 2009, as well as of work carried out in other forums, including the work of Working Group VI on registration of security rights in movable assets, was recommended.

22. After discussion, it was generally agreed that the Working Group should take a broad approach to its scope of work and take into consideration all possible types of documents in electronic format while leaving open the possibility to differentiate the treatment of those electronic documents, when so desirable.

B. Legal challenges for electronic transferable records

23. The Working Group noted that significant challenges remained when the transfer of the electronic record involved a third party. In that context, it was stressed that transferability and negotiability should be distinguished, with particular focus on the latter as it involved, among others, the protection of third parties. It was agreed that the Working Group should deliberate on the concept of transferability and negotiability in depth and clarify the distinction between those two concepts.

24. It was further noted that, at least in some legal systems, and possibly subject to further qualifications such as the bona fides of the transferee, certain claims to the underlying transactions would not be able to affect the validity of the title transferred with a negotiable instrument. It was mentioned that negotiability of the instrument depended upon both the applicable law and the contractual terms of the instrument.

25. It was indicated that, while paper-based negotiable instruments relied on a presumption of existence of only one original and authentic document, the actual goal of such requirement was to ensure that only one party would be entitled to require performance of the obligation embodied in the negotiable instrument. It was further indicated that such goal might be achieved in the electronic environment without necessarily following the traditional approach, given that electronic records did not exist in only one copy, as electronic transmission itself required duplication of those records.

26. It was suggested that uniqueness in an electronic environment could be achieved through an appropriate use of the notion of control over the negotiable electronic record, which, in turn, would depend on the possibility to reliably identify and authenticate the party exercising control. Such reliable process of identification and authentication, it was added, necessarily required reference to identity management systems. In that respect, it was further indicated that different levels of identification and authentication might be appropriate in light of the different roles of the parties involved in the transfer of the negotiable electronic records.

27. It was further suggested that a discussion of past attempts to establish systems for negotiable records would allow the Working Group to better understand the reasons that prevented their widespread adoption. Among relevant factors mentioned were obstacles arising from limited acceptance of the underlying legal principles in foreign legal systems as well as the lack of adequate provisions in the applicable law.

28. It was also suggested that, while UNCITRAL texts and other legislative texts were traditionally inspired by the principles of non-discrimination, technology neutrality and functional equivalence, the peculiar needs posed by negotiable electronic records might require a discussion on the possibility of deviating from such principles. In response, it was stated that, while the peculiar features associated

with electronic means might allow for a different treatment of electronic documents vis-à-vis paper ones, such treatment would still need to be drafted in technology neutral terms.

C. Functional equivalence and technology neutrality

29. The Working Group had a preliminary discussion on whether the existing fundamental principles of electronic commerce were sufficient to facilitate the use of electronic transferable records or further principles needed to be developed.

D. Functional equivalence for “uniqueness”

30. In relation to existing practice, it was illustrated that the Electronically Recorded Monetary Claims Act of Japan (2007) aimed at facilitating new financial methods by introducing electronic transferable records as a substitute for paper-based promissory notes or bills.

E. Functional equivalence for “possession”: the concept of “control”

31. Reference was made to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (“Rotterdam Rules”)⁷ where the “right of control” was defined as the right to give the carrier instructions in respect of the goods (article 1, para. 12). It was illustrated that under the Rotterdam Rules the notion of right of control was applicable to negotiable and non-negotiable documents as well as to electronic and paper-based documents. Moreover, that notion made reference to procedures relating to the issuance and transfer of records and the identification of the holder as sole subject entitled to performance.

32. It was suggested that trustworthiness, reliability and confidence were paramount factors to be considered in future discussions on control of electronic transferable documents.

33. It was mentioned that an in-depth analysis of different models and technologies for identifying the person in control of the electronic record was required in order to understand how the notion of control could be put into effect in an electronic environment. In that respect, it was emphasized that the Working Group should not limit its work to a specific model but adopt a broad approach accommodating various models and their combinations.

34. Several challenges were said to arise when transposing the notion of a negotiable instrument to the benefit of the bearer into an electronic environment. It was said for example, that a registry would require an inscription such as the name of the person entitled to the instrument.

35. Furthermore, it was suggested that the Working Group should consider issues arising from the conversion of electronic transferable records into paper-based ones and vice versa.

⁷ United Nations publication, Sales No. E.09.V.9 (treaty not yet in force).

36. In response to a statement that the notion of control was already present in article 6 (3) of the UNCITRAL Model Law on Electronic Signatures, 2001 (“Model law on Electronic Signature”),⁸ it was noted that that provision was relevant for the identification of the signatory, while the concept of control of an electronic transferable record aimed at establishing an equivalent of possession of a negotiable instrument in the electronic environment.

37. It was mentioned that the Bill of Lading Electronic Registry Organisation (Bolero) system⁹ did not allow for the use of negotiable instruments as it was based on contractual agreements. It was further noted that it did not provide a mechanism to protect third parties, which could lead to difficulties when those parties were involved in cross-border transactions.

F. The registry approach

38. The Working Group engaged in a discussion about the registry approach as a means to achieve the functional equivalence of electronic transferable records. As a starting point, references were made to existing registries, for example, the international registry system established under the Convention on International Interests in Mobile Equipment, 2001 (“Cape Town Convention”), the Bolero system and national registry systems. Reference was also made to the current work being undertaken by Working Group VI on registration of security rights in movable assets (see above, para. 21).

39. While the usefulness of electronic registries was generally recognized by the Working Group, it was suggested that caution should be taken in exploring such an approach. First, it was noted that existing registries were created to address specific needs, for example, the registries established under the Cape Town Convention served the purpose of dealing with highly mobile equipment of significant value. Second, it was suggested that the cost of establishing and operating such registries needed to be carefully considered. Third, a concern was raised that the adoption of the registry approach should not compromise the principle of technological neutrality.

40. After discussion, the Working Group agreed that, while existing registries operating at national and international levels needed to be taken into account, the registry approach was not to be considered as the only approach available to achieve functional equivalence of electronic transferable records. Furthermore, it was stressed that coordination with Working Group VI was essential.

G. Possible methodology for future work by the Working Group

41. It was noted that the lists of topics submitted for possible future consideration (A/CN.9/WG.IV/WP.115, para. 69, and A/CN.9/WG.IV/WP.116, section 4) provided a useful starting point to identify relevant topics.

⁸ United Nations publication, Sales No. E.02.V.8.

⁹ Bolero is set up under English Law and is governed by its own private law framework, the Bolero Rulebook. For a description of Bolero, see A/CN.9/WG.IV/WP.90, paras. 75-86.

42. It was suggested that a discussion on the liability of trusted third parties and other service providers, and therefore not limited to registry operators, would be desirable. In response, it was noted that past attempts to deal with liability issues in the Working Group had highlighted the existence of different approaches in the various jurisdictions.

43. It was generally agreed that it was premature to specify the form of the work to be undertaken. It was suggested that it could include a range of instruments. It was further said that clarifications on this point would be possible with progress of work.

44. In that respect, it was said that the Working Group should aim at drafting texts directly related to the needs of the electronic environment and that did not affect the underlying legal provisions. It was added that it was necessary to ensure that those texts be in accordance with the mandate of UNCITRAL and effectively contribute to the development of international trade. Therefore, they should address issues relating to cross-border recognition of electronic transferable records.

45. Some delegations raised concern that any work in the field of electronic commerce might not be needed given the absence of any identifiable problems with respect to electronic transferable records. Conversely, other delegations stated that such work would provide practical and financial benefits to persons who would not otherwise use electronic transferable records. Consultations by some States with their stakeholders had not revealed any situation that caused problems with respect to electronic transferable records and it was suggested that in the absence of legal obstacles to the use of electronic transferable records, the Working Group should consider other work such as providing rules for identity management.

46. In response to the observation that there was no reported legal obstacle to the use of electronic transferable documents, it was noted that the establishment of an enabling legislative environment generated confidence in users about the status of electronic transferable documents, thus promoting the use of those documents. It was added that, in certain jurisdictions, negotiable instruments could be used only if statutory provisions allowed them, and that the lack of such provisions prevented the development of a practice.

47. It was pointed out that while examples of domestic legislation on electronic transferable documents suggested some need for legislation, and that some domestic legislation had been effective, legal obstacles might exist in the use of electronic transferable records in a cross-border context, for example, in the use of electronic bills of lading, for which harmonized rule-making by the Working Group might meet industry needs.

48. It was suggested that a compilation of the practice in the various jurisdictions and business sectors would be useful to identify legal obstacles to the use of electronic transferable documents. In that regard, it was mentioned that the Working Group would benefit from concrete examples of different systems and a list of legal obstacles identified, in particular, in the area of international trade.

49. On the other hand, it was also suggested that the Working Group should first consider the general principles of the law of electronic transferable documents. It was explained that that approach would allow full consideration of the implications of future decisions on more detailed rules.

50. It was further suggested that definition of the terms “electronic transferable documents” and “electronic negotiable documents” would be useful to identify the scope of work.

51. In that respect, it was explained that in common law systems, negotiable instruments were considered a subset of transferable documents qualified by the fact that the negotiation of the instrument took place without reference to the underlying transaction. It was added that the holder in due course of a negotiable instrument could receive a better title to the payment of a sum of money or to the delivery of goods than that held by the transferor, provided other requirements were satisfied.

52. It was mentioned that electronic transferable records were excluded from the scope of UNCITRAL texts on electronic commerce and that therefore, they should be the object of future work.

53. It was further explained that negotiable instrument regimes existing in civil law jurisdictions were similar to those in place in common law jurisdictions. It was noted that such instruments, when issued to the holder, were circulated by endorsement and delivery and, when issued to the bearer, by simple delivery. Therefore, possession of the document was the critical element in their negotiation.

54. As to the scope of work, it was suggested that a list of documents contained in article 2 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the “Electronic Communications Convention”)¹⁰ could provide a useful starting point for discussion. It was recalled that those documents were excluded from the scope of application of the Convention due to the difficulty of creating an electronic equivalent of paper-based negotiability and, in particular, of ensuring the singularity of those documents. It was added that the common element of those documents was the possibility of transferring rights with the document. Reference was also made to articles 9 and 10 of the Rotterdam Rules as being relevant.

55. One suggestion was to identify common and minimum legal requirements for negotiability and the legal obstacles to their transposal in the electronic environment. On the other hand, a concern was raised that legal obstacles to the use of electronic transferable documents and actual industry needs for the use of those documents should be identified prior to engaging in a discussion on the scope of work.

56. It was suggested that cross-border recognition was an implicit goal in all issues related to electronic transferable documents. The possibility of clarifying the relation between electronic transferable documents, on the one hand, and electronic money and payments, on the other hand, was also mentioned.

57. The Working Group engaged in a discussion on the creation of electronic transferable documents. It was clarified that the issue being dealt with was not how the rights embodied in electronic transferable documents were created, as that matter was governed by substantive law. Instead, the issue to be considered was the creation of the form of an electronic transferable document that could achieve functional equivalence with a transferable paper-based document.

¹⁰ United Nations publication, Sales No. E.07.V.2 (treaty not yet in force).

58. It was generally agreed that UNCITRAL texts on electronic commerce already provided principles for achieving functional equivalence for “writing” and “signature” that may be relevant to the creation of electronic transferable documents, subject to further qualification in light of actual needs.

59. It was suggested that the question of the party entitled to issue or request issuance of an electronic transferable document would also need to be addressed, particularly under the registry approach. In that context, references were made to article 35 of the Rotterdam Rules and the relevant provisions in the Korean law regarding the issuance of the electronic bill of lading (A/CN.9/692, paras. 30-32).

60. It was explained that a signature could perform at least two functions in the context of electronic transferable documents: first, identifying the party and linking that party to the content of the document and second, preserving the integrity of the content of the document, if technology so allowed. However, it was added that that second function could be achieved otherwise: for instance, in a registry system, integrity of the record could be assured by the registry system itself.

61. The Working Group then considered the topics of transfer and enforcement of rights in electronic transferable documents. It was said that those topics were closely related.

62. It was explained that different models could be used for the transfer of those documents and the rights embodied therein, such as the registry model and the token model. It was further said that significant differences in the technical features of those models could exist, for example, with respect to the type of electronic signature and associated level of security.

63. It was indicated that a distinguishing feature of negotiable instruments and documents of title was the protection granted against claims from third parties. It was added that such feature could be obtained only with statutory provisions, as contractual agreements could not affect third parties. Moreover, it was added that in certain jurisdictions, the issuance of those instruments and documents was subject to the existence of an explicit legal provision.

64. It was emphasized that, since delivery was necessary for transferring possession of negotiable instruments and documents of title and of the rights embodied therein, defining a functional equivalent to the notion of possession would permit effective transfer of electronic transferable documents and the rights they represented.

65. It was noted that envisageable mechanisms for the transfer of electronic transferable documents were significantly different from those in place for paper-based transferable documents. Therefore, it was suggested that legal standards should enable the use of electronic transferable documents by defining the general requirements for the functional equivalent of possession, while technology would implement those requirements. It was further explained that, once the functional equivalent of possession was achieved, effects such as negotiability would derive from substantive law applicable both to electronic and to paper-based transferable documents.

66. With respect to uniqueness, it was said that the functional equivalent of possession should identify the sole holder entitled to performance and exclude all persons other than the holder from demanding performance.

67. It was further said that the requirements for the presentation of the electronic transferable document deserved careful consideration, as that presentation might require additional cooperation from the recipient.

68. It was illustrated that reliable identification of the holder was important not only to allow exercise of the right of control but also to verify the validity of the chain of transfers of the document.

69. With respect to identification of the holder, it was explained that two approaches existed. Under the first approach, the law referred entirely to the parties' agreement to determine the adequate level of identification. Under the second approach, the law enumerated requirements on the necessary level of identification. It was suggested that the second approach should be explored bearing in mind the principle of technological neutrality. In that connection, reference was made to the relevant provisions of the Model Law on Electronic Signatures as a possible basis for the preparation of future texts.

70. In the same line, reference was made to article 8 (3) of the UNCITRAL Model Law on Electronic Commerce, 1996 ("Model Law on Electronic Commerce")¹¹ as a possible source of inspiration for standards for originality and integrity of the electronic transferable document.

71. The Working Group engaged in a discussion on registries for electronic transferable documents. It was illustrated that in some cases, the law mandated the establishment of registries, which could be operated by either public or private entities, while in other cases, industry demand drove the development of private registries in accordance with minimal legal requirements and under governmental supervision.

72. A question was raised whether registries for electronic transferable documents would operate at a national or international level. It was pointed out that international registries would require additional mechanisms to ensure transparency and neutrality in their operation, and that coordination and interoperability between national and international registries should be ensured to preserve legal certainty.

73. Another question was raised whether registries for electronic transferable documents would be tailored to specific types of those documents or would encompass multiple types. In that regard, it was noted that registries that focused on a specific document or industry did not pose particular challenges with respect to user awareness since those registries required user's participation, or were particularly relevant for that industry. On the other hand, registries dealing with a wider range of electronic transferable documents might require additional measures to enhance user awareness.

74. It was indicated that the design and operation of registries would depend on a number of elements including the type of electronic transferable document, the technology adopted for the registry, industry and market demand. A question was posed whether a registry system adopting a specific technology could accommodate all types of electronic transferable documents and operate in countries with varying levels of available information and communication technology.

¹¹ United Nations publication, Sales No. E.99.V.4.

75. In light of the above, it was suggested that the Working Group could focus on identifying requirements for the establishment of registries and possible modalities for the transfer of electronic transferable documents in those registries.

76. The Working Group was briefed about the work of Working Group VI (Security Interest) on the preparation of a text on the registration of security rights in movable assets. It was first recalled that efforts had already been made to ensure consistency of the UNCITRAL Legislative Guide on Secured Transactions (“UNCITRAL Secured Transactions Guide”)¹² with the fundamental principles of UNCITRAL texts on electronic commerce. Such coordination resulted in recommendations 11 and 12 of the UNCITRAL Secured Transactions Guide.

77. It was further explained that the aim of the current work was to provide guidelines for the establishment and operation of a security rights registry based on the UNCITRAL Secured Transactions Guide and, in particular, Chapter IV. As the registry being envisaged was, to the extent possible, an electronic one, a discussion had taken place at the eighteenth session of Working Group VI to ensure consistency with the fundamental principles of UNCITRAL texts on electronic commerce (A/CN.9/714, paras. 34-47).

78. It was noted that the following characteristics differentiated a security rights registry, as envisaged by the UNCITRAL Secured Transactions Guide, from a title registry. First, the security rights registry was based on notice registration and not on document registration. Second, the purpose of the registration was not to create the security right but rather to make it effective against third parties. Therefore, the notice was merely a reference point for third parties informing them of the possible existence of a security right. Third, the security rights registry was grantor-based and not asset-based. Finally, no formal authorization was required in the notice registration process. Based upon these distinctions, it was generally agreed that a security rights registry was significantly different from a title registry.

79. It was further noted that the UNCITRAL Secured Transactions Guide and the text being prepared had sections on the coordination of registries, including possible coordination between title registry and security rights registry, which could be useful in future deliberations of Working Group IV.

80. The Working Group engaged in a discussion on the extent to which the issuer should remain involved in the transfer or negotiation of an electronic transferable document. It was explained that the issuance of an electronic transferable document entailed agreement on the technology to be used between the issuer and the first holder. The necessity to ensure that that document could be subsequently circulated without the involvement of the issuer was stressed. It was also pointed out that from the technological perspective, the involvement of the issuer during the life cycle of the electronic transferable document depended on the type of technology used.

81. The Working Group then discussed the impact of different modes of transferring rights in electronic transferable documents on the protection of third parties in good faith. In that respect, it was said that protection of third parties was derived from substantive law. It was stressed that electronic and paper-based transferable documents should give the same level of protection to third parties.

¹² United Nations Publication, Sales No. E.09.V.12.

82. However, it was also said that different systems for electronic transferable documents could offer varying levels of protection to third parties. In particular, it was added, while several examples of registry-based systems giving adequate protection to third parties existed, less information was available to the Working Group at this time on token-based systems. It was further indicated that, while certain systems might in practice provide lesser protection to third parties, it was desirable to leave flexibility in developing solutions adequate to actual business needs.

83. There was general agreement that issues relating to the liability of third parties involved in the transfer or storage of electronic transferable documents, or in the identification of the parties of those documents, were relevant and that therefore they should be retained for future deliberation. However, the view was also heard that such issues were not limited to electronic transferable documents.

84. The Working Group moved to consider the matter of the conversion of electronic transferable documents to paper-based ones, and vice versa. The importance of that matter for the acceptance of electronic transferable documents in business practice was stressed in light of varying levels of technological development in different countries and among commercial operators.

85. The “Loi concernant le cadre juridique des technologies de l’information” of Québec, province of Canada (L.R.Q., chapitre C-1.1) was mentioned as useful reference for future work on this topic. It was explained that in that law, the notion of document was defined in technology neutral terms, and that that approach allowed the exchange of paper and electronic support at any time without affecting the legal status of the information contained in the document, provided the conversion procedure was documented in order to ensure integrity of that information (article 17). It was added that article 17 (5) of the Model Law on Electronic Commerce could also provide useful guidance on conversion of documents.

86. It was indicated that in the United States of America, in some systems, if a paper-based transferable document needed to be converted to an electronic form, it had to be presented to the issuer, and that, if an electronic transferable document had to be converted to a paper-based one, control on it had to be surrendered. Moreover, the replacing document had to mention that a replacement took place. It was explained that the goal of such procedure, which was similar to the mechanism provided for in article 10 of the Rotterdam Rules, was to ensure that only one transferable document would remain in circulation. Reference was also made to the Check Clearing for the 21st Century Act which allowed the creation of an electronic version of the paper check.

87. Similar provisions were illustrated with respect to the law of the Republic of Korea, which, in the case of conversion of an electronic bill of lading, required the annotation of previous endorsements on the back of the paper-based bill of lading (see also A/CN.9/692, para. 37). In that respect, a question was raised whether the conversion of the document would require an agreement between the issuer and the holder, or whether the request of one party, at least in some circumstances, would suffice.

88. Different practices were reported with respect to conversion of electronic and paper-based non-transferable documents. It was explained that in Italy the

conversion of a paper-based document to an electronic one had to be certified by a trusted third party (a notary or the public administration) in order to maintain the same legal validity of the document, while in Paraguay electronic documents could maintain legal validity when printed on paper with an identification number and bar code. Other jurisdictions reported resistance to the destruction of converted paper-based documents.

V. Work of other international organizations on legal issues relating to the use of electronic transferable records

89. The Working Group moved to discuss work of other organizations on legal issues relating to electronic commerce and, in particular, draft Recommendation 37 on Signed Digital Evidence Interoperability of the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) (the “draft Recommendation”). It was indicated that some States as well as the UNCITRAL Secretariat had responded to the invitation to submit comments on the draft Recommendation to its Project Team within the Open Development Process.

90. The following concerns on the draft Recommendation were raised. First, the general approach adopted in the draft Recommendation seemed to run against the fundamental principles of UNCITRAL texts on electronic commerce, in particular, the principle of technology neutrality, by favouring a specific type of electronic signature. Second, the draft Recommendation seemed not to allow parties the flexibility to agree on the technology more appropriate to their needs. Lastly, certain terms used in the draft Recommendation, such as “evidence”, had legal implications, despite the disclaimer contained in the draft Recommendation stating the contrary.

91. After discussion, the Working Group expressed appreciation for the work of UN/CEFACT aiming at facilitation of trade and harmonization of business practices. The Working Group welcomed the referral of the draft Recommendation from UN/CEFACT in light of the complementarities of the work of the two organizations. The Working Group also looked forward to future cooperation with UN/CEFACT, including through its involvement in future deliberations of the Working Group, with a view, in particular, to clarifying the text and underlying policy choices of the draft Recommendation. It was agreed to have a more detailed review of the draft Recommendation at future sessions.

VI. Other business

A. Technical assistance and cooperation

92. In the framework of the strategy for technical cooperation endorsed by the Commission at its forty-fourth session (A/66/17, paras. 254, 255 and 257), the Working Group heard updates on technical cooperation activities in the field of electronic commerce. In particular, initiatives at the regional level to promote the adoption of UNCITRAL texts on electronic commerce were illustrated, as well as resulting legislative enactments. The desirability to promote broader formal adoption of the Electronic Communications Convention was also stressed. The

Working Group expressed appreciation for the work undertaken by the Secretariat in the field of technical cooperation and highlighted the importance of that work in furthering the mandate of UNCITRAL.

B. Future meetings

93. The Working Group engaged in a preliminary discussion about its future work. It was generally agreed that discussions at the next session would benefit from working documents encompassing and addressing the various issues that were identified at this session and compiling information about relevant legislation in different jurisdictions and current practices in various industries.

94. In that context, it was recognized that the dates assigned for the next session of the Working Group (13-17 February 2012, New York, or 9-13 January 2012, Vienna) might not provide sufficient time for Member States to consult with industry and for the Secretariat to collect the information needed for the preparation of the necessary working documents.

95. The Secretariat was first requested to inquire into the possibility of finding alternative dates for the next session, possibly later in spring 2012, to allow for additional time for preparation. It was further suggested that, while maintaining the option of having the next session in spring 2012, various forms of inclusive consultations, including expert group meetings, video conferences, or regional workshops, should be explored to assist the Secretariat in preparing the working documents and to maintain a channel of communication between Member States of the Working Group. Member States were also urged to provide relevant information to the Secretariat at the earliest time possible to assist the Secretariat in preparing the working documents. In the circumstances, the Secretariat was requested to also consider convening the next session, subject to the Commission's approval, in fall 2012, in light of the progress made in preparing that meeting.

**B Note by the Secretariat on legal issues relating to the use of
electronic transferable records, submitted to the Working Group on
Electronic Commerce at its forty-fifth session**

(A/CN.9/WG.IV/WP.115)

[Original: English]

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Introduction

1. At its forty-fourth session in 2011, the Commission agreed that Working Group IV (Electronic Commerce) should be convened to undertake work in the field of electronic transferable records.¹ In particular, at that session it was recalled that such work would be beneficial not only for the generic promotion of electronic

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 250.

communications in international trade, but also to address some specific issues such as assisting in the implementation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (“Rotterdam Rules”).² Similarly, it was noted, other transport business, such as aviation, could benefit directly from the formulation of uniform legal standards in the field. It was also noted that work regarding electronic transferable records may include certain aspects of the other topics discussed in documents A/CN.9/728 and A/CN.9/728/Add.1.

2. To assist the Working Group in its work, this note will provide a general overview and summary of key legal issues relating to the creation, use, and transfer of electronic transferable records. This note will focus on issues arising from the use of such records in electronic rather than the traditional paper form. It will not address substantive legal issues that would apply regardless of the medium used, such as wording requirements or rights of a holder of such a record.

I. Subject matter: electronic transferable records

3. The term electronic transferable record is used in this note as a general term to refer to the electronic equivalent of a transferable instrument (negotiable or non-negotiable) or a document of title:

(a) Transferable instruments are financial instruments that may contain an unconditional promise to pay a fixed amount of money to the holder of the instrument, or an order to a third party to pay the holder of the instrument. Examples of transferable instruments include promissory notes, bills of exchange, cheques, and certificates of deposit. They may also include chattel paper (e.g. retail instalment sales contracts, promissory notes secured by an interest in personal property, and equipment leases);

(b) Documents of title are documents which in the regular course of business or financing are treated as adequately evidencing that the person in possession of such document is entitled to receive, hold, and dispose of the document and the goods indicated therein (subject to any defences to enforcement of the document). Examples of documents of title include certain transport documents, bills of lading, dock warrants, dock receipts, warehouse receipts, or orders for the delivery of goods.

4. Each of these categories of documents evidences an obligation owed by the person issuing the document to another person named in the document or to bearer. For example, a promissory note is a transferable instrument that evidences an obligation to repay a debt. A negotiable warehouse receipt is a document of title that represents an obligation by the warehouse operator to deliver goods stored in the warehouse to the owner of the warehouse receipt. These documents can circulate independently of the underlying transaction.

5. Currently both transferable instruments and documents of title typically exist as paper documents. To distinguish an electronic transferable record from its paper

² United Nations publication, Sales No. E.09.V.9 (treaty not yet in force).

equivalent, the term “transferable paper” is used in this note as a general term to refer to transferable instruments and documents of title in traditional paper form.

II. Legal challenges for electronic transferrable records

6. Transferable paper “reifies” the value or obligation they represent; that is, the obligation to pay a sum of money or to deliver goods is embodied in the written document, and the rightful possessor of the document (i.e., the holder) is entitled to enforce and obtain the benefit of it. The written document itself is tangible, but its value does not lie in its physical characteristics. Rather, its value is in the rights embodied in the paper. Thus, possession of the transferable paper is generally required to enforce the rights.

7. Because transferable paper is recognized as the single embodiment of those rights, the mechanism used to transfer the rights in transferable papers is physical delivery to the transferee of the paper itself, usually coupled with the transferor’s signed declaration of an intent to transfer (either written on the document or attached to it). This typically constitutes evidence of the transferee’s right to enforce the underlying obligation. Stated differently, title to transferable paper (and the rights it comprises) passes by endorsement (where necessary) and delivery of the original paper document.

8. These key characteristics of transferable paper raise several issues that represent obstacles to the creation, use, transfer, and enforcement of electronic transferable records and that must be addressed in order to create equivalent electronic transferable records. Those issues may be summarized as follows.

A. Writing and signature

9. Generally, transferable paper must be in writing and signed. While writing and signature requirements and the probative effect of electronic communications generally have been perceived as major legal barriers to the development of electronic commerce in the past, those concerns have now been settled in articles 5 to 10 of the UNCITRAL Model Law on Electronic Commerce (“Model Law on Electronic Commerce”).³ Matters pertaining to contract formation in an electronic environment are settled in articles 11 to 15 of the Model Law on Electronic Commerce.⁴ Matters relating to electronic signatures are dealt with in the UNCITRAL Model Law on Electronic Signatures (“Model Law on Electronic Signatures”).⁵

³ United Nations publication, Sales No. E.99.V.4. See Model Law on Electronic Commerce: Article 5, Legal recognition of data messages; Article 6, Writing; Article 7, Signature; Article 8, Original; Article 9, Admissibility and evidential weight of data messages; Article 10, Retention of data messages.

⁴ See Model Law on Electronic Commerce: Article 11, Formation and validity of contracts; Article 12, Recognition by parties of data messages; Article 13, Attribution of data messages; Article 14, Acknowledgement of receipt; Article 15, Time and place of dispatch and receipt of data messages.

⁵ United Nations publication, Sales No. E.02.V.8.

10. Most of these issues are also similarly addressed in Articles 8, 9, 10 and 12 of the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the “Electronic Communications Convention”).⁶ However, the Electronic Communications Convention expressly excludes electronic transferable records from its scope.⁷ This was done “because the potential consequences of unauthorized duplication of ... any transferable instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money make it necessary to develop mechanisms to ensure the singularity of those instruments,” and because the “need for ensuring their uniqueness go beyond simply ensuring the equivalence between paper and electronic forms, which is the main aim of the Electronic Communications Convention.”⁸

11. Thus, as suggested by an earlier study by the Secretariat,⁹ surmounting the issues of writing and signature in an electronic context does not solve the issue of negotiability, which may be perhaps the most challenging aspect of implementing electronic transferable records in international trade practices.

B. Uniqueness and guarantee of singularity

12. Since each transferable paper embodies the rights it represents, there typically must be a single unique document that represents the rights embodied in such transferable paper, and any transfer or assignment of such rights by the holder requires the physical transfer of the singular document physically representing such rights.

13. Thus, if a person is to receive possessory title of a transferable instrument or a document of title by receiving it as an electronic message, the addressee will need to be satisfied that no identical message could have been sent to any other person by any preceding party in the chain, thereby creating the possibility of other claimants to the title. In other words, the potential consequences of unauthorized duplication of any electronic transferable record that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money make it necessary to develop mechanisms to provide a guarantee of singularity of those records.

14. The concern regarding a guarantee of singularity arises from the fact that an electronic record generally can be copied in a way that creates a duplicate record identical to the first and indistinguishable from it. Absent special measures or widespread application of technologies today not in common use, there is little or no certainty that any electronic record is unique.

⁶ United Nations publication, Sales No. E.07.V.2 (treaty not yet in force): article 8, Legal recognition of electronic communications; article 9, Form Requirements; article 10, Time and place of dispatch and receipt of electronic communications; article 12, Use of automated messages for contract formation.

⁷ Electronic Communications Convention, article 2, paragraph 2.

⁸ Electronic Communications Convention, Explanatory Note, paras. 80-81. Note that the Rotterdam Rules contain, in article 9, the requirements for the use of one category of electronic transferable records, that is negotiable electronic transport records. However, that text does not discuss the details of those documents.

⁹ A/CN.9/WG.IV/WP.69, para. 55.

15. It is important to recognize that the requirement that transferable paper be unique (i.e., the requirement for a guarantee of singularity) is different from the requirement that such document be presented or retained in its original form. Both the Model Law on Electronic Commerce and the Electronic Communications Convention recognize this distinction and, for purposes of transposing these requirements in an electronic environment, address each of them separately.

16. Legal requirements that documents be made available or retained in their original form are addressed by the Model Law on Electronic Commerce (article 8) and the Electronic Communications Conventions (article 9, paragraph 4) essentially as evidentiary requirements aimed at ensuring document integrity and availability. This is achieved by providing that an electronic communication will satisfy the requirement that it be made available or retained in its original form if: (1) there exists a reliable assurance as to the integrity of the information, and (2) the information is capable of being displayed to the appropriate persons. Under this approach, multiple copies of the same electronic communication can qualify as being in original form.

17. Ensuring that a document is unique typically requires that it be the only one in existence (or alternatively, that any copies be clearly identifiable as a copy). Article 17 of the Model Law on Electronic Commerce recognizes the need to address the issue of uniqueness in the context of electronic transport documents, but does not specify how this is to be done: it simply requires that “a reliable method is used to render such data message or messages unique.” Article 9 of the Rotterdam Rules also indirectly addresses the issue by requiring that “The use of a negotiable electronic transport record shall be subject to procedures” defined by the parties and by identifying four categories of issues intended in part to address uniqueness concerns. However, like the Model Law on Electronic Commerce, the Rotterdam Rules do not specify how those procedures are to be accomplished. By contrast, while the drafters of the Electronic Communications Convention also recognized that uniqueness is a critical requirement for electronic transferable records, they acknowledged that finding a solution for that problem required a combination of legal, technological and business solutions, which had not yet been fully developed and tested. Thus the Electronic Communications Convention dealt with the issue by excluding electronic transferable records from the scope of the Convention.¹⁰

18. As a consequence, a key challenge to be faced in designing a legal regime to accommodate electronic transferable records is to define a functionally equivalent mechanism to address the requirement of uniqueness or singularity of those records. In this respect, it is important to note that the function of uniqueness or singularity is to provide adequate assurance that only one creditor may claim the entitlement to the performance of the obligation embodied in the document. This is done by eliminating the possibility that multiple enforceable documents embodying the same entitlement could circulate.

¹⁰ See Electronic Communications Convention, article 2, paragraph 2; see also A/CN.9/571, para. 136.

C. Physical possession

19. With transferable paper, the requirement for a guarantee of singularity is coupled with the requirement for physical possession of the paper document that represents the obligation. It is possession of the unique document embodying such rights and obligations¹¹ that is generally required in order to become a person entitled to enforce it.¹² Rights to the delivery of goods represented by documents of title are typically conditioned on the physical possession of a unique paper document (e.g., the bill of lading, warehouse receipt, or other similar document). Likewise, rights to the payment of a sum of money represented by transferable instruments are also typically conditioned on the physical possession of a unique paper document (e.g., a promissory note, bill of exchange, cheque, or other similar document).

20. Possession is important not because tangible paper documents are per se valuable, but because only one person can possess a unique tangible object at one time. The possession requirement coupled with the singularity requirement protects the issuer from multiple liabilities on the same instrument, helps to provide assurance to a transferee (i.e., the holder) that it has acquired good title, and protects the transferee from a fraudulent transfer of a duplicate.

21. Thus, in addition to addressing the singularity requirement, a key challenge for the implementation of electronic transferable records is to define a functionally equivalent mechanism to address the requirement for possession of the electronic transferable record. This requires devising a process whereby a holder who claims due negotiation of an electronic transferable records will feel assured that there is a unique electronic transferable record in existence, and that there is a means to take control of that electronic transferable record in a manner that is functionally equivalent in law to physical possession.

D. Transfer of rights by delivery

22. Transfer by delivery is the norm for the effective circulation of transferable papers. Negotiable instruments, such as bills of exchange and promissory notes, are typically negotiated by transfer of possession of the instrument by a person other than the issuer to a person who thereby becomes its holder. Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the transferor. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone. Article 13 of the United Nations Convention on International Bills of Exchange and International Promissory Notes, 1988¹³ reflects this principle by providing that an instrument is transferred by endorsement and delivery of the instrument by the endorser to the endorsee; or by mere delivery of the instrument if the last endorsement is in blank. The same principle can be found in articles 11

¹¹ The person legally in possession of the transferable paper is typically referred to as the holder, and the holder is the person entitled to enforce the document.

¹² There may, however, be special rules for enforcing lost, destroyed, or stolen transferable papers.

¹³ United Nations publication, Sales No. E.95.V.16 (treaty not yet in force).

and 16 of Annex I to the Convention Providing a Uniform Law on Bills of Exchange and Promissory Notes, 1930.¹⁴

23. As noted above at paragraphs 9-11, existing electronic commerce laws surmounting the issues of writing and signature in an electronic context facilitate the use of various processes by which an electronic transferable record might be signed for endorsement but they do not solve the issue of delivery required for a transfer of the value inherent in an electronic transferable record.

E. Identification and authentication of holder

24. Another significant challenge faced in adapting transferable paper legal regimes to accommodate electronic transferable records lies in the identification and authentication of the person who is considered to have possession (or, in an electronic environment, control) of the electronic record that represents the obligation (i.e., the holder) and who thus constitutes the creditor or beneficiary of the value it represents. This is in addition, of course, to the underlying need to reliably identify and authenticate the other parties to an electronic transferable record — e.g., the original issuer and the transferor.

25. Establishing the identity of the issuer who signs the original electronic transferable record and of the transferor who endorses the electronic transferable record to transfer it to another party is required for a valid electronic signature under article 7 of the Model Law on Electronic Commerce, article 6 of the Model Law on Electronic Signatures and article 9, paragraph 3, of the Electronic Communications Convention. However, those provisions merely require the use of a method to identify the signatory, leaving it to the parties to determine how that may be accomplished.

26. With respect to the holder, however, the identification problem is a different one. The holder is the person entitled to enforce the electronic transferable record, yet the identity of the holder may not be noted on the transferable record itself, and the holder may change from time-to-time as the record is transferred from one person to another. Thus a mechanism must be in place to identify the person that, at any particular point in time, is considered to be the holder. In a paper environment the person in possession of the unique transferable paper may be presumed to be the holder. But in an electronic environment, where the concept of possession may need to be replaced with a functional equivalent such as control (see paragraphs 43-51 below), a mechanism must be in place to establish the identity of such person.

F. Other issues

27. A critical element in the acceptance and diffusion of electronic transferable records relates to their acceptance by third parties, which, in turn, depends on their level of trust in the underlying processes, as well as their trust in third-party providers of trust services, such as registries and trust platform operators.

¹⁴ League of Nations, *Treaty Series*, vol. CXLIII, p. 259, No. 3313 (1933-1934).

28. Generally, electronic records can be easily altered in a manner that is not detectable. Thus, the usability and general trustworthiness of an electronic transferable record as well as its use as evidence in court require procedures to ensure the continuing integrity and availability of both the electronic record and its electronic signature. This necessitates providing appropriate data security for both the electronic transferable record and its related processes in order to guarantee their accuracy and completeness and to guard against unauthorized transfers or alterations whether intentionally or accidentally made.

29. The establishment of electronic equivalents to transferable paper raises a number of additional issues. These may include the satisfaction of legal requirements on record-keeping, the adequacy of certification and authentication methods, possible need of specific legislative authority to operate electronic registry systems, the allocation of liability for erroneous messages, communication failures, and system breakdowns; the incorporation of general terms and conditions; and the safeguarding of privacy.

III. Functional equivalence and technology neutrality

30. Historically, UNCITRAL has addressed the problems created by paper-based form requirements through the principle of “functional equivalence.”¹⁵ Under this principle, the Model Law on Electronic Commerce, the Model Law on Electronic Signatures and the Electronic Communications Convention, as well as legislation implementing the principles set forth in those documents, establish requirements that are intended to replicate in the electronic world the objectives achieved by each form requirement in the paper world.

31. The functional equivalence approach is based on an analysis of the purposes and functions of the traditional paper-based requirements in order to determine how those purposes or functions could be fulfilled through electronic techniques.¹⁶ This approach “does not attempt to define a computer-based equivalent to any particular kind of paper document.” Instead, it singles out the basic functions of the primary paper-based form requirements, and sets out criteria that, if satisfied, enable electronic records to enjoy the same level of legal recognition as corresponding paper documents.¹⁷ By doing so, it also allows States to enforce electronic transactions in accordance with existing laws “without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements.”¹⁸

¹⁵ See, e.g., Electronic Communications Convention, Explanatory Note, para. 133.

¹⁶ Electronic Communications Convention, Explanatory Note, para. 51.

¹⁷ Electronic Communications Convention, Explanatory Note, para. 51.

¹⁸ See, e.g., Electronic Communications Convention, Explanatory Note, para. 52.

32. This principle of functional equivalence goes beyond the concept of non-discrimination¹⁹ and requires that paper-based and electronic documents should be treated equally by the law so long as the electronic document satisfies the requirements for equivalence specified in the law.

33. To facilitate the development of electronic alternatives to transferable paper, it is essential to transpose to the electronic world the paper-based requirements of uniqueness, possession, and negotiation by delivery. This requires defining equivalents that are able to achieve the same results as those paper-based requirements, and doing so in a manner compatible with the electronic medium.

34. The need to establish criteria for equivalence for those functions fulfilled by transferable paper may be met by adopting a single broad and flexible standard that could satisfy all the functions of the paper document in the electronic environment, or by separate standards aiming at fulfilling each individual function of the paper document.

35. In addressing the requirements for functional equivalence, the Working Group should also keep in mind the principle of “technology neutrality” reflected in prior UNCITRAL texts, including the Model Law on Electronic Commerce, the Model Law on Electronic Signatures and the Electronic Communications Convention. This principle holds that the law should not discriminate between different technologies, i.e., the law should neither require nor assume the adoption of a particular technology. The goal of technology neutrality is important from the standpoint of not stifling development of any technology or unfairly favouring one technology over another. Strictly adhering to the principle of technology neutrality will maximize the ability to accommodate all possible present and future models.

IV. Functional equivalence for “uniqueness”

36. Electronic records — even if signed with “qualified” or “secure” signatures — do not inherently possess a characteristic of uniqueness when used with most current technologies. In fact, as noted above (paragraph 14), most electronic records can be copied without the “copy” being easily distinguishable from the “original”. To overcome this, several alternate approaches for achieving the electronic functional equivalent of a unique paper document have been proposed or implemented.

¹⁹ The principle of non-discrimination provides that “A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.” Electronic Communications Convention, Article 8 (1). This principle is key to most e-commerce laws. See, e.g., Model Law on Electronic Commerce (Article 5), the European Union Electronic Signatures Directive (Article 5 (2)), and UETA (Section 7 (a)) and E-SIGN (Section 101 (a)(1)) in the U.S.A. While the principle of non-discrimination is designed to eliminate the nature of the medium as a reason to deny effect or enforceability to an electronic communication, signature, or contract, it may leave open the concern that an electronic communication does not satisfy certain form requirements.

A. Technical uniqueness

37. In theory it may be technically possible to create a truly unique electronic document that cannot be copied (at least without the copy being distinguishable as a copy) and that can be transferred. If and when technology that is capable of ensuring the uniqueness of an electronic record and of enabling its transfer is widely available, it would provide a basis for rendering an electronic record unique, so that it can mimic a unique paper document. Technologies possibly relevant for achieving technical uniqueness might include digital object identifiers (DOI) and digital rights management (DRM).

38. Most existing electronic transferable record laws, however, have been written on the assumption that the problem of guaranteeing the uniqueness of a record cannot be solved at the level of the design of the record itself, or in any event, that the concept of a truly unique electronic record is not a reality, and that a different approach is required. Generally, such laws take the view that it is not necessary that an electronic transferable record possess any intrinsic characteristic that makes it truly “unique” in the sense that identical copies cannot exist. Instead, they focus on establishing the functional equivalence of uniqueness through requirements designed: (1) to ensure the integrity and availability of at least one copy of the electronic transferable record by designating an authoritative copy (i.e., to specify and determine the terms of the electronic transferable record), and (2) to identify the owner or holder (i.e., person in control) of such electronic transferable record.

39. Stated differently, two issues must be addressed: (1) what are the terms of the electronic transferable record?, and (2) who is the person entitled to the benefit of its value or obligation? In some jurisdictions, the terms of the electronic transferable record are established by designation of an authoritative copy, and the identity of the person entitled to the benefit of its value or obligation is established through the concept of control (used as a functional equivalent for possession).

B. Designation of authoritative copy

40. Designating an authoritative copy of an electronic transferable record (without regard to how many other copies may exist), can address concerns regarding the integrity of the record (i.e., establishing “what” the holder owns an interest in) without the need for the existence of a unique record. Approaches to designation of an authoritative copy include:

(a) Designation based on storage in a specific secure system. One approach involves storing a copy of the electronic transferable record designated as the authoritative copy on a specific secure computer system designed for such purpose and protected by appropriate security and access controls. This might involve, for example, the use of an information system that is specifically designed to store and keep track of a particular type of electronic transferable record, perhaps for a particular business sector. The designated authoritative copy of the electronic transferable record remains on the system for its life cycle, and a related registry tracks the identity of the holder. Under this approach, uniqueness of an electronic record is established through the design of a secure environment within which a copy of the electronic record can be kept. Controls on the system ensure that the

integrity of such electronic transferable record remains assured, regardless of where or how the record is stored on the system, or how many copies the system maintains;

(b) Designation based on verifiable content or location. An alternative approach allows the specific copy that constitutes the authoritative copy, and the computer system on which it is stored, to change over time. This is often done through the use of a registry that tracks the location where the authoritative copy is stored, and/or that maintains a digital fingerprint (e.g., the hash value or digital signature) of the authoritative copy so that it can be readily determined whether the integrity of the copy maintained by or for the holder is intact and matches the original. Sometimes referred to as a registry model, this approach allows for the creation, issuance, storage and transfer of the electronic transferable record on a variety of distributed information systems, with certain information transmitted to and recorded in a central registry. The designated authoritative copy of the electronic transferable record is not necessarily stored in the registry, but any copy can be verified as accurate by reference to the registry. Thus, in some systems the registry holds the authoritative copy as well as the identity of the person in control of it. In other systems, the registry simply holds only the digital signature of the authoritative copy, which is then available to verify the integrity of any copy the person in control later seeks to enforce.

41. Other approaches may also be devised that use technology, process or agreement as a substitute for uniqueness.

42. Finally, it should be noted that while some laws authorize or require one or more of the approaches above, other laws have left the approach to this issue unresolved. For example, as noted in paragraph 17 above, neither the Model Law on Electronic Commerce nor the Rotterdam Rules specify the method whereby such a singularity requirement can be satisfied, and leave it to the parties to agree on the method to be used for this purpose.

V. Functional equivalence for “possession”: the concept of “control”

43. In most legal models governing electronic transferable records, the concept of “control” over an electronic record is used as the functional equivalent of possession. That is, the person in control of the electronic transferable record is considered the holder capable of enforcing the electronic transferable record. Where control of an electronic transferable record is used as a substitute for possession of transferable paper, transfer of control serves as the substitute for delivery of the electronic transferable record, just as transfer of possession (plus endorsement where required) serves as delivery of transferable paper.

44. As noted above at paragraphs 38-39, in the absence of technical uniqueness for electronic records, the control approach can also help to address the singularity requirement of transferable paper. By providing a process for designating the identity of the person in control of the electronic transferable record (along with a process to establish “what” it is that the holder owns an interest in),²⁰ the concern

²⁰ See discussion of uniqueness at paragraphs 36-42 above.

regarding the existence of multiple copies of the electronic transferable record is eliminated, since ownership (i.e., holder status) is not determined by possession of any copy of the electronic transferable record itself and transfer does not involve altering or endorsing those copies.

A. Identifying the person in “control”

45. Where control is used as a substitute for possession, there must be a method for identifying the current party in control of a specific electronic transferable record. This may be accomplished by having evidence of the identity of such person integrated into the authoritative copy itself, or by having the authoritative copy logically associated with a method for tracking the identity of such person (such as a registry), so that a person viewing the authoritative copy is also alerted, and has access, to the evidence of control

46. Thus, the concept of “control” is typically defined in a manner that focuses on the identity of the person entitled to enforce the rights embodied in the electronic transferable record. For example, under United States law: “A person has control of [an electronic] transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.”²¹ The key point is that a system, whether involving third-party registry or technological safeguards, must be shown to reliably establish the identity of the person entitled to payment of a sum of money or delivery of goods.²²

47. Legal systems using “control” as a replacement for “possession” often specifically recognize that the control requirements may be satisfied through the use of a trusted third-party registry system (see below, paragraphs 58-60). Other technological approaches may also be available to achieve the same goal.

48. In general, the primary approaches that have been advanced to establish the identity of the person to whom the electronic transferable record was issued or transferred [i.e., the person in control] include the following:

(a) Person in control identified in electronic transferable record itself (token model). Under the token model approach, the identity of the person in control of the electronic transferable record (the holder) is contained in the electronic transferable record itself, and changes in ownership (e.g., assignments) are noted by modifications made directly to the electronic transferable record. With this approach, establishing the owner of the electronic transferable record requires a system to maintain careful control over the electronic record itself, as well as the process for transfers of control. In other words, like transferable paper, there may be a need for technological or security safeguards to ensure the existence of a unique “authoritative copy,” that cannot be copied or altered,²³ and that can be referenced to determine the identity of the owner (as well as the terms of the electronic transferable record itself);

²¹ UETA § 16 (b); 15 U.S.C. § 7021 (b).

²² UETA Section 16, Official Comment 3.

²³ This might be accomplished by the technology used to create the record (which may not yet exist), or by keeping the record under such security that no one can copy or modify it.

(b) Person in control identified in a separate registry (registry model). Under the registry model, the identity of the owner of the electronic transferable record is contained in a separate independent third-party registry. Under this approach, reliably establishing the owner of the electronic transferable record requires careful control over the registry, and the uniqueness of a copy of the electronic transferable record itself becomes less important or irrelevant as long as a means is in place to verify the integrity of the electronic transferable record. The electronic transferable record merely contains a reference to the registry where the identity of the person with control can be found, and does not change over time or in the event of an assignment. The primary concern regarding the copies of the electronic transferable record is that there is a mechanism to determine whether any particular copy is accurate (i.e., that its integrity is intact) so that anyone viewing the copy is on notice as to where the owner is identified, and so that the true owner identified in the registry can enforce it. In this kind of system, the concept of control and the associated concerns regarding security focus primarily on the registry rather than the transferable record itself;

(c) Person in control defined as person with exclusive access. Where the authoritative copy of an electronic transferable record is stored on a specific secure computer system designed for such purpose and protected by appropriate security and access controls, it may also be possible to define the person in control (i.e., the holder) as the single person given access to the electronic transferable record in question. In such case, a transfer of control would require a transfer of the exclusive means of secure access, such as a unique access token.

B. Adoption of the “control” approach

49. Existing legislative examples relating to electronic transferable records that refer to the notion of “control” include article 1, paragraphs 21 and 22, and articles 50 and 51 of the Rotterdam Rules; article 862 of the revised Korean Commercial Act, enacted on 3 August 2007 (Law No. 9746) (article enabling electronic bills of lading);²⁴ and rule 7 of the Comité Maritime International (CMI) Rules for Electronic Bills of Lading.²⁵

50. Several electronic transferable record laws in the United States of America also make use of the notions of an “authoritative copy” and of “control” to establish the conditions for equivalence to the notions of “uniqueness” and “possession.” They include Uniform Commercial Code (UCC) articles 7-106 (Control of Electronic Document of Title), 7-501 (b) (Warehouse Receipts and Bills of Lading: Negotiation and Transfer) and 9-105 (Control of Electronic Chattel Paper), the Uniform Electronic Transactions Act (UETA), 1999, section 16 (Transferable Records), and the Electronic Signatures in Global and National Commerce Act (E-SIGN), 2000, section 201 (Transferable Records).

51. Systems that allow the transfer of rights over the goods and against the carrier while cargo is in transit have also emerged in recent years. They operate on the basis

²⁴ For a description of the Korean law enabling electronic bills of lading, see A/CN.9/692 at paragraphs 26-47.

²⁵ Available at <http://comitemaritime.org/Rules-for-Electronic-Bills-of-Lading/0,2728,12832,00.html>.

that possession of a paper document is replaced by “exclusive control” of an electronic record. Three notable examples are the Bill of Lading Electronic Registry Organisation (Bolero) system, the Electronic Shipping Solutions (ESS) Databridge system, and the Korea Trade Net (KTNET) Registry system. Bolero²⁶ and KTNET²⁷ achieve exclusive control through a title registry. ESS Databridge achieves exclusive control through limiting access to the electronic record in question.²⁸

VI. The registry approach

52. A registry model allows for the creation, issuance and transfer of electronic transferable records based on information transmitted to and recorded in a central registry. Access to the registry might be controlled and might be subject to acceptance of contractual provisions.

53. A registry can be used to assist in the designation of the authoritative copy of an electronic transferable record for purposes of providing a functionally equivalent approach to uniqueness (see paragraph 40 (b) above), and can also be used to identify the person that controls an electronic transferable record for purposes of providing a functionally equivalent approach to possession (see paragraphs 47-48 above).

54. Registry systems, including in electronic form, are currently being discussed by UNCITRAL Working Group VI (Security Interests) in the framework of its work on registration of security rights in movable assets.

55. Registries are also a common feature of most recent initiatives involving electronic transferable records. See, e.g., paragraphs 58-63 below, and A/CN.9/WG.IV/WP.90 December 2000 at paragraphs 39-94.

56. Registry systems may be divided into three main categories:²⁹

(a) Governmental registries. An agency of the State records transfers as public records, and may authenticate or certify such transfers. For public policy reasons, the State agency is usually not liable for any errors, and the cost is borne through user fees;

(b) Central registries. Central registries are established where a commercial group conducts its transactions over a private network (such as SWIFT), accessible only to its members. This type of registry, which has been used for the various securities settlement systems, is preferred where security and speed are critical,

²⁶ Bolero is set up under English Law and is governed by its own private law framework, the Bolero Rulebook. For a description of Bolero, see A/CN.9/WG.IV/WP.90, paras. 75-86.

²⁷ This system was designated as the registry operator for the purposes of the South Korean Presidential Decree on the Implementation of the Electronic Bill of Lading Provisions of the Commercial Act of 2008. For a discussion of the content and workings of this legislation see A/CN.9/692, paras. 26-47.

²⁸ Like Bolero, this system operates under a private law framework, the ESS-Databridge Services and Users Agreement (DSUA). The DSUA is governed by English law but where the contract of carriage in question is governed by US law, transfer of title under the DSUA is governed by the law of the State of New York including the New York Uniform Commercial Code and the United States Uniform Electronic Transactions Act 1999 (T&C 8.1).

²⁹ A/CN.9/WG.IV/WP.67, Annex.

since limited access permits efficient and quick party verification. Access to the actual records of the transactions is usually limited to the users, but summaries of the transactions can be reported publicly in summary form (e.g., in securities trading). The rules of the network usually govern the liabilities and costs. Depending on the jurisdiction concerned, such rules may be of a contractual nature or may have legislative character;

(c) Private registries. These registries are conducted over open or semi-open networks, where the issuer of the document, its agent (as in the systems of electronic warehouse receipts in the United States) or a trusted third party (as in the Bolero System) administers the transfer or negotiation process. The records are private and costs may be borne by each user. Liability parallels the present practice with paper, in that the administrator is obliged to deliver to the proper party unless excused by another party's error, in which case local law may apply. Such systems may be based exclusively or primarily on contractual arrangements (as in the Bolero System) or be derived from enabling legislation (as in the systems of electronic warehouse receipts in the United States).

57. International experience has shown that these categories of registry are complementary, rather than mutually exclusive. Indeed, different types of transactions may require the development of different registry systems. Therefore, a possible desirable approach may focus on the areas that are more likely to benefit from an internationally harmonized legislative framework rather than on the type of registry system used.

A. Examples of existing law utilizing registries

58. Several legal systems for electronic transferable records have adopted, or accommodate, a registry model. One example under United States law is section 16 UETA (governing electronic transferable instruments), which accommodates systems based on registries, and notes in its Official Comments that "A system relying on a third party registry is likely the *most effective way* to satisfy the requirements ... that the [electronic] transferable record remain unique, identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified."³⁰ Another example is article 9-105 UCC (governing electronic chattel paper) which was enacted as a response to requests from the auto financing industry to foster wider use of electronic chattel paper.

59. The Convention on International Interests in Mobile Equipment ("Cape Town Convention")³¹ utilizes an international registry system for registration of various interests in mobile equipment. The Cape Town Convention and the protocols thereto deal in an industry-specific way with remedies upon default of the debtor and introduce a priority regime based on international, equipment-specific registries.

60. Another recent example is article 862 of the revised Korean Commercial Act, enacted on 3 August 2007 (Law No. 9746), which enables electronic bills of

³⁰ UETA Section 16, Comment 3 (emphasis added).

³¹ www.unidroit.org/english/conventions/mobile-equipment/main.htm. See also A/CN.9/692, paras. 18-21.

lading.³² It establishes the legal equivalence between paper-based and electronic bills of lading managed in an electronic title registry.

B. Examples of existing registry systems

61. Notable examples of registry systems include the Bill of Lading Electronic Registry Organisation (Bolero) system and the Korea Trade Net (KTNET) Registry system noted at paragraph 51 above. Each of these systems works on the basis that possession of a paper document is replaced by “exclusive control” of an electronic record, where exclusive control is achieved through a title registry.

62. Other examples of registry systems include the MERS eRegistry in the U.S. MERS is an independent industry utility that is intended to track and maintain information on electronic promissory notes in support of home loans. The MERS eRegistry serves as the central (and only) location to identify (i) the current holder of the electronic promissory note, and (ii) the current location of the authoritative copy of the electronic promissory note.³³ It functions as the system of record of rights holders to electronic promissory notes. Any and all subsequent transfers of the electronic promissory notes — i.e., changes in the identity of the entity that owns the note and/or changes of the identity of the entity that maintains the authoritative copy — must also be reflected in the MERS eRegistry.

63. In addition, dematerialized securities systems typically utilize a registry.³⁴ In such systems, the central registry contains a record of the holdings of dematerialized securities and of the rights and restrictions arising therefrom, which are held by depository participants on behalf of investors at any time. Trading intermediaries are normally financial institutions, brokers and other entities authorized to be members of the depository and who hold accounts with the depository.

VII. Possible methodology for the future work by the Working Group

64. With regard to the scope of its work, the Working Group may want to consider whether that work should encompass all types of electronic transferable records in all sectors, or some subset thereof (whether based on type of electronic transferable record, industry sector, or some other criteria). This discussion would allow also for an assessment of the actual market demand for electronic equivalents.³⁵

65. While the progress of its work will allow the Working Group to clarify the final desirable outputs (e.g., a guidance document or uniform law provisions), once the Working Group has determined the scope of its work it might be useful to develop a clear set of high-level principles to be incorporated in any international

³² For a description of the Korean law enabling electronic bills of lading, see A/CN.9/692, paras. 26-47.

³³ From MERS eRegistry Integration Handbook Volume I (Release 2.75 – 7/31/06), Overview of the MERS eRegistry, at p. 4.

³⁴ A/CN.9/WG.IV/WP.90, paras. 45-60.

³⁵ See A/CN.9/728/Add.1, para. 11.

system for electronic transferable records. Such principles will need to address issues relating to cross-border use of electronic transferable records, too.

66. The identification and promotion of such harmonized principles would facilitate the later development of rules for the legal processes involved in the creation, use, negotiation, and enforcement of electronic transferable records. Mechanisms for the transfer or negotiation of rights, including those based on the flow of written documents, show a very similar structure irrespective of the area in which they take place and of the nature and content of the rights concerned. Such similarities will probably increase as the use of electronic means for this purpose becomes more widespread.

67. Moreover, the use of electronic transferable records may vary by sector or business application. Electronic transferable records may, for example, have differing requirements, depending on the application, for authentication, security, access by third parties, conversion from electronic to paper and vice-versa, system cost constraints, transaction ranges, volumes and scalability, mobility, negotiability, party capabilities, automated transaction processing, timeliness and transaction finality, single registries vs. multiple registries (and interoperability and transfers between systems), fraud risk, and evidentiary and regulatory concerns. In addressing these factors, many sectors will rely to a significant extent on private system rules, with associated legislation to address such areas as third-party property rights.

68. Such differing requirements highlight the need to clarify the fundamental considerations in this area as well as to rationalize approaches to solving specific problems. Accordingly, the Working Group could develop basic principles and considerations that will be common to all unique implementation systems, and offer a means to allow the specific needs of each system to be adequately addressed. Those principles could be refined with respect to particular sectors, as appropriate.

69. Within the scope of work it determines appropriate, topics the Working Group may want to consider addressing include:

(a) The ways in which rights in electronic transferable records should be created, transferred, and enforced so as to achieve functional equivalence with transferable paper;

(b) Whether and how electronic transferable records can be converted to transferable paper documents, and vice versa;

(c) The requirements for identifying and verifying the holder of the rights in an electronic transferable record, and the requirements for protecting and verifying the integrity of electronic transferable record;

(d) The use of electronic registries or other third party service providers, recognizing that specific solutions may vary based on sector and application requirements;

(e) The extent to which the issuer of the underlying obligation should be involved in the transfer, negotiation, or conversion of an electronic transferable record and its consequences;

(f) The impact of different modes of transferring of rights an electronic transferable record on the protection to be enjoyed by a third-party transferee in good faith, vis-à-vis both the issuer and other third parties;

(g) The responsibilities of third-party entities such as registries, transaction platform operators, identity providers, certifying authorities and other third-party participants involved in the storage or transfer of an electronic transferable record or identification of the person in control of such a record.

C. Note by the Secretariat on legal aspects of electronic commerce — Proposal by the Government of Spain, submitted to the Working Group on Electronic Commerce at its forty-fifth session

(A/CN.9/WG.IV/WP.116)

[Original: Spanish]

Within the framework of preparations for the forty-fifth session of Working Group IV (Electronic Commerce), the Government of Spain has submitted to the Secretariat the attached document.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

Annex

**Future work of Working Group IV (Electronic Commerce):
electronic transferable records**

In view of the decision adopted at the forty-fourth session of the Commission with respect to Working Group IV (Electronic Commerce), the delegation of Spain would like to suggest some possible areas of work with a view to facilitating decision-making by the Group during the initial stages of its work. The objective of this working paper is therefore not, for the time being, to submit a non-negotiable formal proposal but simply to identify the issues that, in the view of the delegation of Spain, might be highlighted as relevant when the Group takes up the work entrusted to it, that is, work on electronic transferable records. In the paragraphs that follow, the opinion of the delegation of Spain with regard to some aspects of the issues under consideration is set out.

1. Common features of national regimes applicable to negotiable or transferable documents

Taking as a starting point the basic objective of developing an instrument that enables or helps States to draw up legislation on electronic transferable records, the delegation of Spain considers it of vital importance to identify precisely what the point of departure and the focus of the Group's work should be. Doing so will, inter alia, make it possible to determine the content and scope that the instrument should ultimately have. There is no reason why the principles to be applied in carrying out this task should differ from — and indeed they should not differ from — those observed by UNCITRAL when drawing up previous instruments in the area of electronic commerce. In particular, regulation of the electronic equivalent of paper-based negotiable or transferable documents should be based on the identification of the functions that paper as a medium, and the elements arising from its use, fulfil within the framework of the legal regime applicable to them, in order to thus determine, in compliance with the policy guided by the principle of functional equivalence, how electronic means can fulfil the same functions as paper and thus achieve recognition as having equal legal effect.

The features referred to, since they are dependent upon a physical medium such as paper, relate strictly to the formal aspects of transactions that centre around the issuance and use of such documents. In that regard, the delegation of Spain is of the view that, as on past occasions when addressing issues in this area, the work to be undertaken and the expected result must focus on the purely procedural aspects of the phenomenon under consideration. As can be seen, the process described requires the analysis of what those features are under national legal regimes, since any attempt at harmonization in this area must take into account the extent to which national laws are already harmonized with respect to some or all of the aspects of potential relevance.

(a) Negotiable or transferable documents

In order to ensure consistency with the approach proposed, a step that must first be taken is to clarify the meaning of the term “transferable records”. This will make it possible, *inter alia*, to delimit the scope of the work and the scope of application of the instrument developed. This clarification is necessary not only because the meaning of the term may differ depending on the legal tradition concerned but also because of the different ways in which the various types of negotiable document have evolved both in commercial practice and in legislation, and because of the way in which that evolution has come to influence formal issues.

In that regard, the delegation of Spain considers that the work should focus on transferable documents, identified as documents as yet in paper form and therefore dependent on that medium. Documents of this kind are usually issued individually, such as promissory notes, bills of exchange or documents of title to goods. In reality, the types of document that fall within that category inevitably depend on the practice and national legislation of each country. The key factor in that regard is strict dependence on the medium of paper and the consequent need to eliminate obstacles to the use of paper and electronic means for the same purposes and with the same effects. Some of the documents originally categorized in legislation as negotiable or transferable documents are no longer dependent on that medium, since a number of instruments have for some time provided for the representation of those documents in data sets in electronic form, such as registry entries. This is most often the case with regard to negotiable securities issued *en masse* (and perhaps grouped into series or categories), such as stocks, bonds and financial instruments in general. For reasons unrelated to the advent of the electronic communication network and more closely linked to the functioning of organized or official secondary markets, securities of this kind, which many years ago were also paper-based, can be in electronic form (electronic records and registry entries), and consequently their transfer, transmission or negotiation can also be carried out by electronic means. Thus, given that systems for the issuance and negotiation of instruments or securities of this kind by electronic means are already in place in every country, such documents or securities should be set aside from the immediate objectives of Working Group IV.

(b) Elements of the protocol characteristic of transferable records

Negotiable or transferable documents, as is known, are characterized by the fact that they provide a mechanism for the transfer of rights that is alternative to the ordinary assignment regime, based on the specific way in which the document is

drawn up and the specific nature of its content and consequently on the transfer of the document in the manner and according to the procedure established by law. That manner and that procedure are based on the transfer of possession, together, in certain cases, with the addition of certain information to the document. A logical consequence of this mechanism is that the owner of the document and thus of the rights incorporated in that document must prove and assert that ownership through the possession and presentation of a formally correct document. From this mechanism, which is based on the application of the regime for the transfer of movable property to intangible property, such as personal rights, other legislative consequences arise that relate to the substantive regime specifically governing such transfers of documents and rights and that, although based on the specific formal and physical elements (possession) of the protocol, transcend those elements. In most cases, therefore, the two essential parts of the mechanism provided for by law are the documentary nature (and the paper-based form) of transferable documents and their possession.

2. Legislation that currently provides for the issuance and use of electronic transferable records

There are already some examples of existing legislation that provides for and regulates the issuance and transfer of electronic transferable records. While such examples — some from national legislation, others from international instruments — are few, they provide useful models that should be taken into account.

(a) The uniqueness of the record

The first such example can be found in the UNCITRAL Model Law on Electronic Commerce and, by extension, in the national laws in which the relevant provisions of the Model Law have been incorporated. In part two of the Model Law, specifically article 17, specific reference is made to contracts of carriage and to the documents that can be issued pursuant to such contracts in order to regulate situations in which, in particular, rights can be transferred under the contract of carriage through the transfer of documents. In such cases, in which the Model Law provides specifically for the use of negotiable transport documents, such as bills of lading, the regulation provided by the Model Law is based on the guarantee of the uniqueness of the document in order to ensure that there is only one possible holder and owner of that document, as in the case of paper documents.

(b) Legislation based on control of the record as equivalent to possession

A second example, with a somewhat different and more fully developed approach, can be found in the United States of America: in the Uniform Electronic Transactions Act and the Uniform Commercial Code — more precisely, in both cases, in the laws that have incorporated the solutions provided by those instruments in this specific area — and in the Electronic Signatures in Global and National Commerce Act (ESIGN).¹ Among international instruments, a parallel approach is set out in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 2008 (the “Rotterdam Rules”).

¹ United States Code Annotated, Title 15, chapter 96; see section 7001 et seq.

Article 16 of the Uniform Electronic Transactions Act regulates the conditions under which electronic transferable records may be issued for the same purposes and with the same effect as records issued on paper. The provisions of the Act apply specifically to promissory notes and documents of title to goods. Article 7 of the Uniform Commercial Code, meanwhile, regulates documents of title to goods that are issued electronically and in negotiable form. The Electronic Signatures in Global and National Commerce Act restricts the scope of its application in this specific area (see section 7021 of the United States Code) to promissory notes issued in connection with a loan secured by a right in rem in immovable property, but has the same structure and approach as the previous examples. The Rotterdam Rules regulate, in a subsidiary manner and within the framework of the main subject matter — contracts for the international carriage of goods wholly or partly by sea — negotiable electronic transport records in electronic form.

The framework used in all of the above examples is based on the identification of a functional equivalent to possession that in legislation is referred to as “control” or “exclusive control” of the record, on the basis of which the mechanism or protocol for the transfer of the electronic record and of the rights incorporated in it is determined. Thus, under that mechanism, in order to transfer the record, the transfer of control (or exclusive control) of the record is necessary, while in order to exercise the rights incorporated in the record, proof of possession — in the form of proof of control of the document — is required.

In all of the examples given, control, as a functional equivalent of possession, is characterized by the fact that it fulfils the same function and serves the same purpose, that is, to identify reliably the owner of the record. The requisite criteria for establishing control of an electronic transferable record are thus (albeit in a different manner under each of the legislative instruments indicated) defined by reference to the capacity of the technology and the system used in the relevant communications to fulfil that function in a sufficiently reliable manner.

In determining what constitutes control of the record, it is important to bear clearly in mind that, in transactions entered into and carried out by electronic means, any exchange or transfer of intangible assets, such as electronic transferable records, will be based on the exchange of information between the parties through the electronic communication network. This means that control will be based purely on the exchange of information that, in most cases, will be written information. One of the various consequences of this is that control, as a reliable indicator of ownership, covers both the functions that in the world of paper we associate with information written in the record (identification of the owner by means of formal requirements such as endorsement) and the functions that we attribute to possession.

The circumstances described above have naturally been taken into account by legislators in all of the cases that we have used as examples. One of the clearest indicators of this is that the legislation referred to presupposes, relatively implicitly, that parties to transactions in which an electronic transferable record can be used will agree on the system and ultimately the technology to be used for the issuance and use of that record. Thus, a key factor influencing whether or not the issuance and transfer of an electronic transferable record is recognized as valid is the technology required for the transfer, the degree of availability of that technology on the market, the architecture and the protocol or mechanism which it logically entails in practice and, as already mentioned, the degree of reliability that it achieves in

fulfilling the function indicated, namely the identification, at all times, of the owner of the transferable record.

Services relating to the use of electronic transferable records of various kinds are already available on the market, in some cases provided for under the aforementioned legislation. Those services are typically outsourced, that is, they are services provided by third parties distinct from the parties that wish to use electronic transferable records in their transactions (and that are therefore the service users). These entities act not only as service providers but also as trusted third parties to the extent that the value of the service provided and its distribution on the market depend, among other variables, on the reliability of the systems that they use and on the reputation that they are able to build up on the basis of that reliability. It is difficult for the users of such services to be able to determine to the necessary extent the reliability of the technology used and whether there is any guarantee that the features of that technology ensure, to a reasonable degree, the existence of the document, the originality of the information that it contains, the authenticity of both the document and any signatures that it may bear, the integrity of the communications exchanged in connection with its use and the identity of its issuer and owner (and that of any other persons that may be referred to in the document in connection with their involvement, at whatever stage, in its circulation). The role of such entities is therefore that of trusted intermediaries as third parties removed from the transactions in which their services may be used. This aspect should be taken into account by practitioners responsible for applying relevant legislation (judges, for example) and thus for deciding whether control of the document exists and whether the entity that claims to have such control is therefore the owner of the record, since that determination should be correct only if the communication system used ensures to a reasonable extent that the transferable record has the requisite qualities and if that system reliably identifies the owner of that record. The concept of reliability is therefore of vital importance in this and other areas of electronic commerce law (digital signatures; originality of the document).

3. Systems used in practice for the issuance and transfer of electronic transferable records

All existing systems for providing services of this kind (like the systems that preceded them) satisfy, in different ways, the requirements indicated. Thus, they are based on the creation of information management systems designed to enable users to verify, by means of technology and communications, the conditions that by law must be met in order for the desired legal effects to be recognized. In some cases, the systems are specifically designed to fulfil that purpose and are consequently available commercially with the aim of enabling users to issue and negotiate electronic transferable records. In other cases, the systems are not yet traded for that purpose but may be used to issue and transfer electronic transferable records.

According to one of the types of classification typically used to differentiate these systems, a distinction is made between registry systems and token systems. This classification is based on the logical and protocol-related structure and architecture of each such system. In all cases, the systems in question are information management systems designed for a specific purpose: the issuance and transfer of electronic transferable records under conditions that satisfy the

requirements of the law (the main requirement being that the owner and holder of the record should be reliably identified).

Registry systems are based on the creation of information systems with a registry-based structure. In such registries, which follow the same approach as other registry-based information structures for the assignment of title or ownership rights, the record appears showing the identity of the owner. Transfers of the record and of ownership of the record (with all the consequences that such transfers might entail) take the form of whatever transactions the users have agreed upon either under the system or previously, outside the system, but in all cases involve change of ownership reflected in the register specified by the person authorized for that purpose, that is, the transferring owner. From the legal perspective, such systems are capable of satisfying the control requirement, since the technology on which they are based, being sufficiently reliable, ensures the identification of a sole owner of the record (and of the rights incorporated in that record) at any time. They are also based on the creation of closed environments for centralized multilateral communications that in turn are firmly based on security measures designed to verify the identity of users and to ensure the integrity of communications.

Token systems are based on an approach that in essence may be described as parallel to that followed in the world of paper; it too is based on the identification of original and unique documents (as is the case in registry systems) that can be recognized as such by the software used to process them and can therefore be transmitted from one information system to another without losing any of the aforementioned qualities. In this way, it is possible to replicate in the electronic environment the approach followed in the physical world, in which the transfer of a negotiable document involves the transfer of the document itself: in the case of a paper document, possession of that document is transferred; in the case of an electronic document, control of the document is transferred (if the system used meets the control requirement, where applicable).²

In both cases, regardless of its architecture and the structure in which it results, the approach of the protocol followed by the parties under these systems to produce legal effects would be the same, since, in order for an electronic transferable record (recognized as original and authentic) to be transferred, control of that record must be transferred. Also in both cases, the determination of the existence of the record, its qualities and its effects, as well as its ownership and transfer, are based on the exchange of information. The verification of such qualities and facts is in turn based on the intervention of trusted third parties. Although such entities can intervene in each case in a different way, they act as trusted intermediaries in the verification of the reliability of the system, of the technology that that system uses and, by extension, of the information exchanged. The building of trust is one of the cornerstones of this overall approach, whether viewed from the technical, commercial or service-sector or legal perspective. In many cases, trust-building mechanisms do not differ greatly from those with which we are

² The so-called “digital objects infrastructure” is consistent with that approach. It is based on the creation and use of “digital objects”, unique and differentiated data sets that can be recognized as such through use of the necessary software, which in turn is based on a system of unique numbering codes that are applied at all times both to the digital objects and to the repositories in which those objects might be located. The codes are assigned by the authorities responsible for their administration (a central registry and a peripheral or decentralized structure).

already familiar in other areas (particularly those relating to electronic signatures), and can be established in alternative structures to which, depending on the role of the service providers themselves as trusted third parties (particularly in view of the persons who might acquire an electronic transferable record), other intermediaries and layers of trust can be added, such as certifying or audit entities or possibly the public sector.

4. Scope and objective of the work to be carried out

All of the above observations and comments have been made with the aim of helping to determine the scope and objectives of the work to be carried out by Working Group IV. Consideration of the limited legislation in this area, the experience acquired in the interpretation and application of that legislation and commercial practice conducted in accordance with it serve as an initial indication of the issues that might be addressed by such a body as UNCITRAL and the manner in which they might be addressed.

There are a number of points that, in the view of the delegation of Spain, must be resolved during the initial phase of the Working Group's work. Those points include, but are not limited to, the following:

(a) In accordance with the ultimate and overall objective of providing States with the means or instruments to approve legislation on electronic transferable records, the nature of the instrument or instruments to be created should be studied. There are a number of possibilities in that regard. It is the understanding of the delegation of Spain that one option of interest is the preparation of model legislation (a model law or a supplement to the Model Law on Electronic Commerce), particularly in view of the lack of relevant legislation in Spain and indeed in the majority of States. However, other possibilities should also be considered by the Working Group when it convenes;

(b) The issues that such an instrument should address include the following:

- The type of documents to which it might apply;
- The nature and scope of the provisions and principles set out in the final instrument and the relationship of those provisions and principles to existing substantive legislative provisions that constitute the regime governing paper-based negotiable documents. In view of existing instruments and standards in the area of electronic commerce, the option preferred by the delegation of Spain is to restrict the scope of the work and of the instrument finally produced to purely procedural and formal issues in order to ensure consistency with the substantive principles of existing national legislation;
- The provisions that are to govern the issuance and transfer of electronic transferable records, including:
 - Requirements for their valid and effective issuance;
 - Requirements for their valid and effective transfer to a new owner or negotiation;
 - Requirements with regard to proof of ownership of the record, that is, proof of possession;

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- Whether the standards or principles ultimately identified and agreed upon are based on a known concept, such as control of the record, or a different concept, the content and defining elements of that concept;
 - The requirements and standards to be applied in order to withdraw or cancel the record at the time of its termination; and
 - Procedural issues relating to the specific regime governing negotiable or transferable documents and exercise of the rights incorporated in those documents in the context of litigation, and the regulation of those issues with respect to documents issued in electronic form.
- The possible implications of intervention by trusted third parties, whether or not in connection with providers of services relating to the issuance and use of transferable or non-transferable electronic records, and the role that such parties should play. Issues relating to the status of service providers, certifying entities or any trusted intermediary potentially encompass a number of aspects. Those aspects that might be the subject of the work to be undertaken by Working Group IV should be examined. Two issues that the delegation of Spain considers to be of interest are the following:
 - The study of possible models for regulation of the market for such services (for example, those based on the creation of a basic “public trust system” and on a certain degree of public control) with the aim of establishing clear criteria for the application of the standards developed; and
 - Study of the liability potentially faced by such entities and the measures that by law can be taken in order to ensure the optimal regulation of such liability in terms of efficiency and effectiveness.
 - The requirements for the cross-border recognition of electronic transferable records, strictly in relation to procedural or formal issues specific to the provisions of electronic commerce law.

III. INSOLVENCY LAW

A. Report of the Working Group on Insolvency Law on the work of its fortieth session (Vienna, 31 October-4 November 2011)

(A/CN.9/738)

[Original: English]

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I. Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (Insolvency Law) (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on three insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and

liabilities in insolvency and pre-insolvency cases, both of which were of current importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency.

3. At its thirty-ninth session in 2010, Working Group V commenced its discussion of those three topics on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.96). The decisions and conclusions of the Working Group are set forth in document A/CN.9/715. The work on topic (c) was completed by the Working Group at its thirty-ninth session and at its forty-fourth session in 2011, the Commission finalized and adopted the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fortieth session in Vienna from 31 October to 4 November 2011. The session was attended by representatives of the following States members of the Working Group: Austria, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Malaysia, Mexico, Nigeria, Norway, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was also attended by observers from the following States: Belgium, Croatia, Denmark, Dominican Republic, Ecuador, Guatemala, Indonesia, Iraq, Lebanon, Panama, Peru, Slovakia, Slovenia, Sudan, Switzerland and Syrian Arab Republic.

6. The session was also attended by observers from Palestine and the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and the World Bank;

(b) *Invited intergovernmental organizations*: the Caribbean Community (CARICOM);

(c) *Invited international non-governmental organizations*: Alumni Association of The Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), Center For International Legal Studies (CILS), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (IIT), International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), New York State Bar Association (NYSBA) and Union des Avocats Européens (UAE).

8. The Working Group elected the following officers:
Chairman: Mr. Wisit Wisitsora-At (Thailand)
Rapporteur: Mr. Pedro Enrique Amato (Bolivarian Republic of Venezuela)
9. The Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.V/WP.98);
 - (b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.99);
 - (c) A note by the Secretariat on Directors' responsibilities and liabilities in insolvency and pre-insolvency cases (A/CN.9/WG.V/WP.100); and
 - (d) A proposal for a definition of "centre of main interests" (articles 2 (b) and 16 (3) of the UNCITRAL Model Law on Cross-Border Insolvency) by the delegations of Mexico, Spain and the Union Internationale des Avocats (UIA) (A/CN.9/WG.V/WP.101).
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) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; and (b) directors' responsibilities and liabilities in insolvency and pre-insolvency cases.
 5. Other business.
 6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' responsibilities and liabilities in insolvency and pre-insolvency cases, on the basis of documents A/CN.9/WG.V/WP.99, A/CN.9/WG.V/WP.100 and A/CN.9/WG.V/WP.101 and other documents referred to therein. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)

12. The Working Group commenced its session with a general discussion of the form its work on selected concepts of the UNCITRAL Model Law on Cross-Border

Insolvency (the “Model Law”) in relation to centre of main interests (COMI) might take by reference to the issues raised in paragraphs 4-5 of document A/CN.9/WG.V/WP.99.

13. The Working Group confirmed that the purpose of the work was not to change the Model Law, but rather to provide more guidance to assist those responsible for its use and application and to facilitate its wider adoption. For that purpose, the Working Group agreed that, as a working assumption, the focus should be upon revising and enriching the guidance provided in the Guide to Enactment.

A. Proceedings qualifying for recognition under the Model Law: article 2

1. Requirement for insolvency of the debtor

14. The relevance of the preamble to the Model Law to this question was emphasized, in particular paragraph (e), as well as the references already included in the Guide to Enactment to the severe financial distress or insolvency of the debtor. It was suggested that those requirements could be given greater emphasis to ensure clarity as to the scope of the Model Law. It was noted that the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) provided commentary on, and a definition of, what constituted insolvency proceedings, including imminent insolvency, and that that material might be helpful to the Guide to Enactment.

15. A different suggestion was that since insolvency law was continually developing and new types of procedures were increasingly being used, a flexible interpretation of the concepts “foreign proceedings” and “a law relating to insolvency” might be required to ensure the Model Law would cover procedures conducted before commencement of formal insolvency proceedings, such as negotiations with some, but not necessarily all, creditors for refinancing of the debtor, where those procedures did not require agreement of all creditors (since some creditors might, for example, be paid in full) and may not involve approval by the court. In response, it was suggested that where such negotiations with creditors were purely contractual and did not lead to commencement of an insolvency proceeding (such as an expedited proceeding as described in the Legislative Guide), any agreement reached would be enforceable as a contract, both domestically and internationally, without the need for recognition under the Model Law and the assistance associated with recognition. Although it was acknowledged that hybrid types of procedure might increasingly be used to address the financial distress of debtors, it was nevertheless pointed out that the Model Law already contained certain limitations with respect to the type of proceeding to be covered and only a certain degree of flexibility could be provided by the Guide to Enactment without changing the terms of the Model Law itself.

16. After discussion, the Working Group agreed that the Guide to Enactment should focus on the insolvency proceedings covered by the Legislative Guide and involving financial distress of the debtor.

2. Elements of the definition of “foreign proceeding”

17. It was noted that the elements comprising the definition needed to be considered in relation to each other and that a proceeding that was collective might nevertheless fail to satisfy other elements of the definition. As to what constituted a “collective” proceeding, it was agreed, after discussion, that as a general principle all assets and liabilities of the debtor and the claims of all creditors should be addressed by such a proceeding. One exception to the latter requirement would be those proceedings from which secured creditors were excluded where they could nevertheless proceed to enforce their rights outside of the insolvency law or proceedings where secured creditors rights were not affected. Although it was suggested that a proceeding might be considered collective where other classes of claims were excluded on the basis that they were not to be impaired, the Working Group agreed to refer only to the example of secured creditors.

18. The Working Group agreed that the Guide to Enactment might helpfully include a discussion of some of the characteristics of proceedings that might not be covered by the definition, such as procedures that did not require supervision or control by the court or negotiations that were purely contractual in nature.

19. With respect to the element of control or supervision, the Working Group referred to the issues raised in paragraph 31 of document A/CN.9/WG.V/WP.99. It was agreed that it was sufficient if the supervision or control of the court was potential rather than actual and it was noted that in some jurisdictions it might involve supervision or control of the insolvency representative; that expedited proceedings of the kind referred to in the Legislative Guide could be covered; and that a proceeding where the court was no longer involved could nevertheless fall within the definition, provided it was still on foot and had not been closed. It was noted that the discussion in the Legislative Guide indicated various approaches were taken to closure of proceedings following approval of a reorganization plan.

B. Recognition

20. With respect to paragraph 34 of document A/CN.9/WG.V/WP.99, the Working Group was of the view that further explanatory material could be added to paragraphs 73 and 128 of the Guide to Enactment, addressing in particular the requirement for establishment and the reasons why other types of proceeding were not included in the Model Law’s recognition regime.

21. With reference to paragraph 37 of A/CN.9/WG.V/WP.99, the Working Group agreed that it would be helpful to provide a cross-reference not only to the UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective, but also to the Legislative Guide and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. It was suggested that although paragraph 9 of the Guide to Enactment adverted to the relevance of the Guide to users of the Model Law other than legislators, the inclusion of more guidance directed at, for example, judges might require the title “Guide to Enactment” to be revised to include a reference to “interpretation”.

1. Factors relevant to determining COMI and rebutting the presumption

22. The Working Group considered the issues raised in paragraph 40 of document A/CN.9/WG.V/WP.99 and the proposal contained in document A/CN.9/WG.V/WP.101 with respect to defining COMI and the factors that might be relevant to rebutting the presumption in article 16 (3) of the Model Law that the debtor's COMI was its registered place of business (or habitual residence in the case of a natural person).

23. The Working Group considered the standard of the presumption contained in article 16 (3) and, in particular, the manner in which a similar presumption in the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) had been interpreted. It was noted that in the case of the EC Regulation the courts had stated that the presumption was a strong one that would only be rebutted in very limited cases and in the face of exceptional circumstances; reference is made to a recent decision in paragraph 27. The difference between the use of the presumption in the Model Law and the EC Regulation was emphasized, the former being for the purpose of recognition of foreign insolvency proceedings and the provision of assistance to those proceedings, while the latter was relevant to commencement of insolvency proceedings and the automatic recognition of those proceedings by other EU States. After discussion, it was agreed that the standard of the presumption in the Model Law was not the same as in the EC Regulation. It was suggested however, that there was a discrepancy between the importance of the presumption in article 16 (3) and the guidance provided in paragraph 122 of the Guide to Enactment and that there was room for more explanation to be included. That proposal received some support.

24. As to the factors that might be relevant to rebutting that presumption, one view was that in order to provide clarity and certainty it might be appropriate to identify a few key factors, maybe three to four, that should be considered by a court receiving an application for recognition of main proceedings. The key factors might be those noted in paragraph 42 of document A/CN.9/WG.V/WP.99, that is (a) the location of the debtor's headquarters or head office functions or nerve centre, (b) the location of the debtor's management, (c) the location of the debtor's main assets and creditors or the location of the majority of creditors who would be affected by the case, and (m) the location which creditors recognize as being the centre of the debtor's operations. Other factors, such as those set forth in paragraph 20 of A/CN.9/WG.V/WP.95/Add.1, might be relevant to the specific facts of the case, but would not be as important as the key factors. The approach of identifying some key factors received some support.

25. A different view was that because of the fact-specific nature of any inquiry into COMI, it would not be possible or appropriate to identify only a few factors that would be relevant in all cases. What was important, it was stressed, was the overall analysis of relevant, objective factors. The Guide to Enactment should identify a number of factors that might be relevant to rebutting the presumption and cite them as examples, describing what those factors might involve and the circumstances in which they might be relevant, without determining any priorities or the weight to be accorded to any particular factor. The factors should be presented in narrative form rather than as a list, since the latter form might be misinterpreted as indicating priority or relative importance. That approach also received support.

26. Concern was expressed with respect to interpretation of the language used to describe the factors and as to the scope of ascertainability required in factor (m). There was general support for the idea conveyed by factor (a), although other formulations such as “the place of the debtor’s central administration” were proposed. It was observed that factor (b) was too vague and might be satisfied, for example, by reference to the place of residence of management, which was not relevant to the determination of COMI. With respect to factor (c) it was observed that the location of the debtor’s assets was often a key question in insolvency and such a factor would be unlikely to assist in providing predictability with respect to COMI. Concerns were also raised with respect to the difficulty of applying those factors in the context of an enterprise group.

27. With respect to factor (m), it was noted that under the EC Regulation, ascertainability was a key component and would operate to qualify other factors, such as factor (a). Reference was made to a case recently decided by the European Court of Justice¹ in which the court had said the Regulation must be interpreted to mean that the debtor company’s centre of main interests must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors which are ascertainable by third parties. The court went on to say that where the bodies responsible for the management and supervision of the company are in the same place as the registered office and the management decisions of the company are taken, in a manner ascertainable by third parties, the presumption cannot be rebutted. Some support was expressed in favour of adopting that approach and language in the Guide to Enactment, although questions were raised as to the precise meaning of the ascertainability requirement, in particular the identity of the third parties referred to and whether the standard was ascertainability by reference to, for example, formal documents of registration or the information that was known generally in the market. A suggestion to treat ascertainability as an additional factor, rather than as a factor qualifying other factors, also received support.

28. With respect to the proposal contained in document A/CN.9/WG.V/WP.101, there was little support for adopting a definition as such. However, the Working Group noted that paragraphs 1 and 2 were based on the EC Regulation and the Model Law respectively and a suggestion that paragraph 1 might be incorporated in some form in the Guide to Enactment received some support. Although concerns were expressed with respect to the specific wording of the factors set forth in paragraph 4 of the proposed definition, it was noted that to a large extent those ideas were reflected in the factors outlined in working papers A/CN.9/WG.V/WP.95/Add.1 and A/CN.9/WG.V/WP.99 and were subject to similar concerns and considerations with respect to interpretation.

29. A suggestion that the judge commencing the foreign proceeding could be encouraged to include in the commencement decision information as to any evidence they had considered that would be relevant to a subsequent recognition application, as outlined in paragraph 14 of A/CN.9/WG.V/WP.99, received some support.

30. After discussion, the Working Group agreed that the Guide to Enactment should focus on information that would enhance predictability and provide guidance

¹ Interdil Srl, in liquidation, case No. C-396/09.

and assistance to judges of a receiving court in making a decision with respect to the location of COMI. It should include information on why the decision as to COMI was so important in the context of the Model Law and describe the factors that might be relevant to rebutting the presumption under article 16 (3). While there was no consensus on whether the factors should be limited or extensive or as to the precise language, the Secretariat was requested to prepare appropriate material, taking into account the considerations raised and conclusions reached by the Working Group, for consideration at a future session.

2. Effect of recognition of the COMI

31. The Working Group considered whether the effects of recognition should be discussed in more detail in the Guide to Enactment. Although there was some support for expanding the commentary and moving some explanations, such as that contained in paragraph 143, closer to the beginning of the Guide, the Working Group concluded that this topic did not require further treatment in the Guide at this stage.

3. Impact of fraud

32. The Working Group considered various examples of behaviour involving deception or possibly fraud, although it was felt that that was probably too strong a term for the behaviour in question. These examples included the use of fictitious entities, Ponzi schemes, deception as to the location of the debtor's COMI, movement of the COMI in close proximity to commencement of proceedings for improper purposes and dishonest or fraudulent behaviour in the insolvency proceedings once commenced. One view with respect to the movement of COMI was that the receiving court should consider only the location presented to it; how COMI was established in that location was not relevant to recognition under the Model Law. It was pointed out that in a number of jurisdictions, the movement of COMI in close proximity to commencement of insolvency proceedings was associated with the freedom of establishment and would not raise concerns, unless it might be characterized as engineered to deliberately avoid the consequences of insolvency. It was also pointed out that movement of COMI in close proximity to commencement may be the result of a deliberate choice of forum, designed for example, to commence proceedings in a jurisdiction with an insolvency regime more favourable to reorganization or to other insolvency solutions appropriate to the debtor and should not therefore raise concern. Where the COMI presented was fictitious or the foreign proceeding was commenced fraudulently, the receiving court could refuse to recognize the proceeding and may invoke the public policy exception in article 6 of the Model Law. Where the dishonest or fraudulent activity or behaviour was not apparent at the time of recognition, articles 17 and 18 of the Model Law allowed the recognizing court to reconsider its decision. The Working Group agreed that the commentary might mention some of those examples and the possible solutions.

4. Timing relevant to determining COMI

33. The Working Group agreed that the Model Law did not address the relevant date for determining the COMI of the debtor in foreign insolvency proceedings for the purposes of recognition of those proceedings. Several possibilities were

identified: the date of application for, or commencement of, the foreign proceedings (noting that in some jurisdictions that date would be the same) or the date of the application for recognition of the foreign proceedings. It was noted that there were advantages and disadvantages with respect to each of those dates. The date of application for commencement was said to be more appropriate than the date of commencement, especially where there was a gap between the two and there was the possibility for creditors and others to take action with respect to assets of the debtor. If the date of the application for recognition was the relevant date, it was observed that there may be cases where the business of the debtor had ceased to operate at that time, especially where recognition was sought at a late stage of the foreign proceedings, and no COMI or establishment of the debtor would be able to be identified. In such cases, the location of the foreign representative may be the only location with a connection to the foreign proceedings. It was suggested that where several concurrent foreign proceedings were seeking recognition in a single State, the receiving court of that State would have to consider the various proceedings and determine which date might be relevant to the COMI issue. In such cases, chapter IV of the Model Law on cooperation and coordination, as well as articles 17 and 18, might be relevant.

34. The issue of the movement of the COMI in close proximity to the application for commencement and its effect on recognition of the foreign proceedings was further raised. One view expressed was that the question of COMI was to be determined by the originating court at the time the foreign proceedings commenced. In response, it was pointed out that courts generally did not consider whether the proceedings they were being asked to open in their own jurisdiction should be classified as main proceedings based on “COMI” or non-main proceedings based on “establishment”, but rather whether that court had jurisdiction with respect to the debtor. The question of whether proceedings were classified as either main or non-main was relevant only to the issue of recognition under the Model Law, and therefore had to be considered by the receiving court. As noted above (para. 29), any relevant information as to the COMI or establishment of the debtor the originating court might be able to include in its commencement order could prove very useful to the receiving court, even though not determinative or binding on the receiving court, which would have to satisfy itself that the foreign proceedings met the requirements of the Model Law.

35. After discussion, the Working Group requested the Secretariat to prepare a text which raised the issue, identified the possible dates and discussed the various advantages and disadvantages of each date.

C. Enterprise groups

36. The Working Group considered whether, notwithstanding that the Model Law did not apply to enterprise groups as such, material on enterprise groups and the manner in which those groups had been handled in practice could be added to the Guide to Enactment.

37. The Working Group agreed that the topic was very important, reflecting the current commercial reality of global business and of cross-border insolvency proceedings. As to adding material to the Guide to Enactment, while some

reservations were expressed as to the appropriateness of that course of action, it was agreed that reference should be made to part three of the Legislative Guide and the solutions adopted with respect to the treatment of groups in insolvency, particularly in the international context. Beyond that, however, and particularly with respect to the concept of the COMI of an enterprise group, it was suggested that once the Working Group had reached agreement on the factors relevant to identifying the COMI of an individual debtor, it might be possible to consider the group issue further and, in particular, the relevance of those factors in the group context.

V. Directors' responsibilities and liabilities in insolvency and pre-insolvency cases

A. Form of possible principles or guidelines

38. The Working Group commenced its deliberations on that topic with a discussion of the possible form of its work. The Working Group agreed that the goal of the work was to provide guidance on responsibilities and liabilities relevant to the period before the commencement of insolvency proceedings in order to encourage early action with respect to financial distress, thereby facilitating rescue and minimizing harm to creditors and other interested parties. The achievement of that goal would require a balance to be achieved between the desirability of providing incentives to encourage early action in the face of financial distress and the impact the duties imposed might have on the ability of companies to attract qualified persons to take up positions of control and influence and to continue to hold those positions through financial distress and insolvency. It was pointed out that an unintended consequence could be directors taking unnecessary action, such as applying for formal insolvency proceedings at an early stage, simply to escape onerous liability or penalties. The Working Group agreed that the form of a legislative guide would be appropriate to achieving that goal as it could provide commentary on the advantages and disadvantages of different approaches and recommend best practice, as appropriate.

B. Identifying who owes the duty

39. The Working Group recalled the agreement at its thirty-ninth session that, as a starting point, it would be appropriate for formally appointed directors, whether natural or legal persons, to owe the relevant duties. As to other persons who might also owe a duty, the Working Group expressed different views. One view was that it should extend to administrators and others with responsibility for management and supervision of the company and those who might exercise influence over the company, excluding professional advisors. Another view was that it was difficult to determine who would owe the duty without being certain as to the scope of the duty to be imposed. If, for example, the duty was to respond in a timely manner to financial distress by applying for commencement of insolvency proceedings, it need only apply to formally appointed directors. If something broader was contemplated, such as payment of compensation for harm caused, a wider category of person might be required, although the imposition of duties of that nature was likely to be disruptive and contrary to the incentives outlined as the goal of the work.

40. A further view was that it might be desirable not to refer to directors at all, since States may have different definitions and understandings of what the term might mean. It was also suggested that it might be more desirable to adopt a broader, more purposive description, such as those persons responsible for running the company or, alternatively, that the issue could be left to be determined in accordance with national law.

41. After discussion, the Working Group agreed that the guidance should refer to formally appointed directors, with the commentary to address the scope of the meaning of the term “director” and give example of the types of officer and other parties that might be covered by it.

C. Defining the time at which the duties arise

42. The Working Group recalled that at its previous session it had agreed that the duties would arise when the debtor was or would imminently become insolvent, although they would only become enforceable once insolvency proceedings had commenced (A/CN.9/715, para. 81).

43. As a preliminary point, it was suggested that the work should focus on the obligations of directors in the pre-insolvency phase, rather than upon duties and, recalling the discussion on the form of the work, on stimulating and incentivising correct behaviour. That proposal received some support, although it was also suggested that in order to stimulate correct behaviour, it would be necessary to include some real possibility of liability.

44. It was widely observed that defining the time at which any obligation might arise by reference to a bright line test would be very difficult to achieve. Various possible indicators were suggested, including the point at which the directors should have been aware there was no reasonable prospect of avoiding insolvency; when the directors were or ought to have been aware that insolvency could not be avoided; when factual insolvency, however defined, occurred; and the moment when the continuity of the business was threatened. In discussing those indicators, one view expressed was that some might occur too late or too close to the commencement of insolvency proceedings — such as factual insolvency or imminent insolvency — and that the obligations should arise before an irreversible situation of financial distress was reached or insolvency became inevitable.

45. It was emphasized that the discussion should focus on obligations that could be enforced under the insolvency law only when insolvency proceedings had commenced, not on the types of obligation that might be applicable under company law. Once insolvency proceedings commenced, the insolvency representative might be able to take various actions, such as clawing back assets transferred at an undervalue prior to commencement, in order to mitigate the harm done to the debtor company. Any fruits of those actions would accrue for the benefit of the insolvency estate. It was further emphasized that the obligations in question would be complementary to those applicable under company law.

46. After discussion, it was agreed that although there was some general support in favour of focusing on a period of time before the commencement of insolvency proceedings, consensus on how that might be described could not be reached at the

current session. The Secretariat was requested to prepare material that would provide information on the various different approaches taken in existing laws dealing with the topic and consider the advantages and disadvantages of those approaches.

D. Identifying to whom the duties are owed

47. The Working Group recalled that at its previous session various questions with respect to that issue had been discussed, including whether the obligation would be owed to the general body of creditors or the insolvency estate per se (an approach said to be consistent with the Legislative Guide and one that would involve a practical approach based on identifying the potential beneficiaries of any recovery action).

48. Although noting that that issue was dependent on the time at which the obligations might arise, on which there was no consensus, the Working Group expressed various views as to the parties to whom the obligations might be owed. Those included the company itself (which would encompass protection of the assets and the interests of shareholders and other relevant parties), the creditors as a whole or shareholders. It was observed that it might not be possible to draw a bright line between pre- and post-insolvency phases so that before insolvency the obligations were owed, for example, to the company under applicable company law and that after the commencement of insolvency proceedings the focus shifted solely to creditors. Rather, it was suggested that a range of interests were implicated at both stages, even if some change of emphasis might occur as the company moved from between those phases.

E. The nature of the duties or the types of misconduct to be covered

49. Although there was no consensus as to the time at which additional obligations enforceable under the law might be imposed upon directors, many suggestions were made as to what those obligations might entail, once the relevant point of time had been reached. Those included modifying management practices to focus on a range of interested parties broader than required under company law; preparing a report on the possibility of restructuring; acting reasonably in the circumstances and taking professional advice; taking reasonable steps to minimize losses to the company; informing themselves independently of the financial situation of the company and not relying solely on management advice; taking appropriate preventive action to avoid the company sliding into insolvency; avoiding taking action that would aggravate the situation, such as transferring assets out of the company at an undervalue; calling for an external audit; ensuring the best interests of all interested parties were taken into account in determining what action might be taken; and avoiding the loss of key employees.

50. After discussion, it was concluded that the types of obligation being referred to might to some extent overlap with those generally applicable under company law and those set forth under insolvency law. There was agreement that any action proposed in this work should not restrict or interfere with the obligations applicable under other law, such as company law, criminal law, tort law or civil law. There was

also agreement that when a company was in a pre-insolvency phase, however defined, directors should consider additional measures, and some suggestions had been raised as to what those might be (see para. 49 above). It was also concluded that the Working Group was not considering a duty to apply for commencement of insolvency proceedings and in that regard, reference was made to the Legislative Guide (part two, chapter 1, paras. 35-36), where that issue had previously been addressed.

F. Identifying the remedies available

51. The Working Group heard some brief introductions to the remedies available under various national laws. The Secretariat was requested to examine the different approaches taken under national law in order to find common ground and to present material on that common ground for consideration at a future session.

G. Cross-border issues

52. The Working Group agreed that cross-border issues should be considered at a future session once the issues discussed above had been further clarified.

B. Note by the Secretariat on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI), submitted to the Working Group on Insolvency Law at its fortieth session

(A/CN.9/WG.V/WP.99)

[Original: English]

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on two insolvency topics, both of which were of current importance, where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the first of those two topics, concerning a proposal by the United States, as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8, to provide 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 recognition, in a manner that would not preclude the development of a convention.¹ A proposal² concerning a possible definition of “COMI” is contained in A/CN.9/WG.V/WP.101. The second topic concerning the liability of directors and officers of a company in insolvency and pre-insolvency is addressed in A/CN.9/WG.V/WP.100.

4. As a preliminary matter, the Working Group may wish to consider the need to resolve the form and manner in which the first part of the proposal, i.e. guidance on issues related to COMI, might be presented. The proposal (A/CN.9/WG.V/WP.93/Add.2, paras. 68-70) suggests that, in considering the questions raised below, the Working Group should set out the policy rationale for any conclusions it may reach that could form the basis of guidance to be provided on interpretation of the Model Law. Explaining that policy rationale could also provide a helpful “legislative history” for a jurist or insolvency authority to understand the scope and meaning of the various provisions of the Model Law. The Working Group might wish to consider how that might be achieved. Various types of document could be developed, depending upon the level of guidance the Working Group sought to provide, such as information and commentary on the one hand or recommendations on the other. An information document that could accompany the existing text of the Model Law and Guide to Enactment of the Model Law (the Guide to Enactment) might be one solution, while another might be to incorporate the text promulgated by the Working Group in the Guide to Enactment itself. The Working Group may wish to note that the text entitled “The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective” (the Judicial Perspective), which provides information for judges on the use and interpretation of the Model Law, was finalized and adopted by the Commission at its forty-fourth session in 2011.³

5. In considering the question of the form of its work, the Working Group might bear in mind that providing commentary or guidance additional to the existing Guide to Enactment could prove confusing for the reader or user, especially where the commentary or guidance departs from, or provides further elaboration of, points already addressed in the Guide to Enactment. For that reason, revising the Guide to Enactment might be the most effective and efficient approach in order to provide a single source of information and guidance. In that regard, it might be suggested that since some of the issues discussed below are pertinent to use and implementation of the Model Law as enacted, rather than to its enactment per se, they are therefore not appropriate for inclusion in any revision of the Guide to Enactment. The status of the Guide to Enactment, however, and its use by courts as a guide to the meaning of the Model Law (in addition to its use by legislators and policymakers in enacting the Model Law, as noted in paragraph 9 of the Guide to Enactment) suggests that the

¹ See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

² Proposal for a definition of “centre of main interests” (articles 2 (b) and 16 (3) of the UNCITRAL Model Law on Cross-Border Insolvency) by the delegations of Mexico, Spain and the Union Internationale des Avocats (UIA).

³ A pre-release version of the text is available at www.uncitral.org/pdf/english/texts/insolven/pre-judicial-perspective.pdf.

inclusion of additional commentary and guidance in the Guide to Enactment could be appropriate.

6. Since no decision has been taken by the Working Group on this issue and the form of the final work product is thus unclear, this working paper makes reference only to the issues that might be included or further elaborated in “additional commentary”. It does, however, identify some of the paragraphs of the Guide to Enactment that might require reconsideration and amendment if the Working Group were to decide that additional commentary or guidance on the issues discussed should be included in the Guide to Enactment.

7. This paper draws from and builds upon the previous working papers discussing the issue of COMI, specifically A/CN.9/WG.V/WP.95 and Add.1. The Working Group may wish to recall the issues upon which it did not reach a conclusion at its previous session at which those papers were discussed:⁴

(a) The various elements of the definition of “foreign proceedings” in article 2 of the Model Law (see A/CN.9/715, para. 22);

(b) Application of the public policy exception in article 6 (A/CN.9/715, para. 30). The Working Group agreed that the exception should be narrowly construed, but did not further discuss how to ensure that could be achieved;

(c) Prioritization of a list of factors to be used in determining COMI and rebutting the presumption in article 16 (3) (A/CN.9/715, para. 41); and

(d) Impact of fraud on the determination of COMI (A/CN.9/715, para. 43).

8. In addition to the materials previously provided, the following discussion offers further information on some of the points previously discussed, with further questions for consideration by the Working Group.

I. Interpretation and application of concepts relating to centre of main interests

A. Proceedings qualifying for recognition under the Model Law: article 2

1. Requirement for insolvency of the debtor (see A/CN.9/WG.V/WP.95, paras. 8-12)

9. At its thirty-ninth session, the Working Group did not reach a conclusion on the need to further discuss whether the Model Law included a requirement for the financial distress or insolvency of the debtor, other than to take the view (A/CN.9/715, paras. 18) that it was premature to decide whether the definition of “foreign proceeding” in article 2 required clarification additional to that already provided by the Guide to Enactment of the Model Law.

10. A number of points, as noted in the working paper prepared for the thirty-ninth session (A/CN.9/WG.V/WP.95, paras. 8-12), were previously considered by the Working Group when developing the Model Law and various decisions were

⁴ The report of the work of the thirty-ninth session of Working Group V is set forth in A/CN.9/715.

taken. For example, it was acknowledged that since different jurisdictions have different notions of what constitutes “insolvency proceedings” the term cannot easily be defined; rather the work should concentrate on the characteristics that foreign insolvency proceedings should possess in order to qualify for recognition (A/CN.9/WG.V/WP.95, para. 8). Other points are already included in the Guide to Enactment with respect to the requirement of insolvency. It is noted, for example, that the debtor should be experiencing severe financial distress or be insolvent (Guide to Enactment, paras. 1, 13, 14, 51 and 71).

11. To further assist users of the Model Law, the Working Group may wish to consider the following proposals for additional commentary on this preliminary point:

(a) To give greater emphasis to the Preamble to the Model Law, in particular paragraph (e) and the reference to “financially troubled businesses”. Paragraphs 1, 13, 23-24, 51-53 and 71 of the Guide to Enactment could be reconsidered in that regard;

(b) To include references to, or elaboration upon, various elements from the Legislative Guide, including the definition of insolvency (glossary, para. 12(s); the key objectives of an effective insolvency law (part one, chap. I, paras. 1-14 and recommendations 1-6), as well as to the general features of an insolvency law (part one, chap. I, paras. 20-27 and recommendation 7) and to recommendations 15 and 16, which contemplate insolvency or imminent insolvency, as defined, as conditions for commencement of insolvency proceedings. Paragraphs 13-19 and 51-53 of the Guide to Enactment could be relevant to that issue; and

(c) To discuss some of the general characteristics of proceedings that are eligible for recognition under the Model Law, given some of the issues that have arisen in the cases considering this question (A/CN.9/WG.V/WP.95, paras. 18-23). For example, the labelling of a law as an insolvency law may not be determinative; rather what is intended is a law relating to insolvency or the prevention of insolvency or addressing financial distress, including laws that may not require insolvency as a condition for commencement of formal insolvency proceedings, but which nevertheless address financial distress, as opposed to laws that focus on getting rid of a legal entity (especially where that entity is solvent). Paragraphs 23-24 and 51-53 of the Guide to Enactment could be relevant to that issue.

2. Elements of the definition of “foreign proceeding” (A/CN.9/WG.V/WP.95, paras. 13-38)

12. To be recognized under the Model Law, a foreign proceeding must fall within the definition in article 2 (a), which contains several elements. The proceedings should be (*emphasis added*):

- (i) *Collective* judicial or administrative proceeding in a foreign State, including an interim proceeding,
- (ii) Pursuant to a law relating to insolvency,
- (iii) In which proceeding the assets and affairs of the debtor are *subject to control or supervision by a foreign court*,

(iv) *For the purpose of reorganization or liquidation.*

13. It will be recalled that article 16 (1) creates a presumption with respect to the definitions of “foreign proceeding” and “foreign representative” in article 2. If the decision commencing the foreign proceeding and appointing the foreign representative indicates that the foreign proceeding is a proceeding within the meaning of article 2 (a) and that the foreign representative is a person or body within the meaning of article 2 (d), the court is entitled to so presume.

14. It will also be recalled that recognizing courts have relied upon that presumption in several cases (see A/CN.9/WG.V/WP.95, paras. 15-16) where the court commencing the foreign insolvency proceeding (the originating court) noted that for the purposes of seeking recognition, the insolvency representative was a foreign representative and that the proceedings were foreign proceedings. The Working Group may wish to consider whether originating courts should be encouraged to state, without more, that the proceedings would fall within the definition in article 2 (a) and were thus “foreign proceedings” for the purposes of the Model Law or whether in addition they should be encouraged to set out, in the orders made, the essence of the evidence presented to them that would facilitate recognition of the proceedings as foreign proceedings under article 2 (a). The same consideration could apply to appointment of the insolvency representative and recognition of that person as the foreign representative under article 2 (d). The commentary to articles 15 and 17 of the Model Law (paras. 30-31, 67-68 and 125 of the Guide to Enactment) could note that the decisions and orders of the originating court are not determinative or binding on the receiving court, which is required to satisfy itself that the proceedings meet the requirements of article 2 (a), but that in appropriate circumstances those decisions and orders might be given weight by the receiving court in considering and reaching its own conclusions on that question.

15. A related matter concerns the status of the proceedings as either main or non-main (A/CN.9/WG.V/WP.95/Add.1, paras. 1-3). At its previous session, the Working Group agreed that it would be useful if the originating court were to include information concerning the status of the proceedings in any orders it made and, accordingly, that that point could be included in additional commentary (A/CN.9/715, para. 37). Paragraphs 73 and 126-127 of the Guide to Enactment may be relevant to that issue.

(a) Collective proceeding (A/CN.9/WG.V/WP.95, paras. 18-23)

16. It will be recalled that the Guide to Enactment notes the requirement that creditors be involved collectively in the foreign proceeding,⁵ rather than that the proceeding is one designed to assist a particular creditor to obtain payment. It is also noted that a variety of collective proceedings would be eligible for recognition “be they compulsory or voluntary, corporate or individual, winding-up or reorganization”, and would include those where the debtor retained some degree of control over its assets, albeit under court supervision (e.g. debtor-in-possession, suspension of payments).⁶ When discussed in the Working Group in the context of

⁵ Guide to Enactment, para. 23.

⁶ *Id.*, para. 24.

developing the Model Law, it was noted that “a collective character involved representation of the mass of creditors”.⁷

17. In the cases discussed in the previous working paper (A/CN.9/WG.V/WP.95, paras. 19-23), the courts identified various elements regarded as necessary to satisfy the “collective” requirement, including that the proceeding should: consider the rights and obligations of all creditors and realize assets for the benefit of all creditors; contemplate both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action; or be concerned with collecting and distributing the debtor’s assets. Notwithstanding these elements, there continues to be some lack of specificity as to the types of proceeding that might or might not satisfy the “collective” requirement. In this regard, the Working Group might note a concern that proceedings that are not truly collective could attempt to use the provisions of the Model Law to gain control over assets in the receiving jurisdiction or to stop actions in that jurisdiction and in so doing, frustrate other proceedings that are truly “collective”. To achieve greater specificity, it might be relevant to consider not only what constitutes a “collective” proceeding, but also the types of proceeding that do not.

18. At its previous session, the Working Group suggested (A/CN.9/715, para. 21) that the Secretariat could identify some types of proceeding that did not clearly fall within the definition of article 2 (a) or whose inclusion could give, or had already given, rise to various concerns.

19. Proceedings giving rise to concern have included, for example, those that represent only one class of creditor, such as policyholders, in proceedings concerning an insurance company debtor, or prioritized creditors, such as banks, in proceedings that involve reorganization of some, but not necessarily all, debt. The latter may involve various, differently labelled types of proceeding, including expedited proceedings of the kind described in the Legislative Guide (part two, chap. IV).

20. It will be recalled that in discussing expedited proceedings, the Legislative Guide notes (part two, chap. IV, paras. 81-82) that it is not always possible or even necessary to involve all creditors in the voluntary restructuring negotiations that precede expedited proceedings. Typically, these negotiations involve the debtor and one or more classes of creditor, such as lenders and bond and equity holders, and it is usual for certain types of non-institutional and other creditors, such as trade creditors, to continue to be paid in the ordinary course of business. Accordingly, they do not need to participate in the proceedings. Where, however, it is proposed that the rights of those creditors be modified, they would need to participate in the proceedings and agree to the proposed modifications. The Legislative Guide also notes, with respect to the commencement of an expedited proceeding, that it should be available to any debtor that is not yet eligible to commence proceedings under the general provisions of the insolvency law, but it is likely the debtor will be generally unable to pay its debts in the future as they mature (para. 84 and recommendation 160).

⁷ A/CN.9/422, para. 48.

21. While such expedited proceedings would satisfy certain requirements of the definition of a “foreign proceeding”, it may not be clear that in all cases they satisfy the “collective” requirement. Several questions arise. The first is whether the “collective” element requires the consideration, participation or representation of *all* creditors in the proceedings, irrespective of whether or how they are to be affected, or only those creditors whose rights are affected, for example, by postponement or other modification. A second question concerns the manner of their involvement in the proceedings and whether “collective” requires the rights and interest of all creditors to be considered (by the court or the insolvency representative) in the course of the proceedings or refers to their participation or representation in the proceedings. Creditors might participate in different ways, either directly or indirectly, depending on the nature of the proceedings. Where reorganization requires a statutory or contractual percentage of creditors to approve a plan, a requirement for direct participation would be satisfied. In liquidation, however, creditors may have no clear opportunity for such direct participation. In terms of representation, there are again different approaches, such as creditor committees or representatives appointed by the court (creditor participation is discussed in the Legislative Guide, part two, chap. III, paras. 75-114).

22. A different approach to the question of what constitutes a “collective proceeding” might be to suggest that the proceedings must be for the collective good of all creditors (in the sense that all will benefit when the debtor trades out of its financial difficulties), rather than focussing on a requirement that the rights of all creditors be considered or that all creditors participate or be represented in the proceedings.

23. Some laws have approached the issue of definition by reference to the label given to each type of proceeding in different jurisdictions. In the European Union, for example, the EC Regulation includes an annex listing the names of different types of proceeding to be covered by the Regulation. While that approach might be possible for a limited number of jurisdictions in a regional context, it might not prove to be helpful in a global context, since not all jurisdictions share a common understanding of what those labels mean and it might prove cumbersome and difficult to achieve in a comprehensive manner.

24. The Working Group may wish to consider which of these approaches might be desirable or whether there are alternatives that would be preferable.

(b) Pursuant to a law relating to insolvency (A/CN.9/WG.V/WP.95, paras. 24-29)

25. It will be recalled that the preparatory documents to the Model Law indicate this formulation was used to allude to the fact that liquidation and reorganization might be conducted under law other than, strictly speaking, insolvency law (e.g. company law).⁸ It was approved by the Working Group as being “sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute in which they might be contained.”⁹

26. The previous working paper (A/CN.9/WG.V/WP.95, paras 26-29) noted that the question of what constitutes “a law relating to insolvency” had been considered

⁸ A/CN.9/WG.V/WP.44, Notes to article 2 (c), para. 2.

⁹ A/CN.9/422, para. 49.

by several courts, particularly in the context of determining whether a receivership proceeding was a foreign proceeding that would qualify for recognition. The cases had identified various elements of that requirement: that the law in question did not have to be statutory (i.e. it could include the common law) or that it did not have to be a law relating exclusively to insolvency. One case also decided that having identified the law pursuant to which the proceedings were brought, the court was to consider whether that law related to insolvency and whether the other factors to which the definition [in article 2] referred could be regarded as being brought about “pursuant” to that law.¹⁰

27. Some cases also indicated the characteristics of the proceedings in question that did not satisfy the requirement of the Model Law. For example, where the recited purpose of the proceedings was to prevent dissipation and waste, rather than to liquidate or reorganize the debtors’ estates; where the detriment that the court was concerned to prevent was detriment to investors rather than to all creditors; where the powers conferred and duties imposed on the insolvency representative were to gather in and preserve assets, not to liquidate or distribute them; and where the insolvency representative had no power to distribute the assets of the debtor.

28. The proposal in paragraph 11 above also relates to what is intended by “law relating to insolvency”. To provide further guidance on this point, the Working Group may wish to consider whether the additional commentary should discuss the purpose of insolvency laws, i.e. to prevent or address financial distress, and other purposes that would not satisfy the definition.

(c) Control or supervision of assets and affairs of the debtor by a foreign court
(A/CN.9/WG.V/WP.95, paras. 30-35)

29. It will be recalled that other than noting that a foreign proceeding would include proceedings in which the debtor retained some measure of control over its assets, albeit under court supervision,¹¹ the Guide to Enactment does not define the level of control or supervision required to satisfy the definition or the time at which that supervision or control should arise. Preparatory documents suggest that this formulation was adopted to clarify the formal nature of the control or supervision requirement and make it clear that “private financial adjustment arrangements that might be entered into by parties outside of judicial or administrative proceedings [and which] could take a potentially large number of forms”¹² were not suitable for inclusion in a general rule on recognition.

30. Some cases that have considered this requirement have concluded: that both assets and affairs of the debtor must be under the control or supervision of the courts; that involvement of the court at a later stage of the proceedings, for example after approval of a reorganization plan by creditors, was sufficient to establish the degree of oversight required for recognition; and that the mere possibility under the relevant law of oversight by a court was sufficient, even if, in fact, there was no oversight in the particular case.

¹⁰ *Stanford International Bank* (on appeal), A/CN.9/WG.V/WP.95, para. 27, footnote 32.

¹¹ Guide to Enactment, para. 24.

¹² A/CN.9/419, para. 29.

31. The Working Group may wish to consider whether this issue should be further elaborated to highlight some of the ways in which and times at which the court might supervise or control the assets and affairs of the debtor sufficient to satisfy the definition in article 2 (a). That discussion, which might be added to paragraphs 67-68 of the Guide to Enactment, could address the following issues:

(a) The different types of proceeding, such as an expedited proceeding, where the court involvement comes at a later stage;

(b) The degree of supervision or control required and whether it should be actual or potential. For example, should the requirement be for actual control or supervision of the assets and affairs of the debtor by the court or would it be sufficient for the court to have the possibility of supervising the insolvency representative, who in turn was responsible for supervising the debtors assets and affairs?;

(c) Whether that control or supervision must be actual at the time of the application for recognition, noting for example, cases where the application for recognition is made at a late stage in the proceedings, such as after approval of a reorganization plan, and the court no longer has any involvement.

B. Recognition

1. Main and non-main proceedings (A/CN.9/WG.V/WP.95/Add.1, paras. 1-3)

32. Article 17 of the Model Law provides that a foreign proceeding within the meaning of article 2 (a) shall be recognized as either a foreign main proceeding or a foreign non-main proceeding.

33. At its previous session, the Working Group agreed that the Model Law clearly provided for recognition of only two types of proceeding — main and non-main. Proceedings not falling into either category could not be recognized, as noted in the Guide to Enactment. Paragraph 128, for example, confirms that the Model Law does not envisage recognition of a proceeding commenced in a State in which the debtor has assets but no establishment as defined in article 2 (c).

34. Given that there has been some lack of clarity in interpreting this aspect of the Model Law, the Working Group may wish to consider whether the explanation provided at paragraphs 73 and 128 of the Guide to Enactment is sufficient or whether the issue should be clarified by additional commentary.

2. Location of COMI — article 16 presumption (A/CN.9/WG.V/WP.95/Add.1, paras. 4-18)

35. It will be recalled that article 16 of the Model Law establishes a presumption upon which the court is entitled to rely in determining COMI. Article 16 (3) provides that, in the absence of proof to the contrary, the debtor's registered office (or habitual residence in the case of an individual) is presumed to be the centre of its main interests (COMI). Paragraph 122 of the Guide to Enactment makes it clear that article 16 establishes presumptions that allow the court to expedite the evidentiary process. At the same time, those presumptions do not prevent a court, in accordance with the applicable procedural law, from calling for or assessing other evidence if

the conclusion suggested by the presumption is called into question by the court or an interested party. It might also be noted that reliance on the presumption can, in the absence of independent review by the receiving court, facilitate improper forum shopping.

36. A number of cases have raised issues concerning the location of the COMI of the debtor and the interpretation of the presumption in article 16. Particular concerns relate to rebuttal of the presumption and the factors that would be relevant in that regard, especially in the case of a company debtor. Those decisions, including cases under both the EC Regulation and the Model Law, were set forth in A/CN.9/WG.V/WP.95/Add.1, paragraphs 6-18.

37. In relation to the question of COMI, the Working Group may wish to consider whether it would be appropriate to refer, in additional commentary, to the UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective, in particular section II.C, which details the steps to be taken in the process of recognition. Although directed to judges rather than to legislators, that information might nevertheless prove useful to the latter.

3. Factors relevant to determining COMI and rebutting the presumption

(A/CN.9/WG.V/WP.95/Add.1, paras. 19-21)

38. At its previous session, the Working Group considered the factors set out in A/CN.9/WG.V/WP.95/Add.1, paragraph 20 and agreed that a list of indicative factors would assist judges in their COMI analysis (A/CN.9/715, para. 41). Different views were expressed as to the relative importance of the various factors included in that list. Although it was suggested that the final list should be short and that the factors could be prioritized, it was felt that such an approach might prove to be unduly restrictive for judges.

39. The Working Group may wish to note that paragraph 127 of the Guide to Enactment provides:

“It is not advisable to include more than one criterion for qualifying a foreign proceeding as a main proceeding and provide that on the basis of any of those criteria a proceeding could be deemed a main proceeding. An approach involving such ‘multiple criteria’ would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding.”

In considering the approach of listing factors relevant to determining COMI, the Working Group may consider how it should be made clear that the intention is not to provide multiple criteria, but rather to provide guidance on how the single criteria, i.e. centre of main interests, is to be interpreted.

40. An initial issue for consideration by the Working Group concerns the purpose of providing a list of factors and whether it is, for example:

(a) To inform judges and other users of the Model Law about the types of factor that might be (or have been) taken into account in determining COMI; or

(b) To be determinative and limit the factors that should be considered, i.e. in the nature of a recommendation.

41. If the former is intended, the list could be included in additional commentary, with some drafting refinements, as set forth in A/CN.9/WG.V/WP.95/Add.1,

paragraph 20. The commentary could indicate that some of those factors might be considered to be more important than others, but that nevertheless all of them could be considered, depending on the facts of the specific case. That commentary might suggest, for example, that (f) the location from which financing was organized or authorized or the location of the debtor's primary bank, would only be important where the bank controlled the debtor; that (k) the location of employees, might be important where employees could be future creditors, or less important on the basis that protection of employees is more an issue of protecting the rights of interested parties, is not relevant to the COMI analysis and is, in any event addressed by article 22 of the Model Law; that (e) the jurisdiction whose law would apply to most disputes, was not sufficiently important to be a determining factor and could, in any event, be a jurisdiction unrelated to the place from which the debtor was managed or conducted its business, factors that were both considered to be more important than (e). Such an explanation might be inserted, for example, after paragraph 126 of the Guide to Enactment.

42. If the second approach were to be followed, a preliminary question relates to the form of the final work product to be adopted by the Working Group and whether the inclusion of recommendations would be appropriate. A second question relates to the style of any recommendation. It will be recalled that the Legislative Guide uses various styles of recommendation. These vary from recommending that an insolvency law should adopt a specific, sometimes quite detailed, approach to recommending, without more detail, that a particular issue should be addressed by insolvency law. With respect to the factors listed in A/CN.9/WG.V/WP.95/Add.1, paragraph 20, it could be recommended, for example, that the key factors to be considered are (a) the location of the debtor's headquarters or head office functions or nerve centre; (b) the location of the debtor's management; and (m) the location which creditors recognize as being the centre of the company's operations. The recommendation could also state that while other factors may be relevant in specific cases, they should be considered to be of secondary importance and only to the extent they relate to or support the above three factors.

43. Irrespective of the approach to be adopted on this issue, it might be useful for users of the Model Law if the factors to be listed were further elaborated to provide, for example, information on the types of circumstance in which each might be important or in which they have been found to be important, without reference to any specific case or jurisdiction.

44. Recalling that the presumption in article 16 (3) with respect to an individual debtor relates to habitual residence, the Working Group may wish to consider whether specific factors should be identified in order to rebut that part of the presumption. Those factors would relate only to habitual residence for individuals and not affect the COMI analysis for legal entities. In that regard, it might be noted that while individuals can move easily from place to place, it is more complicated in the case of a legal entity and might suggest, in some circumstances, opportunistic behaviour. In others, it might reflect a desire to gain access to a more favourable insolvency regime, such as one inclined to reorganization, rather than to liquidation.

4. Effect of recognition of the COMI

45. The Guide to Enactment to the Model Law provides that the effects of recognition of proceedings as main or non-main proceedings relate to the granting

of relief. It does not deal with other implications of that recognition, such as that the law of the location of the COMI might be the law applicable to many aspects of the proceedings, as provided in recommendation 31 of the Legislative Guide. Examples of those other effects encountered in practice, such as in the Lehman Brothers cases, might provide a useful illustration of the issues.

46. The Working Group may wish to consider whether the effects of recognition should be discussed in more detail in any additional commentary or guidance.

5. Impact of fraud (A/CN.9/WG.V/WP.95/Add.1, paras. 22-25)

47. As noted in the previous working paper, there have been a number of cases in which the impact of fraud was discussed. The courts in those cases looked at the extent to which fraud might have an impact on the determination of COMI where the place of registration was merely a pretext and no actual business was carried out there. One solution suggested was to look instead at the place from which the fraud was being conducted.

48. At its previous session, the Working Group considered the impact of fraud, concluding that the issue would need further consideration (A/CN.9/715, para. 43). It may wish to take up that discussion again on the basis of the material previously provided.

6. Time relevant to determining COMI (A/CN.9/WG.V/WP.95/Add.1, paras. 26-36)

49. It will be recalled that a number of cases arising under both the Model Law and the EC Regulation have involved a debtor moving from one jurisdiction to another in close proximity to the commencement of insolvency proceedings. The Model Law does not address that possibility or make any mention of timing with respect to the determination of COMI, other than the tense of the language of article 17 (a), which provides that the foreign proceeding is to be recognized as a main proceeding “if it *is taking place* in the State where the debtor *has* the centre of its main interests” (*emphasis added*).

(a) Cases under the Model Law

50. In the cases under the Model Law dealing with this issue, various courts concluded:

(a) The proceedings had to be current at the time of the application for recognition;

(b) In order to be recognized as a foreign main proceeding, the COMI had to be in the State seeking recognition at the time recognition was sought: an operational approach that looked at the history of the debtor’s connection with a particular State could not be accepted;

(c) The determination of COMI must rely on the facts in existence at the time of the application for recognition;

(d) A “totality of circumstances” approach should not be precluded in appropriate cases where, for example, there may have been an opportunistic change of location of the registered office of a company in order to establish COMI (as a

result of e.g. insider exploitation, untoward manipulation, overt thwarting of third-party expectations, biased activity or motivation).

(b) Cases under the EC Regulation

51. In several the cases under the EC Regulation, the courts concluded:

(a) The location of the debtor's COMI should be decided by reference to the time of the application for commencement of insolvency proceedings;

(b) If the debtor moved after the application, but before commencement, that was not sufficient to move the COMI;

(c) Moving the jurisdiction of incorporation may not be sufficient to transfer a company's COMI, unless sufficient evidence can be advanced to rebut the presumption as to registered office;

(d) The relevant time to consider COMI was the date of the hearing for commencement or earlier if there was an application for interim relief;

(e) The consideration of COMI should be based on objective and ascertainable facts.

52. In comparing the approaches under the Model Law and the EC Regulation, the Working Group will recall that COMI is relevant under the Model Law for recognition of existing foreign proceedings, while under the EC Regulation it relates to the proper place for commencement of proceedings. At its previous session, the Working Group agreed that the relevant time for determining COMI under the Model Law should be the date of the initial application for commencement of insolvency proceedings and that that conclusion should be reflected in its final work (A/CN.9/715, para. 45).

53. The Working Group may wish to consider whether and how the issue of opportunistic moving of COMI in close proximity to the application for commencement of insolvency proceedings might be addressed. As noted above, there may be cases where the movement might be the result of legitimate forum shopping to find, for example, a jurisdiction which offers an insolvency proceeding, such as reorganization, that meets the needs of the debtor more closely than the law of its home jurisdiction or it might be the result of manipulation. A distinction might need to be drawn between manipulation that suggests fraud and underlying fraud of the kind discussed above, where the debtor has no legitimate business purpose.

54. The commentary might indicate, for example, that it is desirable for the court to consider that issue more carefully where there is evidence of the movement of COMI in such circumstances. Such a consideration might require the court to look broadly at the list of factors outlined above and not confine its consideration to three or four factors that might be indicated as more important. The commentary might also note that although the decision of the receiving court might be based on the findings of the originating court, the decision is nevertheless that of the receiving court and might be subject to review.

C. Enterprise groups

55. At its previous session, the Working Group noted (A/CN.9/715, paras. 47-48), that many cases under the Model Law involved members of enterprise groups and that it might be beneficial to also provide additional guidance on the interpretation of COMI as it relates to enterprise groups. After discussion, the Working Group agreed to request the Secretariat, resources permitting, to prepare a study on COMI as it relates to enterprise groups for its consideration at a future session, including (i) discussion during its previous work on part three of the Legislative Guide, (ii) existing practice with enterprise groups, and, so far as possible, (iii) suggestions on how far future work might go.

56. With respect to issue (i), the Working Group may wish to recall the working papers prepared for previous sessions that discuss aspects of enterprise groups and COMI — A/CN.9/WG.V/WP.74/Add.2; A/CN.9/WG.V/WP.76/Add.2; A/CN.9/WG.V/WP.82/Add.4; and A/CN.9/WG.V/WP.85/Add.1.

57. While it is not possible to repeat the material provided in those papers, the Working Group may wish to recall the conclusions it reached as a result of discussing those materials at its thirty-first to thirty-sixth sessions.

58. At its thirty-first session, 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 on facilitating coordination and cooperation between the various courts in which insolvency proceedings against different members of an enterprise group might be commenced, whilst acknowledging the desirability of avoiding a multiplicity of proceedings in the corporate group context.

59. At its thirty-second, thirty-third and thirty-fourth sessions, the Working Group had limited discussion of international issues, much of which was confined to attempting to identify a way forward and the manner in which the relevant issues might be discussed.

60. 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 that could be used, for example, to limit the commencement of parallel proceedings or simplify the number of laws that might apply to insolvency proceedings commenced in different States with respect to members of the same group. It also agreed that it would also be difficult to use the COMI of a group to apply the recognition regime of the Model Law to the enterprise group. The Working Group concluded (A/CN.9/666 para. 32): that the presumption contained in article 16 (3) of the Model Law was not directly applicable in the context of enterprise groups; that providing a rule on the COMI of an enterprise group could be useful to facilitate coordination of multiple insolvency proceedings with respect to group members; and that that rule might establish a rebuttable presumption along the lines of article 16 (3) for determining the seat of the controlling group member, with the factors relevant to rebutting that presumption being based upon the factors set forth in paragraphs 6 and 13 of A/CN.9/WG.V/WP.82/Add.4.

61. At its thirty-sixth session, after further consideration of the idea of a coordination centre, the view was expressed (A/CN.9/671, para. 18) that 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 included, in particular, whether the decision identifying a particular coordination centre in one State could be enforced or at least recognized in other States and which State should make the identification decision. It was widely agreed (A/CN.9/671, para. 20) that a decision by one court identifying a coordination centre should not be binding in other States.

62. Although there was some support for retaining a recommendation on the coordination centre, the Working Group was unable to identify a clear role for such a centre that would add to the more general recommendations on coordination and cooperation between the courts and insolvency representatives. Having considered the other draft recommendations, the Working Group returned to the topic of a coordination centre and agreed (A/CN.9/671, para. 23) to delete draft recommendations 1 and 2 (which provided a presumption for identifying the coordination centre), on the basis that the determination of a coordination centre did not imply any legal consequences because it was non-binding. The Working Group nevertheless recognized the value of one entity having the leading role in the cooperation and agreed to address the importance of having one entity acting as the coordinating member in the commentary. That issue was subsequently addressed in the final version of recommendation 250, which provides that the means of cooperation between insolvency representatives may include one of them taking a coordinating role.

63. With respect to issue (ii), no further study as requested could be prepared for this session due to a lack of available resources. However, the Working Group may wish to note that it is uncertain whether existing practice with respect to enterprise groups has developed in any new direction that indicates a solution to the issues already identified by the Working Group in connection with COMI and enterprise groups. Recent practice does suggest, however, the increasing use of coordination and cooperation in ways largely consistent with the recommendations contained in part three of the Legislative Guide to address multiple cross-border proceedings involving members of enterprise groups.

64. In view of the above, it is difficult to provide suggestions in response to issue (iii) above. Noting, in particular, that it is generally agreed the Model Law does not apply to enterprise groups per se, the Working Group may wish to consider further whether it would nevertheless be appropriate to include material in additional commentary on the manner in which the Model Law has been applied in the case of multiple proceedings involving members of enterprise groups or whether that material might more appropriately be included in the Judicial Perspective¹³ when it is revised. The Working Group may also wish to consider how, in light of the above information, the issue of enterprise groups and COMI might be further developed.

¹³ The decision of the Commission adopting the Judicial Perspective (A/66/17, para. 200) makes provision for the Judicial Perspective to be updated as required to reflect developments with respect to application and interpretation of the Model Law.

**C. Note by the Secretariat on directors' responsibilities and liabilities
in insolvency and pre-insolvency cases, submitted to the Working
Group on Insolvency Law at its fortieth session**

(A/CN.9/WG.V/WP.100)

[Original: English]

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V contained in document A/CN.9/691, paragraph 104, that activity be initiated on two insolvency topics, both of which were of current importance, and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the second topic, proposed by the United Kingdom (A/CN.9/WG.V/WP.93/Add.4), INSOL International (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6), concerning the responsibility and liability of directors and officers of an enterprise in insolvency

and pre-insolvency cases.¹ In the light of concerns raised during extensive discussion, the Commission agreed that the focus of the work on that topic should only be upon those responsibilities and liabilities that arose in the context of insolvency, and that it was not intended to cover areas of criminal liability or to deal with core areas of company law.

4. This paper draws upon the paper prepared for the Working Group's thirty-ninth session (A/CN.9/WG.V/WP.96), highlights the conclusions reached by the Working Group at its thirty-ninth session (see A/CN.9/715) and raises additional issues for consideration.

I. The work to be developed

5. Document A/CN.9/WG.V/WP.96, paragraph 15 noted the difficulties associated with harmonizing laws on directors' responsibilities and liabilities in the insolvency context. The Working Group acknowledged those difficulties and identified the need, in considering this topic, to avoid interfering with company and other civil law or criminal law (A/CN.9/715, para. 66). Nevertheless, it agreed that providing guidance on the topic would be appropriate (A/CN.9/715, para. 67). The aim would be to ensure that where insolvency was approaching, directors would have the incentives needed to take appropriate and timely action to preserve the value of the company, rather than simply waiting for commencement of insolvency proceedings. Those incentives would be balanced with consequences, such as personal liability, where such action was not taken.

6. The proposals that A/CN.9/WG.V/WP.96 responded to suggest that it should be possible to crystallize, from effective insolvency regimes, basic principles or guidelines to be reflected in officer and director duties in insolvency. The Working Group noted (A/CN.9/715, para. 62) that the type of guidance to be provided would need to be descriptive rather than normative or prescriptive and that expressions of principle would avoid interference with issues of corporate law.

7. Issues to be discussed might include: the form any principles or guidelines might take and the topics those principles or guidelines might address.

A. Form of possible principles or guidelines

8. In considering the form those principles or guidelines might take, the Working Group may wish to recall the approach adopted in the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) of discussing many of the issues relevant to the development of an effective and efficient insolvency regime in some detail in the commentary and then deriving, as appropriate, a set of legislative recommendations on the key points. Not all issues discussed in the commentary are addressed in the recommendations. At a general level, a commentary on directors' duties could provide guidance to States on the circumstances that could lead to personal director liability, at the same time recognizing the pitfalls and threats to entrepreneurship that may result from overly draconian rules. As noted by the

¹ The first topic, concerning centre of main interests and related issues is discussed in A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.99.

Working Group (A/CN.9/715, para. 108), a key element would be the need to strike a balance between promoting appropriate behaviour and avoiding premature insolvency.

9. As to the scope of the principles or guidelines themselves, the Working Group may wish to recall the variety of approaches adopted in the Legislative Guide, i.e. recommendations that, at their most basic, point to a topic to be addressed in insolvency law and, at their more specific, set forth the detailed manner in which the insolvency law should address the particular issue. The principles or guidelines on directors' duties might adopt the former, more general approach, stating the issue to be addressed and the general manner in which it might be approached including, as appropriate, alternatives. An accompanying commentary could provide, in much the same manner as the Legislative Guide, background and more detailed information on the particular issue.

10. Such an approach would be similar to the approach taken by the OECD Principles, as noted in paragraph 15 of A/CN.9/WG.V/WP.96, which might provide a working basis for the development of this topic:

“There is no single model of good corporate governance. However, work carried out [...] has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist.

“The Principles are non-binding and do not aim at detailed prescriptions for national legislation. Rather, they seek to identify objectives and suggest various means for achieving them. Their purpose is to serve as a reference point. They can be used by policy makers as they examine and develop the legal and regulatory frameworks for corporate governance that reflect their own economic, social, legal and cultural circumstances, and by market participants as they develop their own practices.”²

B. Issues to be addressed

11. The principles or guidelines might address the following issues:

- (a) Identifying who owes the duties;
- (b) Defining the time at which the duties arise;
- (c) Identifying the persons to whom the duties are owed;
- (d) The nature of the duties or the types of misconduct to be covered;
- (e) Identifying the remedies available;
- (f) Cross-border issues.

² OECD Principles, p. 13.

II. Identifying who owes the duties

12. The Working Group agreed that, as a starting point, it would be appropriate to include formally appointed directors, whether natural or legal persons. As to additional persons, such as *de facto* or shadow directors and various other persons in a position of influence (a number of possibilities were identified), it was agreed it might be more appropriate to adopt a purposive approach, rather than using terms such as “*de facto*” or “shadow directors” (A/CN.9/715, para. 69). The Working Group agreed that the question of whether the group of persons should be expanded beyond directors to others with influence needed to be considered further (A/CN.9/715, para. 72).

A. Formally appointed directors as the starting point

13. In view of the above, the starting point of any principles or guidelines on this issue could be that the duties are owed by formally appointed directors, whether natural or legal persons. The principles might provide a general statement to that effect or, as an alternative, an approach similar to that followed by the OECD Principles, that the duties are owed by the formally appointed members of whatever body is charged with the functions of governing the enterprise and monitoring management. Should it be necessary to give examples of those functions, reference might be made to other texts, such as the OECD Principles, in which they are further described.

B. Additional persons

14. The Working Group may wish to consider the question of whether or not additional persons should be included within the scope of any principles on the basis of the discussion set forth in paragraphs 19-23 of A/CN.9/WG.V/WP.96 and the discussion at the thirty-ninth session (A/CN.9/715, paras. 69-71). The issue might be approached, for example, by indicating in commentary rather than a statement of principle the other types of person who might also owe such duties drawing, for example, on paragraphs 19-21 of A/CN.9/WG.V/WP.96.

III. Defining the time at which the duties arise

15. The Working Group agreed that the duties would arise when the debtor was or would imminently become insolvent, referred to as the “vicinity of insolvency”, although they could only be enforced once insolvency proceedings had commenced. It was noted that the point at which the duties arose should be the point at which directors should have been aware there was no reasonable prospect of avoiding insolvency (A/CN.9/715, para. 81).

16. Since the Working Group’s agreement recognizes the duties could arise before the commencement of insolvency proceedings, there is a need to define what constitutes the requisite point at which they arise, possibly by reference to the requisite state of “insolvency”. The Legislative Guide e.g., part two, chap. I, paragraphs 23-30 and recommendations 15 and 16, which address the standards

required to be met for commencement of insolvency proceedings, including imminent insolvency, might provide a starting point for further discussion (see also A/CN.9/WG.V/WP.96, paras. 49-53).

IV. Identifying to whom the duties are owed

17. The Working Group raised a number of issues, including the relevance of the time at which the duty was to be considered (e.g. at the onset of insolvency or after commencement of insolvency proceedings); whether the duty would be owed to the general body of creditors or the insolvency estate per se (an approach said to be consistent with the Legislative Guide and one that would involve a practical approach based on identifying the potential beneficiaries of any recovery action); and how the issue would be addressed in the context of enterprise groups.

18. The decision noted above in III with respect to the time at which the duty arises suggests that the persons to whom the duty is owed might extend beyond the insolvency estate per se, since that would only be formed on commencement of insolvency proceedings. Nevertheless, if the duties can only be enforced post-commencement, the insolvency estate might be the relevant beneficiary and the insolvency representative the person most likely to enforce those duties. The various options were discussed in A/CN.9/WG.V/WP.96, paragraph 33.

19. The Working Group agreed to continue its deliberations at a future session based on the discussion at its thirty-ninth session (A/CN.9/715, paras. 73-79).

V. The nature of the duties or the types of misconduct to be covered

20. The Working Group agreed to base its future deliberations on identifying the steps that would need to be taken to discharge a duty of wrongful trading (A/CN.9/715, para. 91). An introduction to wrongful trading legislation is provided in A/CN.9/WG.V/WP.96, paragraphs 58-60.

VI. Identifying the remedies available

21. It was generally agreed that the insolvency representative would normally have the right to enforce the relevant duty (A/CN.9/715, para. 97); and that insolvency provisions should not negate the rights of others to pursue such a breach where those rights arose under other bodies of law (civil, company or tort law) (A/CN.9/715, para. 98).

22. The Working Group may wish to consider whether, given its conclusion with respect to the time of enforcement of the duties and concerning the rights of others to pursue such a breach, any guidance to be provided should address which other parties might have a right to pursue a breach in the event, for e.g., that the insolvency representative failed to do so. It may also wish to consider whether such guidance should address issues such as the payment of costs where the insolvency representative does pursue such an action, but is unsuccessful.

VII. Cross-border issues

23. The Working Group agreed to consider a number of issues raised (applicable law, access to a foreign jurisdiction to pursue liability actions, applicability of defences from one jurisdiction to proceedings in another) at a future session (A/CN.9/715, para. 109).

D. Proposal for a definition of “centre of main interests” (articles 2 (b) and 16 (3) of the UNCITRAL Model Law on Cross-Border Insolvency) by the delegations of Mexico, Spain and the Union Internationale des Avocats (UIA), submitted to the Working Group on Insolvency Law at its fortieth session

(A/CN.9/WG.V/WP.101)

[Original: English/French/Spanish]

1. The centre of main interests is the place where the debtor conducts his main [economic] activities on a regular basis and is therefore ascertainable by third parties [having a sufficient link with the State where the proceedings have been opened].
2. In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests.
3. The court may rebut this presumption where it is clear from all the circumstances that the centre of main interests of the debtor is located in another country [or has closer links to another country].
4. These circumstances to be considered by the court may be namely:
 - The location of a debtor’s management or those who actually managed the debtor or of the operational management of the debtor
 - The location of the debtor’s main assets and/or creditors
 - The location from which purchasing policy, staff, accounts payable are managed or cash management system was run
 - [...]

E. Report of the Working Group on Insolvency Law on the work of its forty-first session (New York, 30 April-4 May 2012)

(A/CN.9/742)

[Original: English]

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I. Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on three insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and liabilities in insolvency and pre-insolvency cases, both of which were of current

importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency. At its forty-fourth session in 2011, the Commission finalized and adopted the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

3. At its thirty-ninth session in 2010, Working Group V commenced its discussion of those three topics on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.96). The decisions and conclusions of the Working Group are set forth in document A/CN.9/715. The Working Group continued its discussion of topics (a) and (b) at its fortieth session in 2011 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.99, 100 and 101).

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its forty-first session in New York from 30 April to 4 May 2012. The session was attended by representatives of the following States members of the Working Group: Austria, Benin, Cameroon, Canada, Chile, China, Colombia, France, Germany, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Nigeria, Norway, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Uganda, Ukraine, 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: Belgium, Croatia, Denmark, Indonesia, Iraq, Kuwait, Lithuania, Madagascar and Switzerland.

6. The session was also attended by observers from the Holy See and the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and the World Bank;

(b) *Invited intergovernmental organizations*: the Caribbean Community (CARICOM);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), American Bar Foundation (ABF), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Students Association (ELSA), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (IIL), Inter-Pacific Bar Association (IPBA), International Women's Insolvency and Restructuring Confederation (IWIRC), New York State Bar Association (NYSBA) and Union Internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Ms. Diana Lucia Talero Castro (Colombia)

9. The Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.V/WP.102);
 - (b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.103 and Add.1);
 - (c) A note by the Secretariat on directors' obligations in the period approaching insolvency (A/CN.9/WG.V/WP.104); and
 - (d) A proposal from the delegation of the United States of America (A/CN.9/WG.V/WP.105).
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) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; and (b) directors' obligations in the period approaching insolvency.
 5. Other business.
 6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency, on the basis of documents A/CN.9/WG.V/WP.103 and Add.1, A/CN.9/WG.V/WP.104 and A/CN.9/WG.V/WP.105. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)

12. The Working Group commenced its session with a discussion of the draft revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency contained in documents A/CN.9/WG.V/WP.103 and Add.1, together with the proposals contained in document A/CN.9/WG.V/WP.105.

13. The Working Group approved the reordering of the draft text and noted the placement and substance of those paragraphs in respect of which no revisions were proposed.

A. Purpose and origin of the Model Law

14. The Working Group agreed to retain the reference to severe financial distress in paragraph 1 and throughout the Guide to Enactment. It was also agreed that the words “framework for cooperation” were preferable to “interface” in paragraph 3, and should be retained. It was further agreed that the Model Law was more than simply “useful” and that a stronger word should be used at the end of paragraph 3A.

15. The substance of paragraphs 1-3A, 13, 18 and 4-6 was otherwise adopted as drafted.

B. Purpose of the Guide to Enactment and Interpretation

16. The substance of paragraphs 9-10 was adopted as drafted.

C. The model law as a vehicle for the harmonization of laws

17. The substance of paragraphs 12, 20 and 21 was adopted as drafted.

D. Main features of the Model Law**1. Access**

18. The Working Group agreed to delete the words “for which recognition is not required” in the third sentence of paragraph 49B. The substance of paragraphs 49A-D was otherwise adopted as drafted.

2. Recognition

19. A suggestion that a reference to the requirement under article 2 for the foreign proceeding to be a collective proceeding be included in the paragraphs on recognition, with a cross-reference to the remarks on article 2 (paragraphs 23B, 24 and 24A), received support. The substance of paragraphs 37A-F was otherwise adopted as drafted.

3. Relief

20. The substance of paragraphs 37G-H, 32 and 33A was adopted as drafted.

4. Cooperation and coordination

21. The Working Group approved the addition of the clarification from paragraph 173A to paragraph 33B, as proposed in the Note to the Working Group. The substance of paragraphs 33B and C was otherwise adopted as drafted.

22. The substance of paragraphs 33D-G was adopted as drafted.

E. Article-by-article remarks

1. Preamble

23. The substance of paragraphs 54, 51, 51A, 52 and 56 was approved as drafted. The Working Group agreed that, in order to avoid unnecessarily restricting the application of the Model Law, the types of debtor to be covered did not need to be addressed in the Guide to Enactment.

2. General provisions — articles 1-8

Article 1. Scope of application

24. The substance of paragraphs 57 and 59 was adopted as drafted.

Article 2. Definitions

25. The Working Group adopted the substance of paragraphs 67-68A, 71, 23 and 23A as drafted, with the replacement of the word “troubled” by “distressed” in paragraph 23A.

Subparagraph (a) — collective proceeding

26. The Working Group considered paragraphs 23B, 24 and 24A, together with the proposal contained in document A/CN.9/WG.V/WP.105, paragraph 8. There was general agreement on the desirability of providing further guidance on what constituted a “collective proceeding” for the purposes of the Model Law and that the elements identified in paragraph 8 captured the essence of a collective proceeding. A number of concerns were expressed, however, with respect to the specific drafting proposed, on the basis that it might restrict the types of proceeding falling within the scope of the Model Law. It was observed that subparagraphs (a) and (c) could refer to “affected” rather than “all” creditors, that what constituted “sufficient notice” might be unclear and that not all claims would necessarily be subject to pro rata payment; that in referring only to participation with respect to the manner in which assets were administered, subparagraph (b) was too narrow, that it should perhaps refer to creditor participation to protect their legitimate interests and that what constituted “meaningful participation” might be unclear; and that subparagraph (d) should refer to “substantially all” of the assets and liabilities.

27. Support was expressed in favour of the approach of paragraph 23B, which stated the key principle but allowed flexibility. After discussion, it was suggested that paragraph 23B might be supplemented by additional elements drawn from paragraph 8.

28. The Working Group considered a proposal expanding upon the text included in paragraph 8 of document A/CN.9/WG.V/WP.105 as follows:

“Replace paragraph 23B with the following two paragraphs:

“23B. For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding. Such a proceeding should be collective because the Model Law is intended to provide a tool for achieving a coordinated, global solution for the stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular

creditor or group of creditors who might have initiated a collection proceeding in another country. Nor is it intended that the Model Law serve as a tool for gathering up assets in an ordinary winding up proceeding, when such a proceeding does not also include provision for addressing the claims of creditors. There are also certain kinds of actions that might serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms. The Model Law may be an appropriate tool for such proceedings, provided the proceeding is collective as that term is used in the Model Law.

“23C. In evaluating whether a given proceeding is collective, as that term is intended in the Model Law, the following factors may be considered:

“(a) Whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors;

“(b) Whether creditors that are adversely affected by the proceeding have a right (though not necessarily the obligation) to submit claims for determination, and to receive an equitable distribution or satisfaction of their claims;

“(c) Whether such creditors have a right to meaningful participation in the proceeding;

“(d) Whether there are procedures in place for notice to such creditors, so that they can meaningfully participate in the proceedings.”

29. The Working Group supported the proposed paragraph 23B with a few modifications namely: (a) amending the fourth sentence to read, “Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up or conservative proceeding that does not also include provision for addressing the claims of creditors”; and (b) inserting at an appropriate place in the new paragraph 23B the sentence from the existing paragraph 23B of document A/CN.9/WG.V/WP.103 commencing “A proceeding should not be excluded ...”. It was suggested that since some of the elements of what constituted a “foreign proceeding” addressed in paragraph 23B overlapped with those addressed under paragraphs 24F and G of document A/CN.9/WG.V/WP.103, a cross-reference could be included. It was also suggested that since all of the elements of what constituted a “foreign proceeding” should be considered as a whole, that point might be included in the paragraphs on article 2(a).

30. With respect to paragraph 23C of the proposal, concern was expressed that in order to ensure the speed and simplicity of the recognition process, unnecessary and burdensome requirements should not be imposed in order to qualify proceedings as collective proceedings. A simple approach would give the court flexibility to make a determination based on the circumstances of each case. It was proposed that subparagraph 23C (a) should be the key requirement for a collective proceeding and that since subparagraphs (b), (c) and (d) were procedural matters that might not always be present in proceedings otherwise regarded as collective, they should therefore not be considered substantive elements of a collective proceeding. A different view was that subparagraphs (c) and (d) should be retained as requirements of a collective proceeding, but be revised to ensure all parties involved

(i) received proper notice; and (ii) were granted a right to participate in the proceedings. A suggestion was made to define the term “meaningful participation” in subparagraph 23C (c) to provide clarity, as it could be subject to various interpretations or to replace it with a different term such as “effective”.

31. After discussion, the Working Group adopted a new paragraph 23C that would incorporate subparagraph 23C (a) as part of the chapeau to form a general principle. Subparagraphs 23C (b), (c) and (d) would be revised in a narrative form as examples of the ways in which a collective proceeding might deal with creditors. The Working Group agreed that since the Legislative Guide on Insolvency Law treated creditor participation extensively, a cross-reference to the relevant paragraphs of the Guide should be included. The Secretariat was requested to prepare a revised text for consideration at a future session.

Subparagraph (a) — pursuant to a law relating to insolvency

32. The substance of paragraph 24B was adopted as drafted.

Subparagraph (a) — control or supervision by a foreign court

33. The substance of paragraphs 24C-E was adopted as drafted.

Subparagraph (a) — for the purpose of reorganization or liquidation

34. The Working Group agreed to delete the words “including those referred to in the Legislative Guide as expedited proceedings (see para. 24D)” in paragraph 24G and to include clarification that the contractual arrangements referred to would be enforceable as such outside of the Model Law without the need for recognition; nothing in the Guide to Enactment was intended to restrict such enforceability. The substance of paragraphs 24F and G was otherwise adopted as drafted.

Interim proceeding

35. The substance of paragraphs 69-70 was adopted as drafted.

Subparagraph (b), (c), (e) and (f)

36. A proposal to delete the text in square brackets of paragraph 75B was supported. The substance of paragraphs 31, 31A-C and 73-75B was adopted with that revision.

Article 8. Interpretation

37. The substance of paragraph 92 was adopted as drafted.

38. The Working Group noted the proposal contained in A/CN.9/WG.V/WP.105, paragraphs 14-17 and agreed that the development of such material in the form of a digest of case law would not only provide greater access to court decisions on the Model Law and facilitate uniformity and predictability with respect to its interpretation, but also provide a useful supplement to the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

3. Chapter II. Access of foreign representatives and creditors to courts in this State — articles 9-14

39. It was noted that with respect to the reference to “standing” in paragraph 100, that a more detailed reference to other terminology was included in paragraph 166. The Secretariat was requested to align the paragraphs making reference to “standing” and the inclusion of the additional terminology. The substance of paragraphs 93 and 100 was otherwise adopted as drafted.

4. Chapter III. Recognition of a foreign proceeding and relief — articles 15-24

Article 15. Application for recognition of a foreign proceeding

40. The substance of paragraph 112 was adopted as drafted.

Article 16. Presumptions concerning recognition

41. The substance of paragraphs 122 and 122A was adopted as drafted. A proposal to replace the reference to “information” in paragraph 122B with a reference to “evidence” was not supported on the basis that it would not be possible in many legal systems to include evidence in a court decision. Information, however, could be provided and judges should be encouraged to give full and detailed reasons. Information included in court orders could be supplemented by declarations or affidavits that would assist the receiving court. The Working Group agreed to retain the first sentence as drafted and to delete the second sentence of paragraph 122B.

42. Concern was expressed that examples were emerging in practice of originating courts making decisions with respect to COMI in situations where they were not required to do so under national law, but where the intention was to influence or attempt to bind the receiving court to follow that decision. It was observed that since the receiving court was required to independently satisfy itself as to the terms and requirements of the Model Law, it could not be bound by such decisions. It was acknowledged, however, that there might be situations, such as where the originating court was required by its national law to determine issues also addressed by the Model Law, such as with respect to COMI, where some regard might be accorded to such a decision and the reasoning behind it. There was strong support to add language to the effect that an originating court should only make findings with respect to COMI when required to determine its own competence and should not otherwise do so with the aim of influencing the determination of the receiving court.

43. A proposal to replace the words “in the majority of cases” in the second sentence of paragraph 123B with “frequently” was supported.

44. With respect to paragraph 123C, proposals were made to delete both options contained in square brackets and to replace them with the words “alleged centre of main interests”, and to delete the text in square brackets referring to the foreign representative, retaining the alternative text without the square brackets. Both proposals received some support.

45. A proposal was also made that the use of the phrase “enacting State” should be clarified in the Guide to ensure that it was clear in each case whether the enacting State referred to was the receiving or originating State. It was suggested that an approach similar to that adopted in the Judicial Perspective, where a definition was

adopted, might be appropriate. The Secretariat was requested to prepare appropriate revisions to the Guide to Enactment.

46. It was observed that where the debtor was a member of an enterprise group, that fact may add a further consideration to be taken into account by a court examining the issue of COMI. It was recalled the Working Group had agreed that revision of the Guide to Enactment should focus on the individual debtors covered by the Model Law and that the question of treatment of enterprise groups in cross-border insolvency proceedings could be further considered once that work was completed.

47. After discussion, the substance of paragraphs 123A, B and C was adopted with the revisions noted above.

Factors relevant to rebutting the presumption

48. It was observed that there were various situations in which the issue of COMI might arise for determination by the receiving court under the Model Law. The first situation involved cases originating in States where the originating court was not required under national law to make a determination as to the COMI of the debtor. In those cases, the receiving court was not required to inquire into the commencement of the foreign proceedings, but was required to determine whether they were main or non-main proceedings for the purposes of the Model Law on the basis of the debtor's centre of main interests or establishment. In the majority of such cases, it was suggested, that determination would be made on the basis of the material placed before the receiving court by the applicant for recognition.

49. The second situation involved cases where the receiving court was on notice that there was some problem with the initial decision to commence the foreign proceeding or where a dispute arose at the time of the application. Such cases represented the only instance, it was suggested, where the receiving court should go beyond the material presented to it by the applicant for recognition.

50. The third situation involved cases commenced under the EU Insolvency Regulation, which required the commencing court to make a determination as to the COMI of the debtor in order to commence the proceedings. In those cases, it was suggested that, in the absence of a dispute, the court receiving an application for recognition of that proceeding under the Model Law should follow the same procedure as in the first situation. Another view was that the determination of the originating court would not be binding on the receiving court, but that the receiving court should give due regard to such a determination.

51. It was emphasized that the scheme of the Model Law was designed to ensure the simplicity and speed of recognition, and care should be taken to avoid any interpretation of the requirements of the Model Law that might lead courts to inquire into extraneous or irrelevant matters.

52. The Working Group discussed the proposal contained in A/CN.9/WG.V/WP.105, paragraph 12 and a further proposal to replace existing paragraph 123D, as follows:

“Centre of main interests

“123D. The predictability and transparency of a debtor’s centre of main interests has great economic importance to creditors. It should, in most circumstances, be expected to correspond to the location creditors would expect the debtor to open insolvency proceedings in the event of severe financial distress. Creditors doing business with the debtor evaluate the jurisdiction in which they would likely have to demonstrate their claims in the event of an insolvency proceeding, and calculate the risk of credit extension in light of the insolvency law likely to apply. This concept underlies the scheme set out in the European Regulation on Insolvency. The Model Law reflects the significance of the concept, defining proceedings opened in the country that is the centre of main interests as the “main” proceeding. The Model Law also accords such proceedings greater deference, and more immediate, automatic relief.

“123E. The essential attributes of the debtor’s centre of main interests correspond to those attributes that tend to indicate to those who deal with the debtor (especially creditors) that this is the country where others would expect the debtor’s insolvency proceeding to be opened. As has been noted, the Model Law indulges a presumption that country of registration is also the country that matches those expectations. That is not always the case however. It is thus important to consider those factors that independently indicate that a given country is the debtor’s centre of main interests.

“Factors relevant to the determination of centre of main interests

“123F. In most cases, the following principle factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor’s centre of main interests. The factors are (i) the location is readily ascertainable by creditors, (ii) the location is one in which the debtor’s principal assets or operations are found, and (iii) the location is where the management of the debtor takes place. In most cases these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the endeavour is a holistic one, designed to determine that the location of the proceeding in fact corresponds to where the debtor’s true seat or principle place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings. When the court determines that there is proof contrary to the presumption in Article 16(3), the court should consult these factors in determining the location of the debtor’s centre of main interests.”

53. Suggestions to revise that text included: (a) amending the penultimate sentence of new paragraph 123E as follows: “However, in reality, COMI may not coincide with the place of registration”; (b) deleting the words “the court determines that” in the final sentence of new paragraph 123F; (c) reversing the order of

subparagraphs (ii)-(iii) of paragraph 123F on the basis that (ii) was less important than (iii); (d) omitting subparagraph (ii) or at least deleting the reference to location of principal assets on the basis that it was the factor most likely to point to a number of different locations and might lead to some uncertainty as to what might constitute the “principal” assets. In response, it was pointed out that in liquidation, the location of assets might be an important factor in determining COMI, since there may no longer be a place of operations; (e) adopting a formulation, such as centre of administration, rather than “the location where the management of the debtor takes place” in paragraph 123F; and (f) maintaining the heading from A/CN.9/WG.V/WP.103/Add.1 — “Factors relevant to rebuttal of the presumption” rather than the heading contained in the proposal. In that regard, it was observed that since the starting point for the determination of COMI was article 17 and the presumption in article 16(3) of the Model Law was only a procedural device designed to facilitate the speed of the determination in article 17, the heading in the proposal more accurately reflected the issue being addressed. With the exception of the proposal in subparagraph (d), those proposals were generally supported.

54. After discussion, the Working Group requested the Secretariat to prepare a revised text based on the proposal set forth in paragraph 8 above and the issues raised in the discussion in the Working Group.

55. Various views were expressed with respect to paragraphs 123E to I, including maintaining them on the basis that they added information and guidance to the above proposal, deleting them in favour of simplicity and considering them in the light of the above proposal to see what material might usefully be retained. Some support was expressed in favour of each of those proposals. After discussion, the Secretariat was requested revise this section of the Guide to Enactment in the light of the considerations raised.

Abuse of process

56. The Working Group recalled its previous discussion of the impact of fraud on the determination of COMI (A/CN.9/738, para. 32) and the issues that had been raised. After further discussion, the Working Group agreed to retain the substance of paragraph 123J as drafted. Concern was expressed with respect to the references in paragraph 123K to the use of public policy, noting the material included in paragraphs 86 to 89 of the Guide to Enactment and the intention that public policy be interpreted restrictively. The Working Group agreed that the issues referred to in paragraph 123K might better be addressed by a discussion of movements of COMI that could be considered an abuse of process or forum shopping and movements of COMI that might be characterized as choice of forum. The Secretariat was requested to prepare a revised text on those issues for consideration at a future session.

Article 17. Decision to recognize a foreign proceeding

57. The concern noted above in paragraph 42 was further raised. A proposal to add the word “due” to paragraph 124B before the word “regard” and to delete the remainder of the first sentence of that paragraph starting from the words “particularly as it relates” received support.

58. With respect to paragraph 124C, a proposal to reword the first sentence of the paragraph as follows was approved: “Accordingly, recognition of a foreign

proceeding would be assisted if the originating court mentioned in its order any evidence that would facilitate a finding by the receiving court that the proceeding is a foreign proceeding within the meaning of article 2". The Working Group recalled the revisions it had made with respect to paragraph 122B and agreed that the two paragraphs should be aligned.

59. The substance of paragraphs 124-124C and 126 was adopted with those revisions.

Timing of the determination with respect to COMI

60. A proposal was made to provide a clear rule as follows: "The date of commencement of the foreign insolvency proceeding should be used as the date to determine the COMI of the debtor", where the date of commencement would be determined in accordance with applicable law. That proposal received wide support for the reasons cited in paragraph 128C. It was suggested that the proposed wording might be incorporated with the existing paragraph 128E. Some concern was expressed with respect to the possible movement of COMI between the date of commencement of the foreign proceeding and the date of the application for recognition. In response, it was observed that for the purposes of the Model Law, COMI could not change after the date of commencement of the foreign proceeding.

61. A further issue concerned the possibility, referred to in paragraph 128C, of the relevant date being the date of application for commencement of the foreign proceeding, on the basis that there might be a shift of COMI between that date and the date of commencement. It was suggested that, since the Model Law was concerned only with an existing foreign proceeding, the date of commencement was relevant, not the date of the application for commencement. Moreover, any attempt to shift COMI after the date of the application for commencement would be better addressed in the discussion on forum shopping or choice of forum. After discussion, the Working Group agreed to delete paragraph 128D to avoid confusion and to review paragraph 128C to ensure there was sufficient explanation, particularly with respect to the reference to the date of application for commencement as being the relevant date for determination of the COMI of the debtor.

62. The substance of paragraphs 128A to E, 125 and 129-130 was adopted with those revisions.

Article 18. Subsequent information

63. The substance of paragraphs 133-134 was adopted as drafted.

Article 20. Effect of recognition of a foreign main proceeding

64. The substance of paragraphs 141 and 143 was adopted as drafted.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

65. The substance of paragraph 154 was adopted as drafted.

Article 23. Actions to avoid acts detrimental to creditors

66. The substance of paragraphs 165-167 was adopted as drafted.

5. Chapter IV. Cooperation with foreign courts and foreign representatives — articles 25-27

67. The substance of paragraphs 173-175 and 177 was adopted as drafted.

Article 27. Forms of cooperation

68. The substance of paragraphs 181 and 183A was adopted as drafted.

6. Chapter V. Concurrent proceedings — articles 28-31

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

69. The substance of paragraphs 184, 186-187A was adopted as drafted.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

70. The substance of paragraph 188 was adopted as drafted.

Article 31. Presumption of insolvency based upon recognition of a foreign main proceeding

71. The substance of paragraph 197 was adopted as drafted.

7. Assistance from the UNCITRAL Secretariat

72. The substance of paragraph 202 was adopted as drafted.

V. Directors' obligations in the period approaching insolvency

73. The Working Group commenced its consideration of the topic of directors' obligations in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.104.

A. Introduction

74. The Working Group agreed that, as a working assumption, it would proceed with its discussion of this topic on the basis that the text developed would form an additional part of the Legislative Guide on Insolvency Law.

B. Purpose of legislative provisions

75. The Working Group agreed to take up its consideration of the purpose clause when it had completed its discussion of the contents of the recommendations.

C. Contents of legislative provisions

Recommendation 1

76. It was proposed that the draft recommendations should be prefaced not by the words “the insolvency law”, but rather by the words “the law relating to insolvency” or “insolvency or other law”. It was noted that the majority of recommendations in the Legislative Guide referred to “the insolvency law” and it was decided, after further discussion, to include references to both the insolvency law and to the law relating to insolvency in square brackets.

77. Various proposals were made to revise the draft recommendation to provide greater clarity and identify more clearly the specific objective of these draft recommendations as follows: (a) to include a reference to the obligations under draft recommendation 4 by adding, after the word “harmed”, the words “as a consequence of the breach of the obligations in recommendation 4” and deleting the words “improper acts or omissions of a director”; (b) to replace the notion of liability to the company with liability to the creditors or the insolvency estate, or to delete the final part of the draft recommendation after the comma and substitute “the director may be responsible for their conduct and remedies may be imposed in the course of insolvency proceedings”; and (c) to insert the words “committed in the period before the commencement of insolvency proceedings” after the words “acts or omissions of a director”.

78. After discussion, the Working Group agreed to revise the draft recommendation along the lines proposed in paragraphs (a) and (c) and to refer to liability to the creditors.

Recommendation 2 — Parties that owe the obligation

79. Concerns were expressed with respect to the use of the word “director” and the scope of its meaning. It was proposed that it should be clear from the draft recommendation that the obligations would apply to persons considered to be a director under national law and to any other person freely exercising management functions or making managerial decisions, including those who ought to be making such decisions, but did not necessarily do so. It was said that the latter should not be exempted simply because of inaction. A different view was that that formulation was too broad and that the words “or ought to make” in paragraph 22 of the commentary should be deleted. A further formulation proposed was to refer to both the duty and the power to manage a business enterprise. It was suggested that in order to accommodate those proposals, a term other than director was required and that “responsible person” might be appropriate. An alternative view was that, provided an explanation was included in the commentary, the term “director” should be used in preference to “responsible person”, which was far too broad in meaning.

80. After discussion, the Working Group agreed to retain the word “director” and to include in the commentary appropriate clarification and explanation with respect to the issues raised in the discussion.

Recommendation 3 — When the obligation arises

81. Proposals to amend the draft recommendation included: (a) adding the words “in the absence of corrective action” before the words “insolvency was likely”; (b) deleting the subjective requirement that the director “knew or ought to have known” about the likelihood or unavoidability of insolvency. In response, it was suggested that that element was essential since it allowed the director’s judgement to be assessed against the knowledge that a reasonable director should or ought to have had in the circumstances; and (c) replacing the words “likely or unavoidable” with the words “would occur”. In response, it was suggested that the period of time covered by the recommendation was that in which the directors could still take remedial steps to avoid insolvency and that, if insolvency was completely unavoidable, the obligations in draft recommendation 4 would be deprived of meaning.

82. After discussion, the Working Group agreed to retain recommendation 3 as drafted.

Recommendation 4 — The obligations

83. General support was expressed in favour of subparagraph (a) of draft recommendation 4 on the basis that it formed a key element of the obligations directors should have in the period approaching insolvency. Additional key obligations, it was proposed, should include seeking professional advice (subparagraph (c)) and protecting the assets of the company (subparagraph (d)). Support was also expressed in favour of specifying in some detail the steps that might need to be taken by directors in pursuance of the obligation under subparagraph (a). Without that detail, it was suggested, the draft recommendation failed to provide relevant guidance for directors on what they might be expected to do.

84. Various concerns were expressed with respect to subparagraph (b) of draft recommendation 4. One view was that it was key to the obligations that should apply in the period approaching insolvency, since it established a link between the focus on the interests of shareholders when the debtor was solvent and the focus on the interests of creditors when insolvency proceedings commenced. Nevertheless, it was clarified that the intention of the subparagraph was not to focus solely on creditors and ignore the interests of other stakeholders, but rather to increase the weighting given to creditor interests in that period relative to the interests of other stakeholders. Another view was that the drafting should be more specific, focusing on an obligation to refrain from any acts that might be prejudicial to the interests of creditors.

85. Although it was suggested that the obligation to ensure they were fully informed was a general obligation applicable to directors under company law, it was suggested that subparagraph (c) of draft recommendation 4 had a particular relevance in the pre-insolvency period, as directors needed to be aware that the company had actually entered that period in order to take reasonable steps under subparagraph (a).

86. Concerns were also expressed with respect to the impact on directors of the second part of subparagraph (d) of draft recommendation 4 and the relationship between that obligation and recommendation 87 of the Legislative Guide in the broader context of avoidable transactions under the Guide. It was suggested that the

first part of subparagraph (d) could be added to the end of subparagraph (b), resulting in an obligation to give due regard to the interests of creditors by ensuring the protection of assets and that the references to recommendation 87 could then be deleted. A different view was that the reference to avoidable transactions should be retained in draft recommendation 4, but that that reference should be based more broadly on the section of the Legislative Guide addressing to avoidable transactions in order to incorporate both the recommendations relating to defences and other relevant explanatory material.

87. Although it received some support, a proposal to place the substance of subparagraphs (c) and (d) of draft recommendation 4 in the commentary was not adopted, on the basis to do so would deprive the draft recommendation of considerable substance.

88. After discussion, the Working Group agreed that draft recommendation 4 should be revised, with the Secretariat requested to provide optional texts for consideration at a future session. Those texts should include the following:

(a) A revision of subparagraph (a) to become part of the statement of principle;

(b) Inclusion of the substance of subparagraph (b) as part of that statement of principle and possible addition of other elements such as “other stakeholders”;

(c) Revision of subparagraphs (c) and (d) to form either distinct obligations or examples that might be taken pursuant to the obligation to take reasonable steps in existing subparagraph (a); and

(d) Revision of the substance of subparagraph (d) to clarify and expand the reference to recommendation 87 of the Legislative Guide in order to reflect the concerns expressed in the discussion.

Recommendation 5 — Liability

89. Concerns were expressed with respect to aspects of the draft recommendation, specifically the meaning of “directly or indirectly” and the manner in which the connection between the failure to fulfil the obligations and the ensuing insolvency or the increase to losses would be assessed. In response to a proposal to insert a period after “in recommendation 4” and delete the balance of the recommendation, it was pointed out that those words modified the liability of the director and deleting them would remove any element of safeguard or protection they might provide.

90. It was observed that the revisions agreed with respect to draft recommendation 1 might effectively overtake draft recommendation 5 and it might thus be deleted. A different proposal was that the second half of draft recommendation 5 could be deleted and a cross-reference to draft recommendation 1 be added.

91. After discussion, the Working Group agreed that draft recommendation 5 should be considered together with draft recommendation 6 and in the light of revisions agreed to draft recommendation 1. The Secretariat was requested to prepare a revised text for consideration at a future session, taking into account the discussion in the Working Group.

Recommendation 6

92. Various concerns were expressed with respect to draft recommendation 6. In particular, it was suggested that the drafting established or implied a presumption of liability unless the directors could prove they had exercised due care and attention. In response, it was observed that the party seeking to allege a breach under draft recommendation 4 bore the burden of proving that breach, while under draft recommendation 6, the director bore the burden of proving, as a defence, that he or she had exercised the due care and attention required or had taken, for example, the reasonable steps required under draft recommendation 4. It was proposed that the draft recommendation should do no more than provide that breach of the obligations in draft recommendation 4 would lead to liability. A director that took the reasonable steps and otherwise satisfied the relevant obligations under draft recommendation 4 should not be found liable. Given that draft recommendation 4 already established certain obligations and that draft recommendation 1 established a connection between the actions of directors in the period approaching insolvency and liability, it was proposed there was no need for draft recommendation 6 and it could be deleted.

93. After discussion, the secretariat was requested to reconsider draft recommendations 5 and 6 in the light of the revisions agreed to draft recommendations 1 and 4 and to prepare a revised text for consideration by the Working Group at a future session.

Recommendation 7 — Remedies

94. The concept of proportionality as contained in the draft recommendation was found to be problematic and the formulation of the chapeau too complex. A proposal to simplify it to wording that limited the director's liability to the loss or damage caused by the breach of the obligations in draft recommendation 4 and to clarify that exemplary or punitive damages were not contemplated was supported. Subparagraph (b) raised concerns similar to those expressed with respect to draft recommendation 4 (d) and while it was acknowledged that a provision along the lines of subparagraph (b) might provide a disincentive for causing loss to the insolvency estate, it was agreed further consideration needed to be given to the drafting and to clarifying the relationship of the draft recommendation to the section of the Legislative Guide on avoidance provisions.

95. After discussion, the Working Group agreed that the focus of the draft recommendation should be the damage caused by the actions of directors in the period approaching insolvency and the provision of compensation for that damage. It was further agreed that: subparagraph (a) be retained, with a clarification that the payment was for damage caused and would be made to the estate; subparagraph (b) caused a number of concerns that needed to be clarified; subparagraph (c) was not a remedy and might be addressed in the commentary; and that subparagraph (d) might be simplified. The Secretariat was requested to prepare a further draft for consideration at a future session.

Recommendation 8 — Conduct of proceedings against a director

96. Several proposals were made with respect to draft recommendation 8: (a) to vary the second sentence to permit "a creditor or any other interested party" to

commence such a proceeding and to explain in the commentary that that might include shareholders; (b) to consider the treatment of creditors that became creditors only by virtue of the acts or omissions of directors in the period approaching insolvency and whether they might be able to pursue individual claims against directors; (c) to clarify to whom recoveries made by creditors would belong; (d) to include in the commentary a discussion parallel to that included in the commentary on avoidance proceedings in part two of the Legislative Guide dealing with issues relevant to the pursuit of such an action against a director. Those proposals were generally supported and the Secretariat was requested to take them into account in revising the draft recommendation and the accompanying commentary.

Recommendations 9 and 10 — Funding of proceedings against a director

97. The substance of draft recommendations 9 and 10 was adopted as drafted.

Recommendation 11 — Additional measures

98. Concern was expressed that since the draft recommendation might be of a criminal or punitive nature and that its focus was on future behaviour, it should not be included in these draft recommendations and could be deleted completely or retained, but only the first sentence. In response, it was suggested that disqualification might be an appropriate remedy in cases, for example, of egregious behaviour by directors, not only to prevent them from causing further harm to creditors generally, but also to serve as an incentive in the period approaching insolvency to take early advice and otherwise satisfy obligations of the kind referred to in recommendation 4. Support was expressed in favour of deleting the draft recommendation completely, deleting the second sentence and retaining the recommendation as drafted. After discussion the Working Group agreed that the first sentence of draft recommendation 11 should be retained and that the second sentence should be placed in square brackets for further discussion at a future session.

D. Purpose of legislative provisions

99. Having completed its deliberations on the draft recommendations, the Working Group returned to its consideration of the purpose clause. It was noted that the purpose clause might need to be aligned with the revisions adopted to the draft recommendations, particularly, for example, with respect to the reference to proportionality. It was also suggested that the purpose of serving as a tool to educate directors on their role and responsibilities in the period approaching insolvency could usefully be reflected in the purpose clause.

100. The Secretariat was requested to prepare a revision of the purpose clause for consideration at a future session.

E. Commentary

101. It was agreed that the word “shareholders” in paragraph 6 of the commentary should be replaced with “stakeholders”. The Secretariat was requested to revise the commentary in the light of the revisions agreed to the draft recommendations.

VI. Technical assistance

102. The Working Group considered this topic in the light of paragraphs 16 and 17 of the provisional agenda A/CN.9/WG.V/WP.102. A number of States reported on recent activity to enact UNCITRAL insolvency texts into national law, specifically part three of the Legislative Guide on Insolvency Law and the Model Law on Cross-Border Insolvency, including both legislation that had entered into force and proposed legislation that was currently being drafted or considered. The Working Group also heard about a number of activities being conducted by States to assist, for example, with judicial education in other States and to develop tools for sharing information on UNCITRAL texts and supporting educational programmes.

103. Several international organizations reported on activities relating to the promotion of UNCITRAL texts and noted in particular the extensive use of the Legislative Guide as a basis for law reform and the dissemination of information on the work of UNCITRAL. The Working Group was advised of the forthcoming UNCITRAL/INSOL/World Bank multinational judicial colloquium in May 2013.

104. Recalling the observations of the Commission noted in paragraphs 16 and 17, a number of States emphasized the need for technical assistance and cooperation activities to enable them to adopt and use UNCITRAL texts to reform national laws. It was also emphasized that while work could be undertaken to assist States with law reform efforts, commitment was needed at the highest levels to ensure that those efforts led to enactment and implementation of the laws developed. It was also emphasized that there was a need for understanding of the importance of insolvency laws to trade and commerce. A call was made to revitalize the relevant trust fund to enable developing States to participate in sessions of UNCITRAL working groups.

**F. Note by the Secretariat on the interpretation and application of
selected concepts of the UNCITRAL Model Law on Cross-Border
Insolvency relating to centre of main interests (COMI), submitted to
the Working Group on Insolvency Law at its forty-first session**

(A/CN.9/WG.V/WP.103 and Add.1)

[Original: English]

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on two insolvency topics, both of which were of current importance, where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the first of those two topics, concerning a proposal by the United States, as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8, to provide 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 recognition, in a manner that would not preclude the development of a

convention.¹ The second topic concerning the liability of directors of a company in pre-insolvency is addressed in A/CN.9/WG.V/WP.104.

4. This note draws from and builds upon the previous working papers discussing the issue of COMI, specifically A/CN.9/WG.V/WP.95 and Add.1, A/CN.9/WG.V/WP.99 and the reports of the Working Group of its thirty-ninth and fortieth session (A/CN.9/715 and 738 respectively).

5. Pursuant to a decision taken by the Working Group at its fortieth session that, as a working assumption, the Guide to Enactment of the Model Law should be revised and enriched (A/CN.9/738, para. 13), this note sets forth draft revisions and additions to the Guide to Enactment as follows:

(a) The introductory paragraphs have been reordered and a new, shorter section IV on main features added;

(b) The paragraphs of the former section on main features have been moved to the article-by-article section or deleted on the basis that much of the material included was repeated under specific articles and was better placed in the article-by-article analysis;

(c) The article-by-article analysis has been expanded and given greater emphasis, reflecting the conclusions of the Working Group.

6. Paragraphs that have not been revised or that do not include revised text are not included in this note, except as strictly necessary. The text of new footnotes has been included; footnotes to be retained from the published version are not repeated, but their location is indicated by a note in square brackets. References to the discussion in the Working Group have also been omitted, but will be updated to reflect current deliberations.

7. For ease of reference, the paragraph numbers from the published version of the Guide to Enactment are retained to indicate the reordering of the text and the additions that have been made. The numbering of the paragraphs in this note is therefore not necessarily sequential. Where a new paragraph has been added, it takes the number of the immediately preceding paragraph with the addition of an alpha character. All headings from the published text have been included and relevant paragraph numbers included in square brackets in the heading to indicate content and facilitate comparison with the published text.

¹ See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

**GUIDE TO ENACTMENT AND INTERPRETATION OF THE
UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY**
*[based on the revised version in annex III of the Legislative Guide
on Insolvency Law]*

I. Purpose and origin of the Model Law

A. Purpose of the Model Law [paras. 1-3, 3A]

1. The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.

Note to the Working Group

The Working Group may wish to note that the phrase "severe financial distress" is used in the published version of the Guide in paragraph 71 dealing with the definitions in article 2, and in particular paragraph (a). Elsewhere the Guide refers to the "insolvent debtor". The Working Group may wish to consider whether "severe financial distress" should be retained, or whether "financial distress" would be sufficient.

2. The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Thus, the States enacting the Model Law ("enacting States") would be introducing useful additions and improvements in national insolvency regimes designed to resolve problems arising in cross-border insolvency cases. By enacting the Model Law, States acknowledge that certain insolvency laws may have to be modified in order to meet internationally recognized standards.

3. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides an [interface] [framework for cooperation] between jurisdictions, offering solutions that help in several modest but significant ways and facilitate a certain level of harmonization. Those solutions include the following:

(a)-(f) [...]

(g) Establishing rules for coordination of relief granted in the enacting State to assist two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

3A. Jurisdictions that currently have to deal with numerous cases of cross-border insolvency as well as jurisdictions that wish to be well prepared for the increasing likelihood of cases of cross-border insolvency will find the Model Law useful.

B. Origin of the Model Law [paras. 13, 18, 19]

13. The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws by and large have not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment.

18. The Model Law takes into account the results of other international efforts, including the negotiations leading to the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the “EC Regulation”), the European Convention on Certain International Aspects of Bankruptcy (1990),² the Montevideo treaties on international commercial law (1889 and 1940), the Convention regarding Bankruptcy between Nordic States (1933) and the Convention on Private International Law (Bustamante Code) (1928).³ Proposals from non-governmental organizations that have been taken into account include the Model International Insolvency Cooperation Act and the Cross-Border Insolvency Concordat, both developed by Committee J of the Section on Business Law of the International Bar Association.⁴

19. [...]

C. Preparatory work and adoption [paras. 4-8]

4. The project was initiated by the United Nations Commission on International Trade Law (UNCITRAL), in close cooperation with INSOL International. The project benefited from the expert advice of INSOL during all stages of the preparatory work. In addition, during the formulation of the Law, consultative assistance was provided by the former Committee J (Insolvency) of the Section on Business Law of the International Bar Association.

5. Prior to the decision by UNCITRAL to undertake work on cross-border insolvency, the Commission and INSOL held two international colloquiums for insolvency practitioners, judges, government officials and representatives of other interested sectors.⁵ The suggestion arising from those colloquiums was that work by

² [footnote 9].

³ [footnote 10].

⁴ Available from www.iiiglobal.org/component/jdownloads/finish/396/1522.html (last visited 15 February 2012).

⁵ [footnote 3].

UNCITRAL should have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency representatives and recognition of foreign insolvency proceedings.

6. When UNCITRAL decided in 1995 to develop a legal instrument relating to cross-border insolvency, it entrusted the work to the Working Group on Insolvency Law, one of the subsidiary bodies of UNCITRAL.⁶ The Working Group devoted four two-week sessions to the work on the project.⁷

7. [...]

8. [...]

II. Purpose of the Guide to Enactment and Interpretation *[paras. 9-10]*

9. UNCITRAL considered that the Model Law would be a more effective tool if it were accompanied by background and explanatory information. While such information would primarily be directed to executive branches of Governments and legislators preparing the necessary legislative revisions, it would also provide useful insight to those charged with interpretation and application of the Model Law, such as judges,⁸ and other users of the text such as practitioners and academics. Such information might also assist States in considering which, if any, of the provisions should be varied in order to be adapted to the particular national circumstances.

10. The present Guide has been prepared by the Secretariat pursuant to the request of UNCITRAL made at the close of its thirtieth session, in 1997 [and revised in accordance with the request of UNCITRAL made at its ... session]. It is based on the deliberations and decisions of the Commission at that thirtieth session,⁹ when the Model Law was adopted, as well as on considerations of the Working Group on Insolvency Law, which conducted the preparatory work. The revisions are based on the deliberations of the Working Group at its thirty-ninth (2010), fortieth (2011) and forty-first (2012) sessions, as well as of the Commission at its [...] session [20...].

III. The model law as a vehicle for the harmonization of laws *[paras 11-12]*

11. [...]

A. Flexibility of a model law

12. In incorporating the text of a model law into its system, a State may modify or leave out some of its provisions. In the case of a convention, the possibility of

⁶ [footnote 4].

⁷ [footnote 5].

⁸ Where “judges” would include a judicial officer or other person appointed to exercise the powers of the court or other competent authority having jurisdiction under domestic insolvency laws [enacting the Model Law].

⁹ [footnote 8].

changes being made to the uniform text by the States parties (normally referred to as “reservations”) is much more restricted; in particular trade law conventions usually either totally prohibit reservations or allow only specified ones. The flexibility inherent in a model law is particularly desirable in those cases when it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as a national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system (which is the case with the UNCITRAL Model Law on Cross-Border Insolvency). This, however, also means that the degree of, and certainty about, harmonization achieved through a model law is likely to be lower than in the case of a convention. Therefore, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the Model Law into their legal systems.

B. Fitting the Model Law into existing national law [paras. 20-21, 49]

20. With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State. This is manifested in several ways:

(a) [...];

(b) The Model Law presents to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding under the national law (article 20);

(c) Recognition of foreign proceedings does not prevent local creditors from initiating or continuing collective insolvency proceedings in the enacting State (article 28);

(d)-(f) [...].

21. The flexibility to adapt the Model Law to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation (see paras. 91-92) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency matters. Thus it is advisable to limit deviations from the uniform text to a minimum. This will assist in making the national law as transparent as possible for foreign users (see also paras. 11 and 12 above). The advantage of uniformity and transparency is that it will make it easier for the enacting States to demonstrate the basis of national law on cross-border insolvency and obtain cooperation from other States in insolvency matters.

49. [...]

IV. Main features of the Model Law [paras. 49A-D, 37, 37A-H, 32-33, 33A-G]

49A. The text of the Model Law focuses on four key elements identified, through the studies and consultations conducted in the early 1990s prior to the negotiation of

the Model Law, as being the areas upon which international agreement might be possible:

- (a) Access to local courts for representatives of foreign insolvency proceedings and for creditors and authorization for representatives of local proceedings to seek assistance elsewhere;
- (b) Recognition of certain orders issued by foreign courts;
- (c) Relief to assist foreign proceedings;
- (d) Cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings.

A. Access

49B. The provisions on access address inbound and outbound aspects of cross-border insolvency. An insolvency representative from the enacting State is authorized to act in a foreign State (article 5) on behalf of local proceedings. A foreign representative has a right of direct access to courts in the enacting State (article 9); a right to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (article 11), for which recognition is not required; and, upon recognition, a right to participate in insolvency-related proceedings conducted in the enacting State under the law of that State (article 12).

49C. The fact that a foreign representative has the right to apply to the courts of the enacting State does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the enacting State for any purpose other than that application (article 10).

49D. Importantly, foreign creditors have the same right as local creditors to commence and participate in proceedings in the enacting State (article 13).

37. [...]

B. Recognition

37A. One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize. The Model Law is not intended to accord recognition to all foreign insolvency proceedings. Article 17 provides that, subject to article 6, where the specified requirements of article 2 concerning the nature of the foreign proceeding and the foreign representative are met and the evidence required by 15 has been provided, the court should recognize the foreign proceeding as a matter of course. The process of application and recognition is aided by the presumptions provided in article 16 that enable the court in the enacting State to presume the authenticity and validity of the certificates and documents, originating in the foreign State, that required by article 15.

37B. Article 6 allows recognition to be refused where it would be “manifestly contrary to the public policy” of the recognizing State. This may be a preliminary

question to be considered on an application for recognition. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that it be interpreted restrictively and that article 6 be used only in exceptional circumstances (see paras. 86-89).

37C. A foreign proceeding should be recognized as a main proceeding or a non-main proceeding (article 17, paragraph 2). A main proceeding is one taking place where the debtor had its centre of main interests (COMI) [at the date of commencement of the foreign proceeding]. In principle, such a proceeding is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs. Centre of main interests is not defined in the Model Law, but is based on a presumption of the registered office or habitual residence of the debtor (article 16, paragraph 3).

37D. A non-main proceeding is one taking place where the debtor has an establishment. This is defined as “any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services” (article 2, subparagraph (f)). Proceedings commenced on a different basis, such as presence of assets, without a centre of main interests or establishment, would not qualify for recognition under the Model Law scheme. Main and non-main proceedings are discussed in more detail below at paras. [...].

37E. Acknowledging that it might subsequently be discovered that the grounds for granting recognition were lacking at the time of recognition, have changed or ceased to exist, the Model Law (article 17, paragraph 4) provides for modification or termination of the order for recognition.

37F. Recognition of foreign proceedings under the Model Law has several effects. Principal amongst them is the relief accorded to assist the foreign proceeding (articles 20 and 21), but additionally the foreign representative is entitled to participate in any local insolvency proceeding regarding the debtor (article 13), has standing to initiate an action for avoidance of antecedent transactions (article 23) and may intervene in any proceeding in which the debtor is a party (article 24).

C. Relief

37G. A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. Accordingly, the Model Law specifies the relief that is available in both of those instances. 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. However, it is possible, as noted above, to align the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding commenced under the law of the enacting State (article 20).

37H. Interim relief is available at the discretion of the court between the making of an application for recognition and the decision on that application (article 19); specified forms of relief are available on recognition of main proceedings

(article 20); and relief at the discretion of the court is available for both main and non-main proceedings following recognition (article 21). In the case of main proceedings, that discretionary relief would be in addition to the relief available on recognition.

32. Key elements of the relief accorded upon recognition of a foreign “main” proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor, and a suspension of the debtor’s right to transfer or encumber its assets (article 20, para. 1). Such stay and suspension are “mandatory” (or “automatic”) in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide “breathing space” until appropriate measures are taken for reorganization or fair liquidation of the assets of the debtor. The suspension of transfers is necessary because in a modern, globalized economic system it is possible for a multinational debtor to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding provides a rapid “freeze” essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

33. [...]

33A. With respect to interim and discretionary relief, the court can impose conditions and modify or terminate the relief to protect the interests of creditors and other interested persons affected by the relief ordered (article 22).

D. Cooperation and coordination

Cooperation

33B. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between foreign representatives is also authorized. Cooperation is discussed in detail in paragraphs 173-183.

Note to the Working Group

Paragraph 173A, addressing the articles in chapter IV dealing with cooperation and coordination, notes that cooperation under the Model Law is not dependent on recognition and may thus occur at an early stage before an application for recognition and in respect of proceedings that are not a foreign proceeding within article 2. The Working Group may wish to consider whether this clarification should also be included in the introduction.

33C. Recognizing that the idea of cooperation might be unfamiliar to many judges and insolvency representatives, article 27 sets out some of the possible means of cooperation. These are further discussed and amplified in the UNCITRAL Practice

Guide on Cross-Border Insolvency Cooperation,¹⁰ which also compiles practice and experience with respect to the use and negotiation of cross-border insolvency agreements.

Concurrent proceedings

33D. Several provisions of the Model Law address coordination of concurrent proceedings and aim to foster decisions that would best achieve the objectives of both proceedings.

33E. The recognition of foreign main proceedings does not prevent commencement of local proceedings (article 28), nor does the commencement of local proceedings terminate recognition already accorded to foreign proceedings or prevent recognition of foreign proceedings.

33F. Article 29 addresses adjustment of the relief available where there are concurrent proceedings. The basic principle is that relief granted to a recognized foreign proceeding should be consistent with local proceedings, irrespective of whether the foreign proceeding was recognized before or after the commencement of the local proceeding. For example, where local proceedings have already commenced at the time the application for recognition is made, relief granted to the foreign proceeding must be consistent with the local proceeding. If the foreign proceeding is recognized as a main proceeding, the automatic relief available on recognition under article 20 will not apply.

33G. Articles 31 and 32 contain additional means of facilitating coordination. Article 31 establishes a presumption to the effect that recognition of a foreign proceeding is sufficient proof of insolvency where insolvency is required for commencement of a local proceeding. Article 32 establishes the hotchpot rule to avoid situations in which a creditor might make claims and be paid in multiple insolvency proceedings in different jurisdictions, thereby potentially obtaining more favourable treatment than other creditors.

V. Article-by-article remarks

Preamble [*Paras. 54, 55, 51, 51A, 52, 53, 56*]

54. The Preamble gives a succinct statement of the basic policy objectives of the Model Law. It is not intended to create substantive rights, but rather to provide general orientation for users of the Model Law and to assist in its interpretation.

55. [...]

Use of the term “insolvency” [*paras. 51-51A, 52-53, 56*]

51. Acknowledging that different jurisdictions might have different notions of what falls within the term “insolvency proceedings”, the Model Law does not define

¹⁰ The text of the Practice Guide is available from www.uncitral.org/uncitral/en/uncitral_texts.html.

the term “insolvency”¹¹. However, as used in the Model Law, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. The reason is that the Model Law covers proceedings concerning different types of debtors and, among those proceedings, deals with proceedings aimed at liquidating or reorganizing the debtor. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2 paragraph (a) are not insolvency proceedings within the scope of the Model Law.

51A. Debtors covered by the Model Law would generally fall within the scope of the UNCITRAL Legislative Guide on Insolvency Law and would therefore be those eligible for commencement of insolvency proceedings in accordance with recommendations 15 and 16 of the Legislative Guide,¹² being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets.

52. It should be noted that in some jurisdictions the expression “insolvency proceedings” has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person or only to collective proceedings against a natural person. No such distinction is intended to be drawn by the use of the term “insolvency” in the Model Law, since the Model Law is designed to be applicable to proceedings regardless of whether they involve a natural or a legal person as the debtor. If, in the enacting State, the word “insolvency” may be misunderstood as referring to one particular type of collective proceeding, another term should be used to refer to the proceedings covered by the Law.

53. [...]

“State”

56. The word “State”, as used in the preamble and throughout the Model Law, refers to the entity that enacts the Law (the “enacting State”). The term should not be understood as referring, for example, to a state in a country with a federal system. The national statute may use another expression that is customarily used for this purpose.

Note to the Working Group

¹¹ The Legislative Guide explains insolvency as being “when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets” and insolvency proceedings as being “collective proceedings, subject to court supervision, either for reorganization or liquidation”.

¹² Recommendations 15 and 16 provide:

15. The insolvency law should specify that insolvency proceedings can be commenced on the application of a debtor if the debtor can show either that:

- (a) It is or will be generally unable to pay its debts as they mature; or
- (b) Its liabilities exceed the value of its assets.

16. The insolvency law should specify that insolvency proceedings can be commenced on the application of a creditor if it can be shown that either:

- (a) The debtor is generally unable to pay its debts as they mature; or
- (b) The debtor’s liabilities exceed the value of its assets.

Document A/CN.9/WG.V/WP.95, paragraphs 34-35, raised the issue of whether the particular entity administered by the foreign representative is a “debtor” as envisaged by the law of the recognizing State. “Debtor” is not a term defined by the Model Law. The Working Group may wish to consider whether that issue should be addressed in the Guide to Enactment; the only material currently relating to the types of debtor covered by the Model Law is article 1 paragraph 2 (paragraphs 60-66 of the Guide to Enactment), which provides for the exclusion of certain debtors, such as specially regulated entities.

CHAPTER I. GENERAL PROVISIONS — ARTICLES 1-8

Article 1. Scope of application

Paragraph 1 [paras. 57 and 59]

57. Article 1, paragraph 1, outlines the types of issue that may arise in cases of cross-border insolvency and for which the Model Law provides solutions: (a) inward-bound requests for recognition of a foreign proceeding; (b) outward-bound requests from a court or [insolvency] representative in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) coordination of proceedings taking place concurrently in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.

58. *[deleted]*

59. “Assistance” in paragraph 1, subparagraphs (a) and (b), is intended to cover various situations dealt with in the Model Law, in which a court or an insolvency representative in one State may make a request to a court or an insolvency representative in another State for assistance within the scope of the Model Law. The Law specifies some of those measures (e.g. article 19, subparas. 1 (a) and (b); article 21, subparas. 1 (a)-(f) and para. 2; and article 27, subparas. (a)-(e)), while other possible measures are covered by a broader formulation (such as the one in article 21, subpara. 1 (g)).

Paragraph 2 (Specially regulated insolvency proceedings) [paras. 60-65]

Non-traders or natural persons [para. 66]

Article 2. Definitions

Subparagraphs (a)-(d) [paras. 67-68A]

67. Since the Model Law will be embedded in the national law, article 2 only needs to define the terms specific to cross-border scenarios. Thus, the Model Law contains definitions of the terms “foreign proceeding” (subparagraph (a)) and “foreign representative” (subparagraph (d)), but not of the person or body that may be entrusted with the administration of the assets of the debtor in an insolvency proceeding in the enacting State. To the extent that it would be useful to define in the national statute the term used for such a person or body (rather than just using

the term commonly employed to refer to such persons), this may be added to the definitions in the law enacting the Model Law.¹³

68. By specifying the required characteristics of a “foreign proceeding” and a “foreign representative”, the definitions limit the scope of application of the Model Law. For a proceeding to be susceptible to recognition or cooperation under the Model Law and for a foreign representative to be accorded access to local courts under the Model Law, the foreign proceeding and the foreign representative must have the attributes of subparagraphs (a) and (d).

68A. Proceedings that do not have those attributes would not be eligible for recognition under the Model Law.

Subparagraph (a) — Foreign proceeding [paras. 71, 23-23B, 24-24G, 69, 70]

71. The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meaning in different legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting State. As noted in paragraph 52 above, the expression “insolvency proceedings” may have a technical meaning in some legal systems, but is intended in subparagraph (a) to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent.

72. *[deleted]*

23. The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. Whether a foreign proceeding possesses those elements would be determined at the time of consideration of the application for recognition.

23A. As noted in paragraph (e) of the preamble, the focus of the Model Law is upon severely financially troubled and insolvent debtors and the laws that prevent or address the financial distress of those debtors. As noted above (para. 51A), these are debtors that would generally fall within the commencement criteria discussed in the Legislative Guide, being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets (recommendations 15 and 16).

(i) Collective proceeding

23B. As a general principle, a collective proceeding is one that addresses all assets and liabilities of the debtor and the rights and claims of all creditors, as opposed to a proceeding designed to assist a particular creditor to obtain payment or a process

¹³ The term “insolvency representative” is used in the Legislative Guide to describe such a person and is explained as being “a person or body, including one appointed on an interim basis, authorised in insolvency proceedings to administer the reorganization or liquidation of the insolvency estate”.

designed for some purpose other than to address the insolvency or severe financial distress of the debtor. A proceeding should not be excluded purely because a class of creditors' rights is unaffected by it nor should those insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law (see Legislative Guide, part two, chap. II, paras. 7-9).

24. Within the parameters of the definition of a foreign proceeding, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganization. This would also include proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments, "debtor in possession").

24A. The Model Law recognizes that, for certain purposes, insolvency proceedings may be commenced under specific circumstances defined by law that do not necessarily mean the debtor is in fact insolvent. Paragraph 194 below notes that those circumstances might include cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment. Paragraph 195 below notes that for use in jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of foreign main proceedings, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding.

(ii) *Pursuant to a law relating to insolvency*

24B. This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained¹⁴ and irrespective of whether the law that contained the rules related exclusively to insolvency. A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress.

(iii) *Control or supervision by a foreign court*

24C. The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 24, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere

¹⁴ A/CN.9/422, para. 49.

supervision of an insolvency representative by a licensing authority would not be sufficient.

24D. Expedited proceedings of the type referred to in the Legislative Guide (see part two, chap IV, paras. 76-94 and recommendations 160-168) should not be excluded. These are proceedings in which the court exercises control or supervision at a late stage of the insolvency process. Proceedings in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so should also not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceedings nevertheless remain open [or pending] and the court retains jurisdiction until implementation is completed.

24E. Subparagraph (a) makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding.

(iv) *For the purpose of reorganization or liquidation*

24F. Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding in article 2, subparagraph (a) may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, including proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding); or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets.

24G. Types of procedures that might not be eligible for recognition could include financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt where the negotiations do not lead to the commencement of an insolvency proceeding, including those referred to in the Legislative Guide as expedited proceedings (see para 24D), conducted under the insolvency law. Such measures would generally not satisfy the requirement for collectivity nor for control or supervision by the court (see paras. 24C-E). Because they could take a potentially large number of forms, those measures would be difficult to address in a general rule on recognition.¹⁵ Other procedures that do not require supervision or control by the court might also be ineligible.

Interim proceeding

69. The definitions in subparagraphs (a) and (d) cover also an “interim proceeding” and a representative “appointed on an interim basis”. In a State where interim proceedings are either not known or do not meet the requisites of the definition, the question may arise whether recognition of a foreign “interim

¹⁵ A/CN.9/419, paras. 19 and 29.

proceeding” creates a risk of allowing potentially disruptive consequences under the Model Law that the situation does not warrant. It is advisable that, irrespective of the way interim proceedings are treated in the enacting State, the reference to “interim proceeding” in subparagraph (a) and to a foreign representative appointed “on an interim basis” in subparagraph (d), be maintained. The reason is that in the practice of many countries insolvency proceedings are often, or even usually, commenced on an “interim” or “provisional” basis. Except for being labelled as interim, those proceedings meet all the other requisites of the definition in article 2, subparagraph (a). Such proceedings are often conducted for weeks or months as “interim” proceedings under the administration of persons appointed on an “interim” basis, and only some time later would the court issue an order confirming the continuation of the proceedings on a non-interim basis. The objectives of the Model Law apply fully to such “interim proceedings” (provided the requisites of subparagraphs (a) and (d) are met); therefore, these proceedings should not be distinguished from other insolvency proceedings merely because they are described as being of an interim nature. The point that an interim proceeding and the foreign representative must meet all the requirements of article 2 is emphasized in article 17, paragraph 1, according to which a foreign proceeding may be recognized only if it is “a proceeding within the meaning of subparagraph (a) of article 2” and “the foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2”.

70. Article 18 addresses a case where, after the application for recognition or after recognition, the foreign proceeding or foreign representative, whether interim or not, ceases to meet the requirements of article 2, subparagraphs (a) and (d) (see paras. 133-134 below).

Subparagraph (b) — foreign main proceeding [paras. 31-31C]

31. A foreign proceeding is deemed to be the “main” proceeding if it has been commenced in the State where “the debtor has the centre of its main interests”. This corresponds to the formulation in article 3 of the EC Regulation (based upon the formulation previously adopted in the European Union Convention on Insolvency Proceedings), thus building on the emerging harmonization as regards the notion of a “main” proceeding. The determination that a foreign proceeding is a “main” proceeding may affect the nature of the relief accorded to the foreign representative under articles 20 and 21, coordination of the foreign proceeding with proceedings that may be commenced in the recognizing jurisdiction under chapter IV and with other concurrent proceedings under chapter V.

31A. The Model Law does not define the concept “centre of main interests”. However, an explanatory report (the Virgos-Schmit Report),¹⁶ prepared with respect to the European Convention, provided guidance on the concept of “main insolvency proceedings” and notwithstanding the subsequent demise of the convention, the Report has been accepted generally as an aid to interpretation of the term “centre of main interests” in the EC Regulation. Since the formulation “centre of main interests” in the EC Regulation corresponds to that of the Model Law, albeit for

¹⁶ M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels 3 May 1996. The report was published in July 1996 and is available from <http://aei.pitt.edu/952>.

different purposes (see para. 123A), jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law.

31B. Recitals (12) and (13) of the EC Regulation state:

“(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor’s assets. To protect the diversity of interests, this Regulation permits secondary proceedings¹⁷ to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

“(13) The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”

31C. The Virgos-Schmit Report explained the concept of “main insolvency proceedings” as follows:

“73. Main insolvency proceedings

“Article 3 (1) enables main insolvency universal proceedings to be opened in the Contracting State where the debtor has his centre of main interests. Main insolvency proceedings have universal scope. They aim at encompassing all the debtor’s assets on a worldwide basis and at affecting all creditors, wherever located.

“Only one set of main proceedings may be opened in the territory covered by the Convention.

...

“75. The concept of ‘centre of main interests’ must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

“The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor’s potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

“By using the term ‘interests’, the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression ‘main’ serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

¹⁷ The EC Regulation refers to “secondary proceedings”, while the Model Law uses “non-main proceedings”.

“In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.

“Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”

Centre of main interests is discussed further in the remarks on article 16.

Subparagraph (c) — foreign non-main proceeding [para. 73]

73. Subparagraph (c) requires that a “foreign non-main proceeding” take place in the State where the debtor has an “establishment” (see below, para. 75-75A). Thus, a foreign non-main proceeding susceptible to recognition under article 17, paragraph 2 may be only a proceeding commenced in a State where the debtor has an establishment in the meaning of article 2, subparagraph (f). This rule does not affect the provision in article 28, namely, that an insolvency proceeding may be commenced in the enacting State if the debtor has assets there. It should be noted, however, that the effects of an insolvency proceeding commenced on the basis of the presence of assets only are normally restricted to the assets located in that State; if other assets of the debtor located abroad should, under the law of the enacting State, be administered in that insolvency proceeding (as envisaged in article 28), that cross-border issue is to be dealt with as a matter of international cooperation and coordination under articles 25-27 of the Model Law.

Subparagraph (e) [para. 74]

74. A foreign proceeding that meets the requisites of article 2, subparagraph (a), should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to obviate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign court, the definition of “foreign court” in subparagraph (e) includes also non-judicial authorities. Subparagraph (e) follows a similar definition contained in article 2, subparagraph (d), of the EC Regulation, as well as the Legislative Guide (Introd., para. 12(i)); the UNCITRAL Practice Guide (Introd., paras. 7-8) and the Judicial Perspective.

Subparagraph (f) [para. 75-75B]

75. The definition of the term “establishment” was inspired by article 2, subparagraph (h), of the European Union Convention on Insolvency Proceedings. The term is used in the Model Law in the definition of “foreign non-main proceeding” (article 2, subparagraph (c)) and in the context of article 17, paragraph 2, according to which, for a foreign non-main proceeding to be recognized, the debtor must have an establishment in the foreign State (see also para. 73 above).

75A. The Virgos-Schmit Report on that Convention provides some further explanation of “establishment”:

“Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.

“The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an ‘establishment’. A certain stability is required. The negative formula (‘non-transitory’) aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.”¹⁸

75B. Since “establishment” is a defined term, the inquiry to be made by the court as to whether the debtor has an establishment is purely factual in nature. Unlike “foreign main proceeding” there is no presumption with respect to the determination of establishment. There is a legal issue as to whether the term “non-transitory” refers to the duration of a relevant economic activity or to the specific location at which the activity is carried on. The commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts or of property would not in principle satisfy the definition of establishment. [However, the presence of an asset together with minimal management of that asset might be sufficient to constitute an “establishment”.]

Note to the Working Group

The Working Group may wish to consider the inclusion of the last sentence of paragraph 75B in order to provide flexibility in determining what might constitute an establishment and avoid a narrow interpretation.

Article 3. International obligations of this State [paras. 76-78]

Article 4. [Competent court or authority]¹ [paras. 79-83]

Article 5. Authorization of [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to act in a foreign State [paras. 84-85]

Article 6. Public policy exception [paras. 86-89]

Article 7. Additional assistance under other laws [para. 90]

Article 8. Interpretation [paras. 91-92]

91. [...]

92. Harmonized interpretation of the Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral

¹⁸ Virgos-Schmit Report, para. 7.1.

awards) that interpret conventions and model laws emanating from UNCITRAL. For further information about the system, see paragraph 202 below.

CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE — ARTICLES 9-14

Article 9. Right of direct access [para. 93]

93. An important objective of the Model Law is to provide expedited and direct access for foreign representatives to the courts of the enacting State. Article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular action. Article 4 deals with court competence in the enacting State for providing relief to the foreign representative.

Article 10. Limited jurisdiction [paras. 94-96]

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency] [paras. 97-99]

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency] [paras. 100-102]

100. The purpose of article 12 is to ensure that, when an insolvency proceeding concerning a debtor is taking place in the enacting State, the foreign representative of a proceeding concerning that debtor will be given, as an effect of recognition of the foreign proceeding, standing [(or “procedural legitimation”)] to make petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding.

Note to the Working Group

The Working Group may wish to consider whether it is necessary to retain the reference to “procedural legitimation” (see also para. 166 below).

101. [...]

102. [...]

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency] [paras. 103-105]

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency] [paras. 106-111]

[Continued in A/CN.9/WG.V/WP.103/Add.1]

(A/CN.9/WG.V/WP.103/Add.1) (Original: English)

Note by the Secretariat on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI), submitted to the Working Group on Insolvency Law at its forty-first session

ADDENDUM

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V. Article-by-article remarks (*continued*)

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

*Article 15. Application for recognition of a foreign proceeding [paras. 112-121]**Article 15 as a whole*

112. The Model Law avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications that might otherwise have to be used. This facilitates a coordinated, cooperative approach to cross-border insolvency and makes fast action possible. Article 15 defines the core procedural requirements for an application by a foreign representative for recognition. In incorporating the provision into national law, it is desirable not to encumber the process with additional procedural requirements beyond those referred to. With article 15, in conjunction with article 16, the Model Law provides a simple, expeditious structure to be used by a foreign representative to obtain recognition.

113-121. [...]

Article 16. Presumptions concerning recognition [paras. 122-122B, 123-123K]

122. Article 16 establishes presumptions that permit and encourage fast action in cases where speed may be essential. These presumptions allow the court to expedite the evidentiary process. At the same time, they do not prevent the court, in accordance with the applicable procedural law, from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question.

Paragraph 1 [paras. 122A-122B]

122A. Article 16, paragraph 1 creates a presumption with respect to the definitions of “foreign proceeding” and “foreign representative” in article 2. If the decision

commencing the foreign proceeding and appointing the foreign representative indicates that the foreign proceeding is a proceeding within the meaning of article 2, subparagraph (a) and that the foreign representative is a person or body within the meaning of article 2, subparagraph (d) the court is entitled to so presume. That presumption has been relied upon in practice by various recognizing courts when the court commencing the proceedings has included that information in its orders.¹

122B. Inclusion of that information in the orders made by the court commencing the foreign proceeding should be encouraged in order to facilitate the task of recognition in relevant cases (discussed further at paras. 124B-C below). Such information would include the [essence] [gist] of evidence presented to the originating court.

Paragraph 2 [para. 123]

123. [...]

Paragraph 3 [paras. 123A-123K]

123A. Although the presumption contained in article 16, paragraph 3 corresponds to the presumption in the EC Regulation, it serves a different purpose. In the Model Law, the presumption is designed to facilitate the recognition of foreign insolvency proceedings and the provision of assistance to those proceedings. Under the EC Regulation, the presumption relates to the proper place for commencement of insolvency proceedings, thus determining the applicable law, and to the automatic recognition of those proceedings by other EU member States. Under the Regulation, the decision on centre of main interests is made by the court receiving an application for commencement of insolvency proceedings at the time of consideration of that application. Under the Model Law, a request for recognition of a foreign proceeding may be made at any time after the commencement of that proceeding; in some cases it has been made several years later. Accordingly, the court considering an application for recognition under the Model Law must determine ex-post whether the foreign proceeding for which recognition is sought is taking place in a forum that is the debtor's centre of main interests [or was the debtor's centre of main interests when the proceeding commenced] (the issue of timing with respect to the determination of centre of main interests is discussed at paras. 128A-E below). Notwithstanding the different purpose of centre of main interests under the two instruments, the jurisprudence with respect to interpretation of that concept in the EC Regulation may be relevant to its interpretation in the Model Law.

123B. The presumption in article 16, paragraph 3 has given rise to considerable discussion, most commonly in the context of corporate rather than individual debtors, with the focus upon the proof required for the presumption to be rebutted. In the majority of cases, the debtor's centre of main interest is likely to be the same location as its place of registration and no issue concerning rebuttal of the presumption will arise.

123C. When a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the

¹ For examples, see A/CN.9/WG.V/WP.95, paras. 15-16.

debtor's registered office and its [seat of operations] [operational centre], the [foreign representative] [party alleging that the centre of main interests is not at the place of registration] will be required to prove the location of the centre of main interests. The court of the enacting State will be required to consider independently where the centre of main interests is located.

Note to the Working Group

The Working Group may wish to consider whether the court is required to make this evaluation and satisfy itself as to the location of COMI in all cases or only where there is a dispute.

Paragraphs 123C and 124D (dealing with paragraph 1 of article 17) refer to the court independently satisfying itself as to the location of the debtor's COMI. Paragraph 124D also notes that the orders or decisions of the originating court are not binding on the receiving court.

The Working Group may wish to consider whether decisions made under laws, such as the EC Regulation, that require the originating court to determine whether the debtor's COMI is in that jurisdiction before a main proceeding can be commenced might be distinguished from decisions made in jurisdictions where the question of whether the local proceeding might be classified as main or non-main will not be relevant to the commencement of local proceedings and the court will not need to consider the issue (although there may be examples where, although not required to consider the question for commencement purposes, the court might nevertheless decide on the location of the COMI). The Working Group may also wish to consider the situation in which a party that failed to persuade the originating court that the debtor's COMI was located somewhere other than the location determined by the originating court then raises the same issue in the context of recognition.

Factors relevant to rebutting the presumption

123D. In determining the location that might constitute a debtor's centre of main interests when it is alleged to be somewhere other than the place of registration, courts have focussed upon what is variously described as the location of the debtor's headquarters; the debtor's nerve centre; the place of the debtor's central administration; or the place from which the debtor's head office functions are performed and upon the factors considered relevant to that determination. Centre of main interests has also been likened to the debtor's principal place of business, although since large, corporate debtors may have several principal places of business, but in principle only one place where head office functions are carried out, the latter standard is likely to provide more certainty as to the debtor's real centre of main interests.

123E. Under the EC Regulation, "centre of main interests" has been authoritatively interpreted as meaning that where the place in which the bodies responsible for the management and supervision of the debtor are located and in which the management decisions of the debtor are actually taken are the same as its registered office, the presumption cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a State other

than that in which the registered office is located cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all relevant factors make it possible for third parties to establish that the company's actual centre of management and supervision and of the management of its interests is located in that other State. However, the presumption may be rebutted in the case of a "letterbox company" that does not carry out any business in the territory of the State in which its registered office is located.

123F. Various factors have been found by different courts to be relevant to rebuttal of the presumption. No rigid formula is applied and no one factor is consistently determinative. Each factor may be more or less relevant or important to building up a picture of the real location of a debtor's centre of main interest by reference to the circumstances of each specific case. The inquiry is thus one of fact and the court will analyse a variety of factors to discern, objectively, where a particular debtor has its centre of main interests. This analysis will examine the location from which the debtor is managed and its physical operations are conducted, together with whether reasonable or ordinary third parties can discern or perceive where the debtor is conducting these various functions.

123G. It has been said that one of the important features of centre of main interests is the perception of the objective observer. One important purpose of centre of main interests is that it provides certainty and foreseeability for creditors of the company at the time they enter into a transaction. While there are differences in approach to determination of the centre of main interests of a debtor, the general trend of the decided cases seems to support objective ascertainment by third parties dealing with the debtor at relevant times. The issue lies more in the focus in some jurisdictions on specific factors, such as the "nerve centre" or "head office" of the particular entity that is the subject of the recognition application.

123H. Third parties may be influenced by information in the public domain and what could be learned in the ordinary course of dealing with the debtor. That may include reference to, for example, details reported in public disclosures made by the debtor, statements made in marketing materials and facts disclosed in contracts and agreements.

123I. [In addition to consideration of the main factors noted above in paragraph 123F, examples of factors that courts have found to be relevant include: the location of the debtor's main assets and/or creditors [the majority of creditors who would be affected by the case]; the location of the debtor's books and records; the location where financing was organized or authorized, or the cash management system was run; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or of the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computers systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.]

Abuse of process

123J. One issue that has arisen in determining centre of main interests is whether the court should be able to take account of abuse of its processes as a ground to decline recognition. There is nothing in the UNCITRAL Model Law itself which suggests that extraneous circumstances, such as abuse of process, should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding”. Since what constitutes abuse of process depends on domestic law or procedural rules, the Model Law does not prevent receiving courts from applying domestic law, particularly procedural rules, to respond to any abuse of process.

123K. An alternative way of dealing with the abuse of process concern may be to consider whether recognition could be refused on the grounds of public policy.² A case could be made to support the proposition that an application for recognition as a main proceeding is an abuse of process if those responsible for pursuing the application know that the centre of main interests is elsewhere and yet deliberately decide to argue otherwise and/or to suppress relevant information when applying for recognition. An approach based on the “public policy” exception has the advantage of separating the recognition inquiry from any abuse-of-process issues in a manner reflecting the terms and spirit of the UNCITRAL Model Law.

Article 17. Decision to recognize a foreign proceeding [paras. 124-124C, 126-128E, 125, 129-132]

Paragraph 1 [paras. 124-124C]

124. The purpose of article 17 is to establish that, if recognition is not contrary to the public policy of the enacting State (see article 6) and if the application meets the requirements set out in the article, recognition will be granted as a matter of course.

124A. In deciding whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition. This requires a determination that the proceedings are foreign proceedings within article 2, paragraph (a). The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of article 15 and article 6 is not relevant, recognition should follow in accordance with article 17.

124B. In reaching its decision on recognition, the receiving court may have regard to any decisions and orders made by the originating court and to the [essence] [gist] of any evidence that may have been presented to the originating court, particularly as it relates to the nature of the foreign proceeding and whether it might be considered a main or non-main proceeding. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the foreign proceeding meets the requirements of article 2. Nevertheless, the court is entitled to rely, pursuant to the presumptions in article 16, paragraphs 1 and 2 (see para. ...), on the information in the certificates

² See the discussion of the public policy exception at paras. [...].

and documents provided in support of an application for recognition. In appropriate circumstances that information would assist the receiving court in its deliberations.

124C. Accordingly, originating courts might be encouraged to include in their orders the [essence] [gist] of any evidence presented to them that would facilitate a finding by a receiving court that the proceeding is a foreign proceeding within the meaning of article 2. This would be particularly helpful when the originating court was aware of the international character either of the debtor or its business and the likelihood that recognition of the proceedings would be sought under the Model Law. The same considerations would apply to the appointment and recognition of the foreign representative.

Paragraph 2 [paras. 126-128]

126. Article 17 paragraph 2 draws the basic distinction between foreign proceedings categorized as the “main” proceedings and those foreign proceedings that are not so characterized, depending upon the jurisdictional basis of the foreign proceeding (see paragraph ... above). The relief flowing from recognition may depend upon the category into which a foreign proceeding falls. For example, recognition of a “main” proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor (article 20, subparagraphs 1 (a) and (b)) and an automatic “freeze” of those assets (article 20, subparagraph 1 (c)), subject to certain exceptions referred to in article 20, paragraph 2.

127-128. [...]

Timing of the determination with respect to COMI [paras. 128A-128E]

128A. The Model Law does not expressly indicate the date that is relevant for determining the centre of main interests of the debtor, other than article 17, subparagraph 2 (a) which provides that the foreign proceeding is to be recognized as a main proceeding “if it is taking place in the State where the debtor has the centre of its main interests” [*emphasis added*].

128B. The use of the present tense in article 17 requires that the foreign proceeding be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State at that time (i.e. it *is* no longer “taking place” having been terminated or closed), there is no proceeding that would be eligible for recognition under the Model Law.

Note to the Working Group

Paragraph 128B refers to the closure of insolvency proceedings. This issue is discussed in the Legislative Guide (part two, chapter VI, paras, 16-19), where it is noted that different approaches are adopted. On that basis and to avoid any confusion that such a paragraph may create, particularly with respect to applicable law, the Working Group may wish to consider whether paragraph 128C might be sufficient.

128C. Having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of

commencement of that proceeding is an appropriate date at which to consider the debtor's centre of main interests. A slightly different, although related, alternative is the date of the application for commencement of the foreign proceeding, which under some insolvency laws might effectively be the same as the date of commencement. Where the debtor ceased trading after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the centre of the debtor's main interests by reference to the date of the commencement of those proceedings would produce a clear result. The same issue may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a centre of main interests, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 (a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine centre of main interests provides a test that can be applied with certainty to all insolvency proceedings.

128D. The use of present tense in the Model Law may be interpreted as suggesting that the relevant date for determining COMI should be the date of the application for recognition of the foreign proceeding. However, that date causes difficulties, particularly if the foreign proceeding is a liquidation proceeding. In such a proceeding, the debtor is unlikely to continue having an active centre of main interests beyond the date of commencement of insolvency proceedings as the business would generally cease operating at the time of commencement, except in those cases where it is to be sold as a going concern or is trading out extant contracts to maximize creditor returns. A consideration of the location of the debtor's centre of main interests as at the date of the application for recognition might conclude that there was no current centre of main interests, only the centre of the activities of the liquidator. Moreover, using the date of the application for recognition overlooks the importance placed by article 15 on the decision commencing the foreign proceeding.

128E. The date at which the centre of main interests determination is made under the EC Regulation is the date of commencement of insolvency proceedings in one member State; other member States are required to automatically recognize those proceedings from that date.

Paragraph 3 [para. 125]

125. The foreign representative's ability to obtain early recognition (and the consequential ability to invoke in particular articles 20, 21, 23 and 24) is often essential for the effective protection of the assets of the debtor from dissipation and concealment. For that reason, paragraph 3 obligates the court to decide on the application "at the earliest possible time". The phrase "at the earliest possible time" has a degree of elasticity. Some cases may be so straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, "the earliest possible time" might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.

Paragraph 4 [paras. 129-131]

129. A decision to recognize a foreign proceeding would normally be subject to review or rescission, as any other court decision. Paragraph 4 clarifies that the decision on recognition may be revisited if grounds for granting it were fully or partially lacking or have ceased to exist.

130. Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognized foreign proceeding has been terminated or its nature has changed (e.g. a reorganization proceeding might be converted into a liquidation proceeding). Also, new facts might arise that require or justify a change of the court's decision, for example, if the foreign representative disregarded the conditions under which the court granted relief. The court's ability to review the recognition decision is assisted by the obligation article 18 imposes on the foreign representative to inform the court of such changed circumstances.

131. [...]

*Notice of decision to recognize foreign proceedings [para. 132]**Article 18. Subsequent information [paras. 133-134]**Subparagraph (a)*

133. Article 18 obligates the foreign representative to inform the court promptly, after the time of filing the application for recognition of the foreign proceeding, of "any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment". The purpose of the obligation is to allow the court to modify or terminate the consequences of recognition. As noted above, it is possible that, after the application for recognition or after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition. Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the terms of the appointment are frequent, but that only some of those modifications are such that they would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of "substantial" changes. The court should be kept so informed when its decision on recognition concerns a foreign "interim proceeding" or a foreign representative has been "appointed on an interim basis" (see article 2, subparagraphs (a) and (d)).

Subparagraph (b)

134. Article 15, paragraph 3, requires that an application for recognition be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Article 18, subparagraph (b), extends that duty to the time after the application for recognition has been filed. That information will allow the court to consider whether relief already granted should be coordinated with the existence of the insolvency proceedings that have been commenced after the decision on recognition (see article 30) and facilitate cooperation under chapter IV.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding [paras. 135-140]

Article 20. Effects of recognition of a foreign main proceeding [paras. 141-153]

141. While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not, for they flow automatically from recognition of the foreign main proceeding. Another difference between discretionary relief under articles 19 and 21 and the effects under article 20 is that discretionary relief may be issued in favour of main and non-main proceedings, while the automatic effects apply only to main proceedings. Additional effects of recognition are contained in articles 14, 23 and 24.

142. [...]

143. The automatic consequences envisaged in article 20 are necessary to allow steps to be taken to organize an orderly and fair cross-border insolvency proceeding. In order to achieve those benefits, the imposition on the insolvent debtor of the consequences of article 20 in the enacting State (i.e. the country where it maintains a limited business presence) is justified, even if the State where the centre of the debtor's main interests is situated poses different (possibly less stringent) conditions for the commencement of insolvency proceedings or even if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20 in the enacting State. This approach reflects a basic principle underlying the Model Law according to which recognition of foreign proceedings by the court of the enacting State produces effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State. If, in a given case, recognition should produce results that would be contrary to the legitimate interests of an interested party, including the debtor, the law of the enacting State should include appropriate protections, as indicated in article 20, paragraph 2 (and discussed in paragraph 149 below).

144-153. [...]

Article 21. Relief that may be granted upon recognition of a foreign proceeding [paras. 154-160]

154. In addition to the mandatory stay and suspension under article 20, the Model Law authorizes the court, following recognition of a foreign proceeding, to grant relief for the benefit of that proceeding. This post-recognition relief under article 21 is discretionary, as is pre-recognition relief under article 19. The types of relief listed in article 21, paragraph 1, are typical or most frequent in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case.

155-160. [...]

*Article 22. Protection of creditors and other interested persons [paras. 161-164]**Article 23. Actions to avoid acts detrimental to creditors [paras. 165-167]*

165. Under many national laws both individual creditors and insolvency representatives have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. Such a right, insofar as it pertains to individual creditors, is often not governed by insolvency law but by general provisions of law (such as the civil code); the right is not necessarily tied to the existence of an insolvency proceeding against the debtor so that the action may be instituted prior to the commencement of such a proceeding. The person having such a right is typically only an affected creditor and not another person such as the insolvency representative. Furthermore, the conditions for these individual-creditor actions are different from the conditions applicable to similar actions that might be initiated by an insolvency representative. The standing conferred by article 23 extends only to actions that are available to the local insolvency representative in the context of an insolvency proceeding, and the article does not equate the foreign representative with individual creditors who may have similar rights under a different set of conditions. Such actions of individual creditors fall outside the scope of article 23.

166. The Model Law expressly provides that, as an effect of recognition of the foreign proceeding under article 17, a foreign representative has “standing” [(a concept in some systems referred to as “active procedural legitimation”, “active legitimation” or “legitimation”)] to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it does not create any substantive right regarding such actions and also does not provide any solution involving conflict of laws. The effect of the provision is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency representative appointed in the enacting State. The Model Law does not address the right of a foreign representative to bring such an action in the enacting State under the law of the State in which the foreign proceeding is taking place.

166A. When the foreign proceeding has been recognized as a “non-main proceeding”, it is necessary for the court to consider specifically whether any action to be taken under the article 23 authority relates to assets that “should be administered in the foreign non-main proceeding” (article 23, paragraph (2)). Again, this distinguishes the nature of a “main” proceeding from that of a “non-main” proceeding and emphasizes that the relief in a “non-main” proceeding is likely to be more restrictive than for a “main” proceeding.

167. Granting standing to the foreign representative to institute such actions is not without difficulty. In particular, such actions might not be looked upon favourably because of their potential for creating uncertainty about concluded or performed transactions. However, since the right to commence such actions is essential to protect the integrity of the assets of the debtor and is often the only realistic way to achieve such protection, it has been considered important to ensure that such right would not be denied to a foreign representative on the sole ground that he or she has not been locally appointed.

Article 24. Intervention by a foreign representative in proceedings in this State
[paras. 168-172]

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN
REPRESENTATIVES [paras. 38-39, 173-178]

38-39. [...]

173. Chapter IV (articles 25-27), on cross-border cooperation, is thus a core element of the Model Law. Its objective is to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results. Cooperation as described in the chapter is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets (e.g. when items of production equipment located in two States are worth more if sold together than if sold separately) or to find the best solutions for the reorganization of the enterprise.

173A. Cooperation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications by the enacting State for assistance elsewhere (see also article 5). Cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets. Such a provision may be useful when that proceeding is commenced in the enacting State and assistance is sought elsewhere. That provision may also be relevant when the enacting State, in addition to the Model Law, has other laws facilitating coordination and cooperation with foreign proceedings (see article 7).

174. Articles 25 and 26 not only authorize cross-border cooperation, they also mandate it by providing that the court and the insolvency representative “shall cooperate to the maximum extent possible”. The articles are designed to overcome the widespread problem of national laws lacking rules providing a legal basis for cooperation by local courts with foreign courts in dealing with cross-border insolvencies. Enactment of such a legal basis would be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative framework for cooperation has proved to be useful.

175. To the extent that cross-border judicial cooperation in the enacting State is based on the principle of comity among nations, the enactment of articles 25-27 offers an opportunity for making that principle more concrete and adapting it to the particular circumstances of cross-border insolvencies.

176. [...]

177. The articles in chapter IV leave certain decisions, in particular when and how to cooperate, to the courts and, subject to the supervision of the courts, to the insolvency representatives. For a court (or a person or body referred to in articles 25 and 26) to cooperate with a foreign court or a foreign representative regarding a

foreign proceeding, the Model Law does not require a previous formal decision to recognize that foreign proceeding.

178. [...]

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives [para. 179]

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives [para. 180]

Article 27. Forms of cooperation [paras. 181-183A]

181. Article 27 is suggested for use by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by articles 25 and 26. Such an indicative listing may be particularly helpful in States with a limited tradition of direct cross-border judicial cooperation and in States where judicial discretion has traditionally been limited and, as an indicative list leaves the legislator an opportunity to list other forms of cooperation. Any listing of forms of possible cooperation should be illustrative rather than exhaustive, to avoid inadvertently precluding certain forms of appropriate cooperation and limiting the ability of courts to fashion remedies in keeping with specific circumstances.

182-183. [...]

183A. The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation expands upon the forms of cooperation mentioned in article 27 and, in particular, compiles practice and experience with the use of cross-border insolvency agreements.

CHAPTER V. CONCURRENT PROCEEDINGS

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding [paras. 184-187A]

184. The Model Law imposes virtually no limitations on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings. Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.

185. [...]

186. Nevertheless, the enacting State may wish to adopt the more restrictive solution of allowing the initiation of the local proceeding only if the debtor has an establishment in the State. The adoption of such a restriction would not be contrary to the policy underlying the Model Law. The rationale may be that, when the assets in the enacting State are not part of an establishment, the commencement of a local proceeding would typically not be the most efficient way to protect the creditors, including local creditors. By tailoring the relief to be granted to the foreign main proceeding and cooperating with the foreign court and foreign representative, the court in the enacting State would have sufficient opportunity to ensure the assets in the State would be administered in such a way that local interests would be

adequately protected. Therefore, the enacting State would act in line with the philosophy of the Model Law if it enacted the article by replacing the words “only if the debtor has assets in this State”, as they currently appear in article 28, with the words “only if the debtor has an establishment in this State”.

187. Those restrictions are useful in order to avoid creating an open-ended ability to extend the effects of a local proceeding to assets located abroad, a result that would generate uncertainty as to the application of the provision and that might lead to conflicts of jurisdiction.

187A. Where under the law of the enacting State the debtor must be insolvent to commence an insolvency proceeding, the Model Law deems the recognized foreign main proceeding to constitute the requisite proof of insolvency of the debtor for that purpose (article 31).

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding [paras. 188-191]

188. Article 29 gives guidance to the court that deals with cases where the debtor is subject to a foreign proceeding and a local proceeding at the same time. The objective of this article and article 30 is to foster coordinated decisions that would best achieve the objectives of both proceedings (e.g. maximization of the value of the debtor’s assets or the most advantageous reorganization of the enterprise). The opening words of article 29 direct the court that in all such cases it must seek cooperation and coordination pursuant to chapter IV (articles 25, 26 and 27) of the Model Law.

189-191. [...]

Article 30. Coordination of more than one foreign proceeding [paras. 192-193]

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding [paras. 194-197]

194-196. [...]

197. This rule, however, would be helpful in those legal systems in which commencement of an insolvency proceeding requires proof that the debtor is in fact insolvent. Article 31 would have particular significance when proving insolvency as the prerequisite for an insolvency proceeding would be a time-consuming exercise and of little additional benefit bearing in mind that the debtor is already in an insolvency proceeding in the State where it has the centre of its main interests and the commencement of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, the court of the enacting State is not bound by the decision of the foreign court, and local criteria for demonstrating insolvency remain operative, as is clarified by the words “in the absence of evidence to the contrary”.

Article 32. Rule of payment in concurrent proceedings [paras. 198-200]

VI. Assistance from the UNCITRAL Secretariat *[paras. 201-202]*

B. Information on the interpretation of legislation based on the Model Law

202. The Model Law is included in the CLOUT information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws that have emanated from the work of UNCITRAL. The purpose of the system is to promote international awareness of the legislative texts formulated by UNCITRAL and to facilitate their uniform interpretation and application. The secretariat publishes, in the six official languages of the United Nations, abstracts of decisions and makes the full, original decisions available, upon request. The system is explained in a user's guide that is available on the above-mentioned Internet home page of UNCITRAL.

**G. Note by the Secretariat on directors' obligations in the period
approaching insolvency, submitted to the Working Group on
Insolvency Law at its forty-first session**

(A/CN.9/WG.V/WP.104)

[Original: English]

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V contained in document A/CN.9/691, paragraph 104, that activity be initiated on two insolvency topics, both of which were of current importance, and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the second topic, proposed by the United Kingdom (A/CN.9/WG.V/WP.93/Add.4), INSOL International (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6), concerning the responsibility and liability of directors and officers of an enterprise in insolvency

and pre-insolvency cases.¹ In the light of concerns raised during extensive discussion, the Commission agreed that the focus of the work on that topic should only be upon those responsibilities and liabilities that arose in the context of insolvency, and that it was not intended to cover areas of criminal liability or to deal with core areas of company law.

4. Discussion of this topic commenced at the Working Group's thirty-ninth session (December 2010, Vienna) and continued at its fortieth session (October-November 2011, Vienna). The deliberations and conclusions of the Working Group are set forth in the reports of those sessions (A/CN.9/715 and A/CN.9/738 respectively).

5. This note, in accordance with the decision of the Working Group at its fortieth session (A/CN.9/738, para. 38), adopts the form of the Legislative Guide on Insolvency Law, containing both a draft commentary on relevant issues and a set of draft recommendations. It has been prepared, in terms of style and cross-references to the commentary and recommendations of the Guide so that it could form a part of the Legislative Guide (part IV) should the Working Group decide that to be the most desirable form for this work to take. The material set forth below builds upon documents A/CN.9/WG.V/WP.96 and 100, as well as decisions taken by the Working Group at its thirty-ninth and fortieth sessions.

I. Directors' obligations in the period approaching insolvency

A. Introduction

6. Corporate governance frameworks regulate a set of relationships between a company's management, its board, its shareholders and other stakeholders and provide not only the structure through which the objectives of the company are established and attained, but also the standards against which performance can be monitored. Good corporate governance should provide incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders, as well as fostering the confidence necessary for promoting business investment and development. Much has been done at the international level to develop widely adopted principles of corporate governance that include the obligations of directors when the company is solvent.²

7. Once insolvency proceedings commence, many insolvency laws recognize that the obligations of the directors will differ both in substance and focus from those applicable prior to the commencement of those proceedings, with the emphasis on prioritizing maximization of value and preservation of the estate for distribution to creditors. Often directors will be displaced from ongoing involvement in the company's affairs by an insolvency representative, although under some insolvency laws they may still have an ongoing role, particularly in reorganization. The obligations of the directors once insolvency proceedings commence are addressed above in recommendations 108-114 and in the commentary, part two, chapter III,

¹ The first topic, concerning centre of main interests and related issues is discussed in A/CN.9/WG.V/WP.103 and Add.1.

² See for example the OECD Principles of Corporate Governance, 2004.

paragraphs 22-34. Recommendation 110 specifies in some detail the obligations that should arise under the insolvency law on commencement of insolvency proceedings and continue throughout those proceedings, including obligations to cooperate with and assist the insolvency representative to perform its duties; to provide accurate, reliable and complete information relating to the financial position of the company and its business affairs; and to cooperate with and assist the insolvency representative in taking effective control of the estate and facilitating recovery of assets and business records. The imposition of sanctions where the debtor fails to comply with those duties is also addressed (recommendation 114 and paragraph 34 of the commentary). In some systems, directors may be criminally liable for failure to observe those duties, while in others they may be personally liable for any damage caused as a result of the breach of those duties.

8. Effective insolvency laws, in addition to providing a predictable legal process for addressing the financial difficulties of troubled debtors and the necessary framework for the efficient reorganization or orderly liquidation of those debtors, should also permit an examination to be made of the circumstances giving rise to insolvency and in particular the conduct of directors of an enterprise. However, little has been done internationally to harmonize the various approaches of national law that might facilitate examination of that conduct and significant divergences remain. Nevertheless, the role and responsibilities of directors of a company in the period leading up to an application for or commencement of insolvency proceedings are increasingly the subject of debate, particularly in view of widespread failures following the global financial crisis.

9. A business facing an actual or imminent inability to meet its obligations as they fall due needs robust management, as often there are difficult decisions and judgements to be made. Competent directors should understand the company's financial situation and possess all reasonably available information necessary to enable them to take appropriate steps to address financial distress and avoid further decline. At such times, they are faced with choosing the course of action that best serves the interests of the enterprise as a whole, having weighed the interests of the different stakeholders in the circumstances of the specific case. Directors afraid of the possible financial repercussions of making such decisions may prematurely close down a business rather than seek to trade out of difficulties or they may engage in inappropriate behaviour, including unfairly disposing of assets or property. However, the different interests and motivations of stakeholders are not so easily balanced and provide a potential source of conflict. For example, where directors are also shareholders of the enterprise, the incentive may be to maximize their own position by imprudently seeking to trade out of insolvency or to hold out on any potential sale in the hope of a better return, especially where the sale price would cover only creditor claims, leaving nothing for shareholders. Such courses of action may involve adopting high-risk strategies to save or increase value for shareholders, at the same time putting creditors' interests at risk. Those actions may also reflect limited concern for the chances of success because of the protection of limited liability or director liability insurance if the course of action adopted fails.

10. Despite the potential difficulties associated with taking appropriate business decisions, when a company faces financial difficulties it is essential that early action be taken. Financial decline typically occurs more rapidly than many parties would believe and as the financial position of an enterprise worsens, the options available

for achieving a viable solution also rapidly diminish. That early action must be facilitated by ease of access to relevant procedures; there is little to be gained by urging early action by directors if that action cannot be directed towards relevant and effective procedures.³ Moreover, those laws that expose directors to liability from trading during the conduct of informal procedures such as restructuring negotiations (discussed in part one, chap. II, paras. 2-18) may operate to deter early action. While there has been an appropriate refocusing of insolvency laws in many countries to increase the options for early action to facilitate rescue and reorganization of enterprises, there has been little focus on creating appropriate incentives for directors to use those options. Often, it is left to creditors to pursue those options or commence formal proceedings because the directors have failed to act on a timely basis.

11. A number of jurisdictions address the issue of encouraging early action by imposing an obligation on a debtor to apply for commencement of formal proceedings within a certain specified period of time after insolvency occurs in order to avoid trading whilst insolvent. Other laws address the issue by focusing on the obligations of directors in the period before the commencement of insolvency proceedings and imposing liability for the harm caused by continuing to trade when it was clear or should have been foreseen that insolvency could not be avoided. The rationale of such provisions is to create appropriate incentives for early action and use of restructuring negotiations or reorganization and stop directors from externalizing the costs of the company's financial difficulties and placing all the risks of further trading on creditors.

12. The imposition of such obligations has been the subject of continuing debate. Those who acknowledge that such an approach has advantages⁴ point out that the obligations may operate to encourage directors to act prudently and take early steps to stop the company's decline with a view to protecting existing creditors from even greater losses and incoming creditors from becoming entangled in the company's financial difficulties. Put another way, they may also have the effect of controlling and disciplining management, dissuading them from embracing excessively risky courses of action or passively acquiescing to excessively risky actions proposed by other directors because of the sanctions attached to the failure to perform the obligations. An associated advantage may be that they provide an incentive to management to obtain competent professional advice when financial difficulties loom.

13. Those commentators who suggest that there are significant disadvantages cite the following examples. There is a possibility that directors seeking to avoid liability will prematurely close a viable business which otherwise could have survived, instead of attempting to trade out of the company's difficulties. Properly drafted provisions, however, would discourage overly hasty closure of businesses and encourage directors to continue trading where that is the most appropriate way of minimizing loss to creditors. It is also suggested that the obligations may be regarded as an erosion of the legal status brought by incorporation, although it can

³ It has been suggested that the dearth of cases under insolvent trading legislation in one State is because of the relative ease of access to voluntary procedures and only those companies that are hopelessly insolvent are ultimately liquidated.

⁴ E.g. *Directors in the Twilight Zone III* (2009), INSOL International, Overview, p. 5.

be argued that limited liability should be seen as a privilege and courts have been alive to the potential for abuse of limited liability where it is to the detriment of creditors. Such obligations might also be regarded as a weakening of enterprise incentives on the basis that too much risk may discourage directors. Properly drafted provisions would focus not so much on the causes of distress, but on the directors' acts or omissions subsequent to that point. Examples from jurisdictions with such obligations suggest that only the most clearly irresponsible directors are found liable.

14. It is also said that such obligations may increase unpredictability, because liability depends on the particular circumstances of each case and also on the future attitudes of the courts. It is suggested that many courts lack the experience to examine commercial behaviour after the event and second guess the decisions that directors took in the period in question. However, in jurisdictions with experience of enforcing such obligations, courts tend to defer to directors' actions, especially when those directors have acted on independent advice. A further suggestion is that there is an increased risk of unexpected liabilities for banks and others who might be deemed to be directors by reason of their involvement with the company, particularly at the time of the insolvency. It is desirable that relevant legislation provide due protection for such parties when they are acting in good faith, at arm's length to the debtor and in a commercially reasonable manner. It is also argued that imposing such obligations overcompensates creditors who are able to protect themselves through their contracts, making regulation superfluous. This approach presupposes, for example, that creditors have a contract with the debtor, that they are able to negotiate appropriate protections to cover a wide range of contingencies and that they have the resources, and are willing and able, to monitor the affairs of the company. Not all creditors are in this position.

15. Director obligations and liabilities are specified in different laws in different States, including company law, civil law, criminal law and insolvency law and in some instances, they may be included in more than one of those laws or they may be split between those laws. In common law systems, the obligations may apply by virtue of common law, as well as pursuant to relevant legislation. Moreover, different views exist as to whether the obligations and liabilities of directors are properly the subject of insolvency law or company law. These views revolve around the status of the company as either solvent, which is typically covered by laws not dealing with insolvency such as company law, or subject to insolvency proceedings, which is addressed by insolvency law. A period before the commencement of insolvency proceedings, when a debtor may be technically insolvent, raises concerns that may not be adequately addressed by either company law or insolvency law. The imposition of obligations enforceable retroactively after commencement of insolvency proceedings may lead to an overlap between the duties applicable under different laws and it is desirable that, in order to ensure transparency and clarity and avoid potential conflicts, they be reconciled.

16. Not only do the laws in which the obligations are to be found vary, but the obligations themselves vary: those applicable before the commencement of insolvency proceedings typically differ from those applicable once those proceedings commence (see part two, chapter III, paras. 22-33). The standards to be observed by directors in performing their functions also tend to vary according to the nature and type of the business entity e.g. a public company as distinct from a

limited, closely held or private company or family business, and with the jurisdiction in which the entity operates. For public companies, the obligations are typically much more rigorous and complex than for other types of company.

17. The application of laws addressing director obligations and liabilities are closely related to and interact with other legal rules and statutory provisions on corporate governance. In some jurisdictions, they form a key part of policy frameworks, such as those protecting depositors in financial institutions, facilitating revenue collection, addressing priorities for certain categories of creditors over others (such as employees), as well as relevant legal, business and cultural frameworks in the local context.

18. Effective regulation in this area should seek to balance the often competing goals and interests of different stakeholders: seeking to preserve the freedom of directors to discharge their obligations and exercise their judgement appropriately, encouraging responsible behaviour, discouraging excessive risk-taking, promoting entrepreneurial activity, and encouraging, at an early stage, the refinancing or reorganization of enterprises facing insolvency. Such regulation could enhance both creditors' confidence and their willingness to do business with companies, encourage the participation of more experienced managers, who otherwise may be reluctant due to the risks related to failure, promote good corporate governance, leading to a more predictable legal position for directors and limiting the risks that insolvency practitioners will litigate against them once insolvency proceedings commence. Inefficient, antiquated and inconsistent guidelines on the obligations of those responsible for management of an enterprise as it approaches insolvency have the potential to undermine the benefits that an effective and efficient insolvency law is intended to produce.

19. The purpose of this [part] is to identify basic principles to be reflected in insolvency law concerning directors' obligations when the company faces actual or imminent insolvency. Those principles may serve as a reference point and can be used by policy makers as they examine and develop appropriate legal and regulatory frameworks. Whilst recognizing the desirability of achieving the goals of the insolvency law (outlined above in part one, chap. I, paras. 1-14 and recommendation 1) through early action and appropriate behaviour by directors, it is also acknowledged that there are threats and pitfalls to entrepreneurship that may result from overly draconian rules. This [part] does not deal with the obligations of directors that may apply under criminal law, company law or tort law, focussing only on those obligations that may be included in the insolvency law and are enforceable once insolvency proceedings commence.

B. Identifying the parties who owe the obligations

20. In most States, a number of different persons associated with a company have obligations with respect to management and oversight of the company's operations. They may be the owners of a company, formally appointed directors, officers or managers (who may serve as executive directors) of a company and non-appointed

individuals and entities, including third parties acting as de facto⁵ or “shadow” directors,⁶ as well as persons to whom the powers or duties of a director may have been delegated by the directors. Although some laws may provide that an enterprise group member cannot be appointed as a director of another group member, nevertheless, a group member may be considered, under a broad definition of “director”, to be a director of other group members. This would typically occur where a group member (or its directors) performs functions concerning the management and oversight of other group members. The issue may be most relevant in the context of controlled and parent group members, where the parent interferes in a sustained and pervasive manner in the management of the controlled group member. However, a decision by a controlled group member to support the parent in circumstances where it was in the controlled group member’s interests to do so and not the result of interference from the parent would not render the parent a director of the other group member.

21. A broad definition may also include special advisors and in some circumstances, banks and other lenders, when they are advising a company on how to address its financial difficulties. In some cases, that “advice” may amount to determining the exact course of action to be taken by the company and making the adoption of a particular course of action a condition of extending credit. Nevertheless, provided the directors of the company retain their discretion to refuse that course of action, even if in reality they may be regarded as having little option because it will result in liquidation, and provided the outside advisors are acting at arm’s length, in good faith and in a commercially appropriate manner, it is desirable that such advisors not be considered as falling within the class of person subject to the obligations.

22. There is no universally accepted definition of what constitutes a “director”. As a general guide, however, a person might be regarded as a director when they are charged with making, do in fact make or ought to make key decisions with respect

⁵ A de facto director is generally considered to be a person who acts as a director, but is not formally appointed as such or there is a technical defect in their appointment. A person may be found to be a de facto director irrespective of the formal title assigned to them if they perform the relevant functions. It may include anyone who at some stage takes part in the formation, promotion or management of the company. In small family-owned companies, that might include family members, former directors, consultants and even senior employees. Typically, to be considered a de facto director would require more than simply involvement in the management of the company and may be determined by a combination of acts, such as the signing of cheques; signing of company correspondence as “director”; allowing customers, creditors, suppliers and employees to perceive a person as a director or “decision maker”; and making financial decisions about the company’s future with the company’s bankers and accountants.

⁶ A shadow director may be a person, although not formally appointed as a director, in accordance with whose instructions the directors of a company are accustomed to act. Generally, shadow directors would not include professional advisors acting in that capacity. To be considered a shadow director may require the capacity to influence the whole or a majority of the board, to make financial and commercial decisions which bind the company and, in some cases, that the company have ceded to the shadow director some or all of its management authority. In an enterprise group context, one group member may be a shadow director of another group member. In considering the conduct that might qualify a person to be a shadow director, it may be necessary to take into account the frequency of the conduct and whether or not the influence was actually exercised.

to functions such as: determining corporate strategy, risk policy, annual budgets and business plans; monitoring corporate performance; overseeing major capital expenditure; monitoring corporate governance practices; selecting, appointing, and supporting the performance of the chief executive; ensuring the availability of adequate financial resources; addressing potential conflicts of interest; ensuring integrity of accounting and financial reporting systems; and accounting to the stakeholders for the organization's performance. For ease of reference, the general term "director" is used in this [part] to refer to such persons. The obligations discussed below would attach to any person who was a director at the time the business was facing actual or imminent insolvency, and may include directors who subsequently resign (see para. 40 below). It would not include a director appointed after the commencement of insolvency proceedings.

Note to the Working Group

23. The Working Group may wish to consider use of a more generic term such as "responsible person".

C. When the obligations arise: the period approaching insolvency

24. The focus of this [part] is upon the obligations that directors might have at some point before the commencement of insolvency proceedings. Although the obligations would arise before commencement of those proceedings, they would only be enforceable once those proceedings commenced and as a consequence of that commencement and would apply retroactively in much the same way as avoidance provisions (see discussion at part two, chap. II, paras 148-150, 152). The point at which the obligations arise is variously described as the "twilight zone", the "zone of insolvency" or the "vicinity of insolvency". Although a potentially imprecise concept, it is intended to describe circumstances in which there is a deterioration of the company's financial stability which, if it remains unaddressed, is likely to lead to insolvency and the commencement of insolvency proceedings.

25. If directors were to have additional obligations in the vicinity of insolvency, there are various possibilities for determining the time at which they might arise. One possibility may be the point at which an application for commencement of insolvency proceedings is made, arguably the possibility that creates the most certainty. If, however, the insolvency law provides for automatic commencement of proceedings following an application or the gap between application and commencement is very short (see recommendation 18), this option will have little effect.

26. Other possibilities focus on the obligations arising when a company is factually or technically insolvent, which under some laws may occur well before an application for commencement of insolvency proceedings is made. Taking the general approach of the Legislative Guide, insolvency might be said to have occurred in fact when a company becomes unable to pay its debts as and when they fall due, or when a company's liabilities exceed the value of its assets (recommendation 15). A further possibility is when insolvency is imminent, i.e. where the company will generally be unable to pay its debts as they mature (recommendation 15 (a)). These tests are increasingly used in insolvency laws as

commencement standards and in some States are used as the basis for imposing an obligation on directors to apply for commencement of insolvency proceedings within a specified period of time, usually rather short, after a company becomes insolvent. The rationale for imposing obligations on directors from the same point of time is to encourage them to act so as to avoid insolvency or to take steps to minimize its extent, including, where appropriate, by initiating formal insolvency proceedings.

27. A somewhat different approach examines the knowledge of a director at a point before commencement of insolvency proceedings when, for example, the director knew, or ought to have known, that the company was insolvent, was likely to become insolvent, that there was no reasonable prospect that the company could avoid having to commence insolvency proceedings or that the continuity of the business was threatened, but before an irreversible situation of financial distress was reached or insolvency became inevitable. One concern with that type of standard might be the difficulty of determining with certainty the exact point at which the requisite knowledge could be imputed. However, it could be argued that provided a company's accounts are accurate, the director should be able to deduce when the company is in difficulty and when it might be in danger of satisfying these insolvency tests or, alternatively, the director can be assumed to have known the information that would have been revealed had the company complied with its obligations to maintain proper books of account and to prepare annual accounts. Such a standard would require a wider consideration of circumstances and context, including, for example, examining the books of the company and its financial position in its entirety. It could involve looking at revenue flows and debts incurred and contingencies, including the ability to raise funds. Generally speaking, evidence of a temporary lack of liquidity would not be sufficient.

D. The nature of the obligations

28. While the underlying rationale for considering directors' obligations in the vicinity of insolvency may be similar in different jurisdictions, different approaches are taken to formulating those obligations and determining the standard to be met. In general, however, laws focus upon two aspects — imposing civil liability for causing insolvency or failing to take appropriate action in the vicinity of insolvency (which might include an obligation to commence insolvency proceedings) and avoiding actions taken by directors in the vicinity of insolvency.

(a) Obligation to commence insolvency proceedings

29. As noted in paragraph 26, some laws impose on directors an obligation to apply for commencement of insolvency proceedings, which would include reorganization or liquidation, within a specified period of time, usually fairly short such as three weeks, after the date on which the company became technically insolvent. Failure to do so may lead to personal liability, in full or in part, for any resulting losses incurred by the company and its creditors, and in some cases criminal liability, if the company continues to trade. This obligation is discussed in part two, chapter I, paras. 35-36. In those jurisdictions where it is necessary to prove that the directors' actions were fraudulent in order to pursue a breach of this obligation, the obligations have proven difficult to enforce. For that reason, some

jurisdictions have replaced or supplemented the “fraudulent trading” tests with a “wrongful trading” test, which provides that directors may be liable if they continue trading beyond the point where they knew or should have known that the company would be unable to avoid insolvent liquidation and have not taken proper steps to protect the interests of creditors.

(b) Civil liability

30. Civil liability imposed on a director in the vicinity of insolvency is typically based on responsibility for causing insolvency or failing to take appropriate action to monitor the financial situation of the company, avoid or ameliorate financial difficulty, minimize potential losses to creditors and avoid insolvency. Liability may arise when directors enter into transactions with a purpose other than ameliorating financial difficulty and preserving the value of the company (such as high-risk transactions or transactions that dispose of assets from the company’s estate resulting in a material increase in the exposure of the company without justification). It may also arise when the directors knew that insolvency could not be avoided or that the company could not meet its obligations as they fell due, but nonetheless continued to carry on business that involved, for example, obtaining goods and services on credit, without any prospect of payment and without disclosing the financial situation of the company to those creditors. Under some laws, it may arise when the directors fail to meet various obligations to report inability to make certain payments, such as tax and social security premiums, or to make a formal declaration of insolvency.

31. Except under those laws where directors are required to report or make formal declarations, directors generally might be expected in the circumstances outlined above to act reasonably and take adequate and appropriate steps to monitor the situation so as to remain informed and thus are able to act to minimize losses to the company and to creditors, to avoid actions that would aggravate the situation, and to take any reasonable action to avoid the company sliding into insolvency.

32. Adequate and appropriate steps might include, depending on the factual situation, some or all of the following:

(a) Directors could ensure proper accounts are being maintained and that they are up to date. If not, they should ensure the situation is remedied;

(b) Directors could ensure that they obtain accurate, relevant and timely information, in particular by informing themselves independently (and not relying solely on management advice) of the financial situation of the company, the extent of creditor pressure and any court or recovery actions taken by creditors or disputes with creditors;

(c) Regular board meetings could be convened to monitor the situation, with comprehensive minutes being kept of commercial decisions (including dissent) and the reasons for them, including, when relevant, the reasons for permitting the company to continue trading and why it is considered there is a reasonable prospect of avoiding insolvent liquidation. The steps to be taken might involve continuing to trade, as there may be circumstances in which it will be appropriate to do so even after the conclusion has been formed that liquidation cannot be avoided because, for example, the company owns assets that will achieve a much higher value if sold on a going concern basis. When the continuation of trading requires further or new

borrowing (when permitted under the insolvency law), the justification for obtaining it and thus incurring further liabilities should be recorded to ensure there is a paper trail justifying directors' actions if later required;

(d) Specialist advice or assistance, including specialist insolvency advice could be sought. While legal advice may be important for directors at this time, key questions relating to the financial position of the company are typically commercial rather than legal in nature. It is desirable that directors examine the company's financial position and assess the likely outcomes themselves, but also seek advice to ensure that any decisions taken could withstand objective and independent scrutiny;

(e) Early discussions with auditors could be held and, if necessary, an external audit prepared;

(f) Directors could consider the structure and functions of the business with a view to examining viability and reducing expenditure. The possibility of holding restructuring negotiations or commencing reorganization could be examined and a report prepared;

(g) Directors could ensure that they modify management practices to focus on a range of interested parties, which might include employees, creditors, suppliers, customers, governments, shareholders and the environment, in order to determine the appropriate action to take. In the period when insolvency becomes likely or hard to avoid, shifting the focus from maximizing value for shareholders to taking account of the interests of creditors provides an incentive for directors to minimize the harm to creditors, who will be the key stakeholders once insolvency proceedings commence, of excessively risky, reckless or grossly negligent conduct;

(h) Directors could ensure that the company does not take actions that would result in the loss of key employees or enter into transactions of the kind referred to in recommendation 87 that might later be avoided, such as transferring assets out of the company at an undervalue. Not all payments or transactions entered into at this time are necessarily suspect; payments to ensure the continuance of key supplies or services, for example, may not constitute a preference if the objective of the payment was the survival of the business. It is desirable that the reasons for making the payment be clearly recorded in case the transaction should later be questioned;

(i) A shareholders' meeting could be called, in the best interests of the company and without undue delay, if it appears from the balance sheet that a stipulated proportion of the share capital has eroded (generally applicable where the law includes capital maintenance requirements).

(c) Avoidance of transactions

33. Recommendation 87 deals with the avoidance of transactions at an undervalue, transactions conferring a preference and transactions intended to defeat, delay or hinder creditors (see part two, chapter II, paras. 170-185). That recommendation would apply to the avoidance of transactions entered into by the company in the vicinity of insolvency. In addition, certain actions of directors may be rendered unlawful once a company becomes insolvent under, for example, wrongful or fraudulent trading provisions, or as acts having worsened the economic situation of the company or having led to insolvency, such as entering into new borrowing or providing new guarantees without sufficient justification. In addition to avoidance

of the transaction, under some laws a director may be found personally liable for permitting the company to enter into such transactions. Liability would typically apply only in relation to directors who agreed to the transaction; those who expressly dissented and whose dissent was duly noted are likely to avoid responsibility.

E. The standard to be met

34. Laws dealing with the obligations of directors in the vicinity of insolvency typically judge the behaviour of directors in that period against a variety of standards to determine whether or not they have failed to meet the obligations.

35. Under some laws, the question of when a director or officer knew, or ought to have known, that the company was insolvent or was likely to become insolvent is judged against the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company. More may be expected of a director of a large company with sophisticated accounting systems and procedures. If the director's skills and experience exceed those required for the job, the judgement may be made against the skills and experience actually possessed, instead of against those required for the job. In contrast, inadequate skill and experience for the job may not excuse a director and they could be judged against the skill and experience required for the job.

36. Another approach requires that there be reasonable grounds for suspecting the company was insolvent or would become insolvent at the time of incurring the debt leading to insolvency. Reasonable grounds for suspecting insolvency requires more than mere speculation and the director must have an actual apprehension that there is insolvency. This is a lower threshold than expecting or knowing the company is insolvent. The standard is that of a director of ordinary competence who is capable of having a basic understanding of the company's financial status and the assessment is made on the basis of knowledge such a director could have had and not on information that might later become apparent. Empirical evidence from jurisdictions with such provisions suggests that when reviewing what occurred, often some time before the review occurs, courts have demonstrated a good deal of understanding of the position in which directors find themselves, carefully analysing the situation they confronted and demonstrating appreciation for the business issues encountered. Courts have been reluctant to second guess directors in their commercial dealings, indicating that it is not appropriate to assume that what in fact happened was always bound to happen or was necessarily apparent at the time.

37. A further approach focuses on mismanagement. This may require a causal link between the act of mismanagement and the debts arising from it or that the mismanagement is an important cause of the company's insolvency. This approach requires that a director be guilty of a fault in management when judged against the standards of a normally well-advised director. Examples of behaviour or actions that might give rise to liability include imprudence, incompetence, lack of attention, failure to act, engaging in transactions that were not at arm's length or of a commercial nature and improperly extending credit beyond the company's means,

while the most common failures have involved directors permitting the company to trade while manifestly insolvent and to have embarked on projects beyond its financial capacity and which were not in its best interests. Other examples of mismanagement include where directors have failed to undertake sufficient research into the financial soundness of business partners or other important factors before entering into contracts; where directors fail to provide sufficient information to enable the supervisory board to exercise supervision over management; where directors neglect the proper financial administration of the company; where they also neglect to take preventative measures against clearly foreseeable risks; and where bad personnel management by the directors leads to unrest and strikes. A finding of mismanagement does not require that a director have actively engaged in the management of the company; passive acquiescence may be sufficient.

F. Enforcement of the directors' obligations on commencement of insolvency proceedings

1. Defences

38. Under some laws, where directors do have obligations in the vicinity of insolvency, they may nevertheless rely on certain defences, such as the business judgement rule, to show that they have behaved reasonably. The business judgement rule establishes a presumption that directors have, for example, acted in good faith and had a rational belief that they acted in the best interests of the company, that they have had no material personal interest, and that they have properly informed themselves. A slightly different approach gives directors the benefit of the doubt on the assumption that business risks are an unavoidable and incidental part of management. As noted above, courts are reluctant to second guess a director who has satisfied the duties of care and loyalty, or to make decisions with the benefit of hindsight. It may also be the case that the business judgement rule provides a defence to some, but not all, of the duties specified under the law.

39. Under laws providing liability for wrongful trading, directors would need to show that they had taken appropriate steps to minimize any potential loss to the company's creditors once they had concluded that the company would have difficulty avoiding liquidation. Provided they can show that they took reasonable and objective business decisions based on accurate financial information and appropriate professional advice, they are likely to be able to rely on this defence even if those decisions turn out to have been commercially wrong.

40. The fact that a director has no knowledge of the company's affairs would generally not excuse failure to meet the obligations. Moreover, resignation in the vicinity of insolvency will not necessarily render a director immune from liability, as under some laws they may leave themselves open to the suggestion that the resignation was connected to the insolvency, that they had become aware or ought to have been aware of the impending insolvency and that they had failed to take reasonable steps to minimize losses to creditors and ameliorate the situation. Where a director has dissented to a decision that is subsequently being examined, that dissent typically would need to have been recorded in order for the director to rely on it. Where a director is at odds with fellow directors over the action to be taken, and despite taking reasonable steps to persuade them has failed to do so, it may be

appropriate for the director to resign, provided his or her efforts and advice are recorded.

2. Remedies

41. Many laws provide different remedies and combinations of remedies for breach of a director's obligations, including those under both civil and criminal law. In terms of civil law, the remedies focus on the provision of compensation for breach of the obligation and the damage caused, although the manner of measuring quantum varies. A few laws also provide for disqualification of a director from acting as a director or taking part in the running and management of a company.

(a) Damages and compensation

42. Where directors are found liable for actions or omissions in the vicinity of insolvency, the extent of the liability varies. Under some laws, directors may be liable for loss or damage suffered by individual creditors and employees, as well as the company itself, where the loss is a direct result of their acts or omissions. They may also be liable for payments that result in a reduction of the insolvency estate or that have resulted in the diminution of the company's assets. Some laws permit the court to adjust the level of liability to match the nature and seriousness of the mismanagement or other act leading to liability. In some cases, the liability may attach to specific directors, while in others, the liability of members of the board may be joint and several. Some laws provide that a director can be found liable for the difference between the value of the company's assets at the time it should have ceased trading and the time it actually ceased trading. An alternative formulation is the difference between the position of creditors and the company after the breach and their position if the breach had not taken place. A slightly different approach may allow recovery from the directors of the difference between available assets and the sum necessary for the company to meet its debts.

43. Some laws that include an obligation to apply for commencement of insolvency proceedings or to hold a shareholder meeting where there is a loss of capital also include provision for award of damages.

44. Where directors are found liable, the amount recovered may be specified as being for the benefit of the insolvency estate. Some laws provide that where there is an all-enterprise mortgage, any damages recovered are for the benefit of unsecured creditors (as noted in para. 12). It may be argued in such cases that compensation should not go to secured creditors as the cause of action does not arise until the commencement of insolvency proceedings and thus cannot be subject to a security interest created by the company prior to that point. Moreover, what is being sought is not the recovery of assets of the company, in contrast to an avoidance proceeding, but rather a contribution from directors to satisfy the claims of all creditors.

45. In addition to the above remedies, debts or obligations due from the company to directors may be deferred or subordinated and directors may be required to account for any property acquired or appropriated from the company or for any benefit obtained in the breach of his or her duties.

(b) Disqualification

46. A consequence provided for under a few laws when insolvency proceedings commence is disqualification of a director from being a director or from taking part in the running and management of a company. Such measures are typically regarded as protective measures designed to remove such directors from a position where they can cause further harm by continuing to perform management and director functions in the same or a different company. Under one law, disqualifications of between two and 15 years may be ordered where the individual is found to be “unfit” to act as a director. Factors relevant to that determination include: breach of a fiduciary duty; misapplication of moneys; making misleading financial and non-financial statements; and failure to keep proper accounts and make returns. It may also include acts relevant to the company’s insolvency, such as the person’s responsibility for the company entering into transactions liable to avoidance on grounds similar to those in recommendation 87 or the company continuing to trade when the director knew or should have known that it was insolvent. The various factors are generally considered cumulatively in determining unfitness in a specific case. In jurisdictions providing for disqualification, those found to be unfit often, though not always, have displayed a lack of commercial probity, gross negligence or serious incompetence.

47. Disqualification may sit alongside other remedies and sanctions as described above, or may be brought independently where the overall conduct of the individual as a director merits such a sanction.

3. Parties who may bring an action

48. A number of laws limit the right to bring an action against a director by reference to the nature of the action, the person with the power to pursue it and the time at which it is brought. Similar considerations also apply to the exercise of avoidance powers, addressed under recommendation 87 (see part two, chap. II, paras. 192-195).

49. A number of laws provide that when insolvency proceedings have commenced, it is only the insolvency representative who, having reviewed a director’s actions prior to insolvency, has the right to proceed against the director to seek, for example, to avoid a particular transaction or to recover compensation for the benefit of creditors in respect of any loss caused to the company. Wrongful trading laws, for example, may permit the insolvency representative to pursue directors for contributions to the insolvency estate where their behaviour has contributed to their company’s insolvency or constitutes an act of mismanagement. Some laws also permit such action to be brought by the public prosecutor or the court acting on its own motion. Under some laws in some circumstances, such as where the insolvency representative takes no action, creditors may have a derivative right (see part two, chap. II, paras. 192-195).

50. Under those laws imposing an obligation to commence insolvency proceedings, the company and creditors may have a claim for damages. Where payments have been made by directors contrary to a moratorium that accompanies the obligation to commence insolvency proceedings, the company itself may have a claim for damages. The company may also have a claim under laws that impose an obligation to hold a shareholder meeting if there is a loss of capital.

4. Funding of proceedings

51. A potential difficulty arising in those cases that permit the insolvency representative to bring an action relates to payment of their costs in the event that the action against the director is unsuccessful. The lack of available funding is often cited as a key reason for the relative paucity of cases pursuing the breach of such obligations. As is often the case with avoidance proceedings, insolvency representatives may be unwilling to expend assets of the insolvency estate to pursue litigation unless there is a very good chance of success (see part two, chap. II, para. 196). Different approaches to funding such proceedings might be adopted. Funding might be made available from the insolvency estate where there are sufficient assets to do so; the right to commence such a proceeding, or the expected proceeds of the proceeding if successful, might be assigned for value to a third party, including creditors; or the costs of commencing such a proceeding might be charged against any possible recovery. In some instances, claims against directors might be settled, avoiding the need to find funding. It is desirable that such proceedings be readily available and that appropriate means of providing funding are developed. It may be appropriate to consider the court in which such proceedings could be commenced; this issue is discussed above in part two, chapter. I, para. 19.

Draft recommendations 1-11

Purpose of legislative provisions

The purpose of provisions addressing the acts or omissions of those responsible for the management of the company (“directors”) when the business faces actual or imminent inability to meet its obligations as they fall due is:

- (a) To ensure that insolvency laws protect the legitimate interests of creditors from being harmed by the improper acts or omissions of directors at that time;
- (b) To provide proportionate remedies for improper acts or omissions of directors where those acts or omissions cause or increase the scale of the insolvency and consequent losses to creditors; and
- (c) To do so in a way that minimizes the risk that such provisions will:
 - (i) Adversely affect successful business reorganization;
 - (ii) Discourage persons from holding positions as directors particularly in businesses in financial difficulty; or
 - (iii) Prevent directors from exercising reasonable business judgement or taking reasonable commercial risk.

Contents of legislative provisions

1. The insolvency law should specify that when insolvency proceedings commence and it is established that the interests of creditors of the company have been harmed by the improper acts or omissions of a director, that director may be liable to the company for their conduct.

Parties that owe the obligations

2. The insolvency law should specify who owes the obligations. It may include any person defined under national law as fulfilling the role of a director [see the explanation of who may qualify as a director in paras. 20-22 above].

When the obligations arise

3. The insolvency law should specify that the obligations in recommendation 4 arise at the point at which a director knew, or ought reasonably to have known, that insolvency was likely or unavoidable.

The obligations

4. The insolvency law should specify that from the point in time referred to in recommendation 3, a director should have the following obligations:

- (a) To take reasonable steps to avoid insolvency or to minimize the extent of insolvency where insolvency is unavoidable;
- (b) To have due regard to the interests of creditors;
- (c) To ensure they are fully informed about the affairs of the company, including by seeking professional advice where appropriate; and
- (d) To ensure that assets of the company are protected and not commit or permit the company to enter into transactions of the type referred to in recommendation 87.

Liability

5. The insolvency law should provide remedies where a director has failed to fulfil the obligations in recommendation 4 and that failure has, either directly or indirectly, caused the insolvency or increased the losses to creditors.

6. The insolvency law should provide that a director who has exercised the due care and attention expected of a competent director would not be liable for failure to fulfil the obligations in recommendation 4.

Remedies

7. The insolvency law should provide that the liability of a director for breach of the obligations in recommendation 4 should be proportionate and be limited to the extent to which the breach, either personally or collectively, has caused losses to arise or increase. The remedies may include:

- (a) An appropriate contribution towards payment of the company's debts;
- (b) Compensation for the loss caused by any transaction covered by recommendation 87 that the company has entered into;
- (c) A limitation on the exercise of set-off with respect to any debts owed by the company to the director;
- (d) Where the director is a creditor, a requirement that the whole or any part of any debt owed by the company to the director should rank in priority after all other debts owed by the company.

Conduct of proceedings against a director

8. The insolvency law should specify that the insolvency representative has the principal responsibility to commence proceedings against a director for breach of the obligations in recommendation 4. The insolvency law may also permit any creditor to commence such proceedings with the agreement of the insolvency representative and, where the insolvency representative does not agree, the creditor may seek leave of the court to commence such proceedings.

Funding of proceedings against a director

9. The insolvency law should specify that the costs of such proceedings against a director be paid as administrative expenses.

10. The insolvency law may provide alternative approaches to address the pursuit and funding of such proceedings.

Additional measures

11. The insolvency law may include measures additional to the remedies set forth in recommendation 7 to deter behaviour of the kind leading to liability of a director under recommendation 5. Such measures may include restricting a director's ability to act as a director for a specified period of time.

Note to the Working Group

52. In the event that this material constitutes part four of the Legislative Guide, these recommendation would be numbered 255-266. Recommendations 8-10 are based on recommendations 93-95 of the Legislative Guide and are included on the basis that they are also appropriate to the conduct of proceedings to pursue a director for breach of the obligations applicable in the vicinity of insolvency.

**H. Proposal for Consideration of the Working Group by the
Delegation of the United States, submitted to the Working Group on
Insolvency Law at its forty-first session**

(A/CN.9/WG.V/WP.105)

[Original: English]

1. Our delegation supports the continuing progress of Working Group V in further clarifying the concepts that form the basis for the Model Law on Cross-Border Insolvency. We appreciate the Secretariat's continued work and efforts in regard to updating the existing Guide to Enactment as that process advances our work.
2. This document is submitted to address specific details that we believe merit further consideration by Working Group V. These proposals include further defining the term collective proceeding, the factual basis to assist in the determination of what constitutes the centre of main interests, and the need for ongoing annotations to update and supplement the Guide to Enactment.

I. Collective Proceedings

3. The Model Law provides for the recognition of a foreign representative in a foreign proceeding to be recognized in other jurisdictions with a minimum of difficulty provided the foreign representative can establish and meet the statutory predicates in order to obtain recognition. As a result the foreign representative upon recognition in a foreign main proceeding can obtain control over assets, halt litigation, obtain information, and obtain a variety of other remedies. In a foreign non-main proceeding, the foreign representative may obtain recognition and the relief granted will be discretionary by the court of the enacting State. Such powers should not be conferred on anyone other than the proper foreign representative of a foreign insolvency proceeding. This is designed to address legitimate proceedings and also designed to exclude proceedings that do not meet the qualification requirements under the Model Law. Careful elaboration of these elements is an important aid to those decision makers who must determine whether a given proceeding qualifies for recognition and relief.
4. One of the requisite elements is that the proceeding in question must be a "collective proceeding." The Model Law itself does not define what constitutes a collective proceeding. The courts that have attempted to interpret the phrase have had some difficulty in articulating a clear, predictable rule. Courts have also consulted the Guide to Enactment for insight with regard to how various phrases in the Model Law should be interpreted. Therefore, the addition to the Guide to Enactment of the definition of what constitutes a "collective proceeding" is necessary to provide clarity and transparency and to provide assistance to Courts addressing the issue.
5. Collective proceedings are to be distinguished from ordinary winding up proceedings of the sort often used to end the "life" of a legal entity outside the insolvency context. In such proceedings, creditors typically do not participate, though they may eventually receive distributions. Such proceeding may, under some

laws, become collective as a result of insolvency, requiring that creditors be given the opportunity to meaningfully participate.

6. Collective proceedings are also distinguished from proceedings that are essentially remedial in nature, such as receiverships instituted primarily for the benefit (and payment) of a particular constituency. Some receiverships may be sufficiently collective in nature (permitting active participation by the entire creditor body in both the liquidation or reorganization of the debtor, and the presentation and satisfaction of their claims) to qualify.

7. **When creditors are permitted to present claims, when they can have input into the manner in which assets are administered, when they can receive payment on a pro rata basis out of the assets being administered, then the proceeding has the qualities of a collective proceeding. The word “collective” contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action.**

8. Based on the foregoing our delegation recommends that the Guide to Enactment set forth a definition of collective proceedings, as follows:

A collective proceeding, for purposes of the Model Law, is one in which:

- (a) All creditors have the right (though not necessarily the obligation) to submit claims, with the expectation of pro rata payment of those claims, subject to statutory priorities;
- (b) All creditors have a right to meaningful participation in the manner in which assets are administered;
- (c) All creditors have sufficient notice in order to exercise these rights; and
- (d) All the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities, and further subject to local exclusions relating to the rights of secured creditors.

II. Factual Components in Order to Determine the Centre of Main Interests

9. The Model Law does not define the concept “centre of main interests.” The concept is critical to the operation of the Model Law in order to determine the situs of the main insolvency proceeding. As set out in the Guide to Enactment, the main proceeding is the point of central coordination for all other proceedings pending in other States, subject to appropriate local protections. A proceeding that is not taking place in a country that is the debtor’s centre of main interests should not enjoy the same level of deference, because the debtor’s ties with that country (and its insolvency regime) are more limited.

10. The Model Law provides a much simpler and streamlined process as opposed to the process that is often associated with the recognition of other kinds of judgments and proceedings internationally. In addition, the Model Law establishes a rebuttable presumption that the debtor’s centre of main interests is in the country in which the registered office is located. The assumption is that the country of

registration will also correspond to the location of the debtor's head office functions and principal operation. In the vast majority of cases, these assumptions will prove to be both valid and adequate.

11. In some cases, country of registration will not correspond to the debtor's centre of main interests. The debtor might, for example, be registered in one country, but have no other significant ties with that jurisdiction other than registration. Or its registration location might have been selected for some other advantage having little to do with its actual operations. In such cases, it may be necessary for a court in the enacting State to examine other factors in order to determine whether a given proceeding is taking place in a State that is, in fact, the debtor's centre of main interests. If it is not, then the court in the enacting State may accord the proceeding more limited relief, or (if there is also no establishment) no relief at all.

12. In all events, the debtor's centre of main interests needs to be both predictable and transparent. When there is reason to address the question, the resulting determination must result from a factual inquiry. Three factors stand out as particularly indicative in determining the debtor's centre of main interests. These factors are:

- (a) The location is readily ascertainable by creditors;**
- (b) The location is one in which the principal assets and operations of the debtor are found; and**
- (c) The location is where the management of the debtor takes place.**

13. In most cases, these primary factors will yield a ready answer. For those cases in which they do not, a court may take into consideration a variety of other additional factors, including the location of the debtor's books and records, the location where financing was organized or authorized, the location from which the cash management system is run, the location of the principal bank, the location of employees, the location in which commercial policy is determined, the site of controlling law governing the main contracts of the company, the location from which purchasing or sales staff, accounts payable and computer systems are managed, the location where reorganization is being conducted, the location whose law will apply to most disputes, the location in which the debtor is subject to supervision or regulation, and the location whose law governs the preparation and auditing of accounts.

III. Proposal to Supplement Annotations

14. The ultimate focus, however, is in arriving at a supportable determination whether the proceeding is originating from a country that is, in fact, the debtor's true centre of main interests. The first three factors should be considered as primary, with resort to other considerations only when the evidence with regard to the primary factors fails to yield a clear result.

15. There is a growing body of decisions interpreting and applying the various provisions of the Model Law. While many of these decisions are accessible by way of various private research services many more are not. In addition, for one reason

or another, private research services are not available to many jurists and insolvency practitioners.

16. The delegation of the United States believes that greater uniformity and predictability in the application of the Model Law is likely to result if users of the law are able to readily access decisions in a single location, maintained by UNCITRAL itself. Accordingly, we recommend that an online annotation system be set up and maintained, as a supplement to the Guide to Enactment. The annotations should be organized, transparent and user-friendly and should refer to specific provisions of the Model Law being addressed in the reported decision. In addition, the annotations would contain hyperlinks to the underlying written decisions.

17. The annotations should be compatible with other systems and publications of UNCITRAL, including cases reported under the CLOUT system and to the extent possible should be formatted in a way to provide consistency.

IV. Conclusion

18. The delegation of the United States appreciates the opportunity to present these concepts to the Working Group.

IV. ONLINE DISPUTE RESOLUTION

A. Report of Working Group on Online Dispute Resolution on the work of its twenty-fourth session (Vienna, 14-18 November 2011)

(A/CN.9/739)

[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 relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.¹ It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission took note of a concern raised that, given that online dispute resolution was a somewhat novel subject for UNCITRAL and that it related at least in part to transactions involving consumers, the Working Group should adopt a prudent approach in its

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

deliberations, bearing in mind the Commission's direction at its forty-third session that the Working Group's work should be carefully designed not to affect the rights of consumers.² Further, the view was expressed that the Working Group should bear in mind the need to conduct its work in the most efficient manner, which included prioritizing its tasks and reporting back with a realistic time frame for their completion.

3. At that session, the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer (C2C) transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided 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 next session.

4. At its twenty-second session (Vienna, 13-17 December 2010) and twenty-third session (New York, 23-27 May 2011), the Working Group commenced its work on the preparation of legal standards on online dispute resolution for cross-border electronic transactions, in particular, procedural rules on online dispute resolution for cross-border electronic transactions.

5. 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.III/WP.108, paragraphs 5-14.

II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-fourth session in Vienna, from 14 to 18 November 2011. The session was attended by representatives of the following States members of the Working Group: Austria, Bolivia, Canada, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, India, Israel, Italy, Japan, Jordan, Kenya, Malaysia, Mexico, Nigeria, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America, Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Angola, Croatia, Denmark, Dominican Republic, Finland, Hungary, Indonesia, Netherlands, Romania, Slovakia, Sudan, Syrian Arab Republic.

8. The session was also attended by observers from the European Union.

9. The session was also attended by observers from the following international organizations:

(a) *Intergovernmental organizations*: Islamic Development Bank (IDB), Secretaría de Integración Económica Centroamericana (Sieca);

² Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 256; and *ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 215.

(b) *International non-governmental organizations*: Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRDP), Chartered Institute Of Arbitrators (CIARB), Construction Industry Arbitration Council, India (CIAC), Electronic Consumer Dispute Resolution (ECODIR), European Law Students' Association (ELSA), Institute of Commercial Law (Penn State Dickinson School of Law), Institute of Law and Technology (Masaryk University), Internet Bar Organization (IBO), Instituto Latinoamericano de Comercio Electrónico (ILCE), International Arbitral Centre Of the Austrian Federal Economic Chamber (VIAC), Moot Alumni Association (MAA), New York State Bar Association (NYSBA).

10. The Working Group elected the following officers:

Chairman: Mr. Soo-geun OH (Republic of Korea)

Rapporteur: Mr. Walid Nabil TAHA (Egypt)

11. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.108);

(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.109); and

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework (A/CN.9/WG.III/WP.110).

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 transactions: draft procedural rules.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group engaged in discussions on online dispute resolution for cross-border electronic transactions: draft procedural rules on the basis of documents A/CN.9/WG.III/WP.109 and A/CN.9/WG.III/WP.110. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Online dispute resolution for cross-border electronic transactions: draft procedural rules

A. General remarks (A/CN.9/WG.III/WP.109, paras. 5-6)

14. At the outset, it was noted that the work on procedural rules for online dispute resolution was not a stand-alone process and that designing one part of the online dispute resolution (ODR) framework required taking into account other parts since they were all interrelated and must operate together. In that regard, the Working Group recalled its decision to first work on draft generic procedural rules for ODR (A/CN.9/716, para. 115) and then to consider other issues, such as applicable law and enforcement of awards, which could affect the final form of the ODR procedural rules (“the Rules”). Several delegations expressed the view that the generic procedural rules for ODR could be adopted on a provisional basis at the next Commission session.

15. The Working Group recalled the decision by the Commission that while the Working Group should be free to interpret that its mandate as covering C2C transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation.³ The Working Group noted that it was tasked to consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at the next session.

B. Notes on draft procedural rules (A/CN.9/WG.III/WP.109, paras. 5-86)

1. Introductory rules (A/CN.9/WG.III/WP.109, preamble, draft articles 1-3)

Preamble

Paragraph (1)

16. The Working Group discussed whether the term “low-value” should be defined. It was suggested to include, in the additional documents to the Rules, a guideline on how that term might be defined or a specific monetary value which might range from 1,500 euros to 5,000 euros. In that regard, concerns were raised that “low-value” was a subjective term which depended on factors such as inflation, exchange rates and regional economic and commercial differences. Additionally, it was mentioned that the Rules or any additional document should not include a predetermined monetary value, as that could become outdated and require revision, which would be difficult. It was also noted that the monetary value of a dispute might increase during the course of the dispute resolution proceeding and thereby exceed the set limit. In response to the suggestions, it was pointed out that, based on the experience of Concilia.net, parties tended to limit themselves to presenting claims that were generally less than 2,000 euros. After discussion, it was agreed that the term “low-value” should not be defined in the Rules but should be dealt with in

³ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

a commentary or other additional document for the purpose of illustrating one or more examples of low-value cases.

17. It was agreed to delete the phrase “*in whole or in part*” in the draft Preamble and to include it elsewhere in the Rules.

18. It was suggested that the exclusion of types of claims such as bodily harm, consequential damages and debt collection should be identified in an additional document, and not in the draft Preamble.

19. A further suggestion was made to include in the draft Preamble that the Rules were intended to apply to disputes relating to the “sale of goods and performance of services”.

20. As to the question of defining “cross-border”, the Working Group recalled its mandate given by the Commission to undertake work in the field of ODR relating to cross-border e-commerce transactions and further recalled its previous deliberation (A/CN.9/721, paras. 27-30). After discussion, it was agreed that the Rules would not contain a definition of the term “cross-border”.

Paragraph (2)

21. The Working Group considered whether the separate documents should be attached to the Rules as annexes or be set out separately elsewhere (A/CN.9/721, para. 53). After discussion, it was agreed to remove the square brackets from the phrase “*which are attached to the Rules as Annexes and form part of the Rules*” and to proceed with deliberation as to the contents of the documents enumerated in paragraph (2). It was noted that the list of documents was not exhaustive and that additional documents might be added.

22. The Working Group agreed to insert the words “*and minimum requirements*” between the words “*Guidelines*” and “*for*” in paragraph (a).

23. Additionally, it was agreed to delete paragraph (b) on the grounds that ODR providers would be able to develop their own Supplemental Rules provided they were consistent with the Rules.

Paragraph (3)

24. It was proposed to modify the paragraph to read as follows: “*Any separate and supplemental [rules] [documents] must conform to the Rules.*”

Draft article 1 (Scope of application)

25. It was noted that the concept of clear and adequate notice to the parties required more precise definition (A/CN.9/721, para. 57) and it was proposed to modify the draft article to read as follows: “*Where the parties have agreed to submit to dispute resolution under these Rules as one of the terms of the online dispute resolution or before the dispute arises, the Rules apply only if the [buyer] [party] was given clear and adequate notice of the agreement to arbitrate. Such notice needs to provide for a consent of the [buyer] [party] to the ODR process and Rules separate from the underlying electronic commerce transaction (e.g., a separate OK click consenting to ODR) in order to ensure that the [buyer] [party] knowingly agreed to arbitrate the dispute under the rules.*”

26. It was further proposed to include a new paragraph in draft article 1: “*As a condition to using the Rules the seller must list its contact information.*” (A/CN.9/721, para. 58).

27. Those proposals generated debate on the issue of the effect in various jurisdictions of pre-dispute agreements to arbitrate involving consumers, and the issue of enforcement of awards involving consumers generally.

28. A number of views were expressed: that in some jurisdictions such agreements were not binding upon consumers due to their regulations or public policy; conversely, that in many jurisdictions that was not the case; that the intent of the Working Group was to create a remedy for consumers where none currently existed; that traditional dispute resolution mechanisms were too costly and time-consuming for these types of low-value disputes; that Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“New York Convention”) required States parties to recognize such agreements; that the application of said Article II was dependent upon what was capable of arbitration; that a law permitting a consumer to pursue other forms of redress notwithstanding such an agreement might not be enforceable in the State of the vendor; that inclusion of the bracketed text in draft article 1 could discourage vendors from using the Rules.

29. After discussion, it was agreed that the issues so raised were important ones requiring additional consultation before further consideration at a future meeting. It was agreed that the bracketed text in draft article 1 and both of the provisions proposed above should remain in square brackets pending further deliberation. It was suggested that the issue of the scope of the agreement be addressed in that context and whether the Secretariat could propose different options for provisions on the agreement covering either all or separate stages of the proceedings.

Draft article 2 (Definitions)

Paragraph (1) “claimant”

30. As to the issue whether the claimant might be either the buyer or the seller, it was mentioned that the Rules were intended to apply to B2B as well as B2C, in which case it would be open to both parties to the transaction to bring a claim. After discussion, it was decided to retain the current text.

Paragraph (2) “communication”

31. The Working Group decided to retain the current wording of the paragraph.

Paragraph (3) “electronic communication”

32. The Working Group agreed that option 1 “electronic communication” provided a broader definition and that that definition was in line with UNCITRAL texts on electronic commerce. At the same time, it was mentioned that the concept of digitized communication was important in view of technological progress and it was agreed that the definition of electronic communication be expanded to include elements from option 2 on digitized communications.

33. The Working Group agreed to delete the words “*telegram, telex*” and to delete the square brackets from the phrase “*short message services (SMS), web-conferences, online chats, Internet forums, or microblogging*”.

Paragraph (4) “neutral” and paragraph (5) “respondent”

34. The Working Group accepted the definitions in draft article 2, paragraph (4) (“neutral”) and draft article 2, paragraph (5) (“respondent”) without change.

Paragraph (6) “ODR”

35. As to the definition of “ODR”, following discussion it was decided to amend the provision to read as follows: “6. ‘ODR’ means online dispute resolution which is a system for dispute resolution through an information technology-based platform and facilitated through the use of electronic communications and other information technology.”

Paragraph (7) “ODR platform”

36. Following discussion it was agreed to modify the definition of “ODR platform” to read as follows: “7. ‘ODR platform’ means one or more than one online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.”

37. It was further agreed that the considerations raised in paragraphs 26 and 27 of A/CN.9/WG.III/WP.109 concerning definition of “ODR platform” had been dealt with by the agreed re-wording of draft article 2, paragraph (7).

Paragraph (8) “ODR provider”

38. Proposals were made to amend the definition of “ODR provider”, including by replacing “and” with “and/or” in the phrase “that administers ODR proceedings and provides an ODR platform”. Further consideration of those proposals was deferred until after deliberations on draft article 3, paragraph (1), on communications, as it was said that the definition of ODR provider could change depending on the stage at which the Rules contemplated the first involvement of the ODR provider in the proceedings.

39. It was decided to retain the bracketed text [*electronic communications*] and to remove the bracketed text [*digitized communications*].

40. Concerns were raised that definitions of ODR provider and ODR platform needed to be clear so as to differentiate the obligations referred to them in the Rules. It was observed that the definition of ODR provider encompassed the roles of ODR administrator and ODR platform provider. It was proposed that these roles might need to be defined separately.

Draft article 3 (Communications)

Paragraph (1)

41. The Working Group considered a suggestion to amend draft article 3, paragraph (1) by adding a new second sentence as follows: “Where applicable, prior

to the selection of the ODR provider, all communications shall be addressed in the manner and at the address set forth in the transaction agreement between the parties". This was said to address the situation where an ODR provider had not yet been sought, as no notice had yet been communicated pursuant to draft article 4, yet the parties wished to avail themselves of an ODR platform in order to facilitate their negotiations.

42. In response it was suggested that: it was difficult to contemplate a situation in which the use of an ODR platform would be sought by the parties before an ODR provider had been engaged; that the ODR provider should be designated and involved from the very beginning and should be made aware of all communications between the parties so as to better administer the process; that involvement of the ODR provider from the earliest stage would allow for the provision to the parties of any necessary translation function and would prevent improper conduct by one party, such as denying that any communications had been received from the other party.

43. It was observed that it was an open question as to when the Rules would take effect, namely whether they would apply before the communication of a notice under draft article 4. If the Rules did not apply prior to this point, it was said that the stage of negotiations between the parties would be left out of the purview of the Rules. That raised the additional question of whether the contents of any "without prejudice" negotiations between the parties could be revealed to the neutral eventually appointed to deal with the dispute.

44. One solution suggested was to withdraw the proposed amendment to draft article 3, paragraph (1) and, recalling the discussion of draft article 2, paragraph (8), to amend the latter article by replacing "and" with "and/or" in the phrase "that administers ODR proceedings *and* provides an ODR platform". This raised the question of whether the definition of "ODR provider" should include an operator of an ODR platform.

45. Another proposal was that the Rules contain two new definitions, one for "ODR platform provider" and one for "ODR service provider", the former being applicable to the stage at which the parties were using the ODR platform for negotiation purposes, the latter to denote a provider who is administering the ODR proceedings, whether on its own platform or using another platform. In support of that proposal, it was pointed out that there were cases where the parties might avail themselves of the platform but not require the services of a provider in order to resolve their dispute. The example of eBay was given in that regard.

46. Further proposals were made:

(a) To modify the definition of ODR provider to read as follows: "*ODR provider means an ODR provider which is an entity that administers ODR proceedings or provides an ODR platform, or both, for the parties to resolve their disputes in accordance with the Rules*";

(b) To retain the current wording as it was broad enough to cover various designs of the ODR process and combinations thereof. It was pointed out that the current wording accommodated a negotiation phase that was monitored by the ODR provider and of which the ODR provider kept a record of communications between

the parties during the negotiation phase, thus providing an incentive for the parties to reach a settlement.

47. It was noted that the definition of ODR provider should be flexible, simple and clear. It was further noted that the Working Group should bear in mind the effect of any change in the definition of ODR provider on the use of that term as it occurred subsequently in the Rules, in order to avoid any confusion.

48. After discussion, it was agreed to put draft article 2, paragraph (8) in square brackets.

49. A further proposal was to amend the paragraph to read as follows: “*All communications in the course of ODR proceeding shall be transmitted by electronic means to the ODR provider or through the ODR platform to be re-transmitted to the ODR provider*”.

50. After discussion, it was agreed to retain draft article 3, paragraph (1).

Paragraphs (2) and (3)

51. It was agreed to remove the words “*or ODR platform*” from both paragraphs (2) and (3).

Paragraph (4)

52. It was proposed to modify the current draft to read as follows: “*The time of the receipt of an electronic communication under the Rules is the time when the ODR provider sends the communication to the intended addressee or when the ODR provider notifies the intended addressee that the communication is capable of being retrieved by the addressee at the ODR platform.*” Further, it was proposed to add the words “*whichever is later*” at the end of the sentence to provide flexibility.

53. Another proposal was to retain the current wording as it was clear and consistent with article 10 of United Nations Convention on the Use of Electronic Communications in International Contracts (“Electronic Communications Convention”). In response, it was pointed out that the Convention applied to businesses while the scope of the Rules included B2B and B2C disputes.

54. After discussion, the Working Group agreed to retain paragraph (4) and to revisit the paragraph at a future session.

Paragraph (5)

55. It was proposed to include paragraph (5) in the guidelines and minimum requirements for ODR providers or any other additional document to the Rules. After discussion, it was agreed to retain the current words in the Rules.

Paragraph (6)

56. It was proposed to insert “*without delay*” after the word “*neutral*”.

57. It was mentioned that the guidelines and minimum requirements for ODR providers or any other additional document to the Rules could include issues related to: automatic function to confirm receipt of electronic communications; capacity of ODR platform to receive electronic communications that were massive in quantity;

the time required to receive and to display those electronic communications; and interruptions of electronic communications beyond the control of the parties.

58. After discussion, it was agreed to put the words “*without delay*” in square brackets.

2. Commencement (A/CN.9/WG.III/WP.109, draft article 4)

Draft article 4 (Commencement)

Paragraph (1)

59. It was proposed to delete the words “*as far as possible*” and to insert the following phrase at the end of the paragraph: “*If there is no evidence, then according to Annex A, detailed explanations should be appended.*”

60. Another suggestion was to retain the current wording as it provided flexibility and did not obligate the parties to provide all evidence, but rather served as a guideline.

61. It was suggested that the requirement of notice identified in annex A was not necessary for the negotiation stage and that such requirements became relevant only in the facilitated settlement and arbitration stages. It was further suggested that annex A could be simplified to require the submission of only essential information that would facilitate negotiation between the parties.

62. After discussion, it was agreed to retain paragraph (1).

Paragraph (2)

63. It was agreed that use of the terms “*promptly*” and “*without delay*” should be consistent throughout the Rules.

Paragraph (3)

64. It was agreed to modify the time period for the preparation of the response to seven calendar days. It was further agreed to retain the word “calendar”. The Working Group requested the Secretariat to look into the definition of calendar days to ensure consistency with other UNCITRAL texts.

Paragraph (4)

65. The Working Group considered the two square-bracketed options offered in paragraph (4). After discussion, it was agreed to remove the brackets from and retain the first option, namely the words “*the ODR provider at the ODR platform*” and delete the words “*the respondent*”.

Annex A

Annex A (a) to (d)

66. It was agreed to retain the paragraphs.

Annex A (e)

67. It was agreed to remove the square brackets from the concluding words of paragraph (e).

Annex A (f)

68. With regard to paragraph (f), a proposal was made to delete option 2 and form a new paragraph combining elements of options 1 and 3, as follows: “*Statement that the claimant agrees to participate in ODR proceedings or, if applicable, statement that the parties have an agreement to resort to ODR proceedings in case any dispute arises between them.*”

69. In response, a number of issues were raised surrounding the necessity of including a negotiation stage in the ODR proceedings, including: that the negotiation stage was crucial to the ODR process as it ensured that the parties were put in touch with one another, and that it was of little cost to the parties; that many successful existing ODR systems included a mandatory negotiation stage; that that stage acted as a “funnel” for the system by which many cases were resolved thus greatly reducing the number of cases having to move on to the stages of facilitated settlement or decision by a neutral; that keeping the stage promoted meaningful negotiation since traders may often ignore e-mails from buyers but were more likely to react to a message from or through an ODR provider indicating that there was a complaint or dispute from a buyer; that there should be no option for parties to opt out of or bypass the negotiation stage (so-called “cherry-picking”); that permitting cherry-picking would require the formulation of rules on which party could make the choice and at what point in time, as well as whether an ODR provider could accommodate such a choice, all of which would add unnecessary complexity to the process.

70. Other views were: that parties should be offered the option to bypass the negotiation stage and go directly to other stages in order to save time and expense; that the stage was superfluous to parties that had already attempted to negotiate a resolution and failed; that some jurisdictions did not regard pre-dispute agreements to arbitrate as binding upon consumers and so the provision as worded would not be acceptable in such jurisdictions.

71. One proposal, citing the importance of identifying the “entry point” into the system, was that there be a presumption that the negotiation stage would apply unless a party could show that bona fide attempts at negotiation between the parties had been tried and failed, in which case the party could elect to proceed to a subsequent ODR stage.

72. After discussion, it was decided to delete option 2 and combine options 1 and 3 as proposed, while placing square brackets around the words “*or, if applicable, statement that the parties have an agreement to resort to ODR proceedings in case any dispute arises between them.*” It was observed that, since discussion of that issue was related to the square-bracketed text in draft article 1, namely “*subject to the right of the parties to pursue other forms of redress*”, the matter would come up for discussion at a later stage.

Annex A (g)

73. Paragraph (g) was the subject of considerable discussion. It was pointed out that the paragraph was intended to prevent multiplicity of proceedings and to ensure that the ODR process was an exclusive one with regard to any particular dispute; that such exclusivity *inter alia* would ensure that businesses were encouraged to participate in the process knowing that they would not be subject to other proceedings in respect of the same matter; that ODR was intended to provide an avenue of redress for consumers — in low-value cross-border transactions — where no such remedy existed at present through national courts; that other successful ODR systems had such a provision; that since ODR begins with an agreement between the parties to participate in it, they have already signalled their willingness to be bound by its results; that the exclusivity principle in paragraph (g) was significant enough that it should be elevated to the status of a separate article in the Rules rather than being a statement in an annex.

74. Other observations regarding paragraph (g) included: that a claimant should be able to avail himself of ODR notwithstanding that he has commenced a proceeding in the courts (in order, for instance, not to exceed a limitation period) since the court proceeding might be delayed and ODR could offer a quicker solution; that the legal proceedings should in that case be suspended during the online settlement proceedings; that a consumer having invoked a chargeback might have to wait for that remedy to take effect and in the meantime should not be prevented from accessing ODR.

75. It was pointed out that paragraph (g) as worded might preclude a claimant from using ODR where he was pursuing a claim in the courts for a matter which was related to the transaction in issue (such as bodily injury resulting from a product) but which itself was not receivable under the Rules, and that that would be an unintended prejudicial result of the paragraph.

76. After discussion, it was agreed to accept a proposal that paragraph (g) be retained in its present form, but with inclusion of the words “*specific dispute in relation to the*” between the words “the” and “transaction”, to make it clear that exclusivity applied only to the specific claim at issue in the ODR proceedings.

Annex A (h)

77. Following a suggestion to delete paragraph (h) as superfluous, on the grounds that the ODR provider would already know whether or not a claimant had paid a filing fee, it was agreed to delete the paragraph.

Annex A (i)

78. Discussion on paragraph (i) concerned the fact that it was necessary to ascertain the location of the parties to ensure the transaction in issue was in fact of a cross-border nature and thus within the scope of the Rules.

79. It was suggested that the term “location” might be confusing in languages other than English, and that terms such as “country of residence” (for individuals) and “place of business” (to maintain conformity with the terminology used in article 6 of the Electronic Communications Convention) might be inserted in the

paragraph to clarify the meaning of “location”. In response, it was also suggested that the term “location” should be consistent with the other UNCITRAL texts.

80. After discussion, it was agreed to retain paragraph (i).

Annex B

Annex B (a)

81. It was proposed to include the phrase “*where the Respondent is the seller*” at the beginning of the paragraph. In support of that proposal, it was pointed out that personally identifiable information was already available to actual sellers at the time of the transaction and that the collection of such information by an imposter posing as a seller could put a buyer at risk for fraud and identity theft. In response, concerns were voiced: that in some transactions, it was not required to provide such information; that the identification of parties was essential under the Rules — for instance, for the neutral to know the identity of the parties to confirm his impartiality and neutrality; and that the signature of the respondent as mentioned in annex B, paragraph (e) could not be verified if the identity of the respondent was not disclosed.

82. Another proposal was to retain the wording as is, since the scope of the Rules was not limited to the relationship between the buyer and the seller and that the Rules should accommodate various types of transactions including those that might not require personally identifiable information to be disclosed. Further, it was mentioned that the current wording accommodated situations where the parties had more than one electronic address and where the registered name of a company might differ from the name under which it traded.

83. After discussion, it was agreed to retain the paragraph as is.

Annex B (b) and (c)

84. The Working Group decided to retain the paragraphs.

Annex B (d)

85. One proposal was to modify the paragraph to read as follows: “*statement that the respondent agrees, or where applicable has agreed (for example in a pre-dispute arbitration agreement) to participate in ODR proceedings*”.

86. In light of the deliberation regarding the mirror provision in annex A, paragraph (f), it was agreed to put annex B, paragraph (d) in square brackets.

Annex B (e)

87. As with annex A, paragraph (e), it was agreed to insert the phrase “*including any other identification and authentication methods*” at the end of the paragraph. Having heard a suggestion that identification and authentication in ODR proceedings should be consistent with the work undertaken by Working Group IV on electronic commerce, it was noted that that topic could be discussed at a later stage. It was agreed to rearrange the order of items in annexes A and B so that the provisions on signature would be last.

Annex B (f)

88. As with annex A, paragraph (g) and noting the concerns raised (see above, paras. 73-76), it was agreed to accept the proposal to insert the words “*specific dispute in relation to the*” between the words “the” and “transaction”.

Annex B (g)

89. The Working Group reiterated its discussion on the mirror provision in annex A, paragraph (i).

90. The Working Group engaged in a discussion on the issue of counterclaims. It was questioned whether a provision on counterclaims could be included in the Rules given the insertion of the words “*specific dispute in relation to the transaction*” in annex A, paragraph (g) and annex B, paragraph (f), namely that a counterclaim might raise a different issue.

91. It was suggested to include the provision on counterclaims proposed in paragraph 50 of A/CN.9/WG.III/WP.109. It was pointed out that a counterclaim could be a useful element in the negotiation stage.

92. Another suggestion was to replace the last bracketed sentence [*The counterclaim shall be decided by the neutral appointed to decide the first claim.*] with [*The counterclaims shall be dealt with in the ODR proceeding together with the first claim.*]. This was said to respond to the question as to who decided whether the counterclaim fell within the ambit of the initial claim. A further suggestion was to include in the Rules a definition of counterclaim. Views were expressed on whether a definition of counterclaim should be included in the Rules or whether it should be up to the parties to define. Concerns were raised that the impact of counterclaims on the proceedings needed further deliberation. Concerns were also raised that in a speedy process involving B2B and B2C claims that the parties should be able to resolve all matters in one proceeding.

93. After discussion, it was agreed to include the suggested provision on counterclaims in the Rules as draft article 4, paragraph (5). It was agreed to modify the bracketed text as proposed and to extend the five calendar days therein to seven. Further, the Working Group requested the Secretariat to prepare a definition of counterclaim and suggest where it might be included in the Rules.

3. Negotiation (A/CN.9/WG.III/WP.109, draft article 5)

94. At the outset, the Working Group recalled several working assumptions related to negotiation: that direct negotiation by the parties through the ODR platform was one stage of ODR proceedings; that the ODR proceeding was composed of three phases — negotiation, facilitated settlement and arbitration — while keeping in mind that compression to a two-phase stage could be considered; that a party could refuse negotiation and request to move to the next stage; and that there were different types of negotiation including automated and assisted negotiation.

95. As to the issue of the commencement of the negotiation phase, the Working Group recalled its discussion on draft article 4, paragraph (4) (see above, para. 65). After discussion, there was broad support that commencement of ODR proceedings encompassed the commencement of negotiation, and in this respect it was recognized that ODR proceedings are one package.

Draft article 5 (Negotiation)*Paragraph (1)*

96. The Working Group considered the various options in bracketed text in the paragraph and agreed that the phrase “*if settlement is reached*” was preferable to begin the paragraph, and that the paragraph should provide for automatic termination of the ODR proceeding in that event. Following a suggestion to incorporate those two elements and to simplify the language of the paragraph, it was agreed to amend the paragraph as follows: “*If settlement is reached, then the ODR proceeding is automatically terminated.*”

Paragraph (2)

97. After discussion, it was agreed to retain the second bracketed text, requiring the parties to settle their dispute by negotiations within a period of ten days, following which the case should move automatically to the next stage, with all references to the appointment of a neutral/arbitrator removed from that paragraph. The Secretariat was asked to redraft the paragraph accordingly.

Paragraph (3)

98. Concerns were expressed that the respondent might not in fact have received notice of the proceedings and thus would not be aware that the time period was running, and that some measure was needed to deal with this potential prejudice to the respondent.

99. It was further suggested that such prejudice could extend to a consumer, in any case where a consumer was the respondent. In response, it was pointed out that in the vast majority of cases consumers would be claimants and not respondents, and so this risk was rather minimal. A further response was that since both parties were participating in ODR by agreement and that a provision had been proposed to require a seller to provide its contact details as a precondition to participating in the ODR system (see above, para. 81), which details should be presumed to be correct, then the risk of such prejudice was minimal.

100. It was also pointed out that: there was a presumption of receipt of communications in draft article 3, paragraph (4) based upon the Article 10 (2) of the Electronic Communications Convention; that where the negotiation phase was fully automated then nothing could be done within that stage to address an issue of potential non-receipt of a notice. It was further pointed out that the time of deemed receipt of the notice by the respondent was dealt with in draft article 3, paragraph (4).

101. There was broad support for the proposition that issues relating to possible non-receipt of communications by a respondent should be dealt with by the neutral, who would be present in the facilitated settlement stage and who had wide powers under draft article 7. The Secretariat was asked to prepare necessary amendments to the language of draft article 7 to enable the neutral to address such issues.

102. There was broad agreement that option 1 was preferable, with the deadline for response being increased to seven from five calendar days, and that option 2 should be deleted. A concern was expressed that, within an overall period for negotiations

of ten days, allowing up to seven days for the filing of a response would leave too little time for negotiation between the parties.

103. There was a proposal to insert the words “*unless one party has chosen otherwise*” between “stage,” and “at which point ...”, in order to reflect the possibility to move past the facilitated settlement stage and directly to arbitration. Another proposal was that, where the respondent was presumed to have refused to negotiate, then the case should go automatically to the facilitated settlement stage. After discussion, the Working Group agreed to a working assumption that if the parties failed to reach a settlement at the negotiation stage, then the case would proceed automatically to the next stage.

Paragraph (4)

104. There was strong support for conducting the ODR procedure promptly and the extension of time limits for the negotiation phase and steps within that phase should be allowed only if both parties agreed to do so.

105. Views were expressed on the ultimate time limit for any extension: that a limit was necessary to prevent one party prolonging the negotiation period in bad faith; that there should be only one such extension allowed and for a fixed duration.

106. After discussion, it was agreed that the parties should be permitted, where they both expressly agree, to a one-time extension of the time limit on negotiations, such extension to be for a period not exceeding ten days beyond the original time limit.

107. A separate question was raised as to the consequences of a settlement being reached and proceedings then being automatically terminated, as called for in draft article 5, paragraph (1). It was pointed out that such a settlement might not be honoured by one of the parties.

108. Suggestions to address that problem included: adding a rule allowing a party to ask that a neutral issue the settlement in the form of an award or decision; allowing the aggrieved party to recommence ODR proceedings to seek an award or decision based on the terms of the settlement, which a neutral would have the power to grant; providing for an administrative application by a party to the ODR provider to have the settlement drawn up and issued as an award or decision.

109. A further proposal was for a simple and clear provision that, in the event parties failed to implement the settlement agreed at the negotiation stage, a party could relaunch ODR proceedings with a view to seeking a binding award based thereon.

110. After discussion, the Working Group requested the Secretariat to draft a provision reflecting the discussion on this issue, for consideration at a future meeting, as well as a provision on how parties might accelerate through the negotiation phase and move to the next phase.

4. Neutral (A/CN.9/WG.III/WP.109, draft articles 6-7)

Draft article 6 (Appointment of neutral)

Paragraph (1)

111. It was proposed to retain the bracketed text [*through the ODR platform*], and further to delete the bracketed text [*automatically*] since the ODR platform would by its nature appoint the neutral automatically. After discussion, the Working Group agreed to retain the first bracketed text and delete the second bracketed text.

Paragraph (2)

112. The Working Group agreed to retain the paragraph.

Paragraph (3)

113. The Working Group deliberated whether communications exchanged at the negotiation stage should be made available to the neutral. It was mentioned that such a practice was in accordance with the purpose of the Rules to provide a swift and efficient procedure.

114. Another suggestion was to provide parties with the option to object to such information going to the neutral, and thus to retain the bracketed text at the end of paragraph (3). In response, it was pointed out that a balance had to be maintained between due process and efficiency of the proceedings and that the unbracketed text in paragraph (3) struck the right balance.

115. It was suggested that that issue be deferred pending consideration of whether ODR was a two or three stage process. In response, it was pointed out that the provision of such information went to the issue of possible tainting of the neutral's impartiality, which was relevant whether the neutral was acting in the facilitated settlement stage or the arbitration stage.

116. After discussion, it was agreed to reverse the order of paragraphs (3) and (4) since the appointment of the neutral could only be final after any objections had been dealt with. It was also agreed to retain the bracketed text at the end of paragraph (3).

Paragraph (4)

117. It was suggested to replace paragraph (4) with the wording proposed in paragraph 65 of A/CN.9/WG.III/WP.109. Further, it was pointed out that the challenge process should be straightforward with no possibility of comments or reasons. It was also observed that since it was in the interest of at least one party to have a speedy process, it would be rare that that party present multiple challenges to the neutral.

118. After discussion, it was agreed to retain the first sentence of paragraph (4) and to replace the rest of the paragraph with the proposal suggested in paragraph 65 of A/CN.9/WG.III/WP.109.

Paragraph (5)

119. It was agreed to retain the words [*through the ODR platform*] and delete [*automatically*] on the same reasoning as for draft article 6, paragraph (1).

Paragraph (6)

120. It was agreed to retain the paragraph.

Paragraph (7)

121. Recalling discussion from the last session (A/CN.9/716, para. 62), it was proposed to remove the brackets as the paragraph provided a practical solution to facilitate the process. Another view was to retain the brackets on the grounds that the Rules should not deprive the parties of the option to choose the number of neutrals. Another proposal was to delete the phrase “unless the parties otherwise agree”. After discussion, it was agreed to retain the text as is, with brackets, with a possibility to discuss the related issues in an additional document.

Draft article 7 (Power of the neutral)*Paragraph (1)*

122. It was suggested to strengthen paragraph (1) by including the phrase “*subject to safeguards to preserve impartiality of the neutral and the integrity of the process*” after the word “appropriate”. The view was expressed that the matter could be addressed in greater detail in a code of conduct for neutrals. After discussion, it was agreed to retain the paragraph bearing in mind the phrase proposed.

123. The Secretariat was asked to consider whether draft article 6, paragraph (6) should be placed in draft article 7, paragraph (1), on the grounds that it might be more appropriately thought of as an obligation of the neutral rather than a precondition.

Paragraph (2)

124. It was suggested to retain the first bracketed text “[*conduct the ODR proceeding*]” and delete the second bracketed text. Another suggestion was to retain the last bracketed text “[*unless the neutral decides otherwise*]” to allow for admission of other material, including by way of video-conference or other technologies. It was further pointed out that admission of further materials could entail additional cost and thus require the consent of the parties, since the Rules do not contemplate an award of costs. After discussion, it was agreed to retain the first and third bracketed texts and to remove the second bracketed text.

Paragraph (3)

125. One proposal to clarify the paragraph was to replace the words “*to amend any document submitted*” with “*to amend any document that party submitted*”. Another proposal was to delete the word “*any*” and to specify the type of documents that were referred to. A further proposal was to delete the first sentence.

126. After discussion, it was agreed to amend paragraph (3) by combining the first and third sentences, to read as follows: “*At any time during the proceedings the*

neutral may require 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”.

127. As to the second sentence, it was decided to put it in square brackets for discussion at a future meeting since it raised issues of proof, on the understanding that the sentence could be moved to another place in the Rules.

Paragraph (4)

128. After discussion, it was agreed that paragraph (4) would remain as drafted.

5. Facilitated settlement and arbitration (A/CN.9/WG.III/WP.109, draft articles 8-9)

Draft article 8 (Facilitated Settlement)

129. Bearing in mind its earlier conclusion (see paras. 97 and 103) that a case moves automatically to the facilitated settlement stage in the event negotiation fails, the Working Group proceeded to consider draft article 8. There was broad agreement to the insertion of a time limit in the facilitated settlement stage.

130. A proposal was made, supported by several delegations, to retain the first two sentences and replace all the text thereafter with the following: “*If the parties do not reach an agreement within ten (10) calendar days, the neutral shall render a [decision] [award] pursuant to Article 9.*”; and further to add a second paragraph to draft article 8 as follows: “*2. If, as a consequence of his or her involvement in the facilitation of settlement, any neutral develops doubts as to his or her ability to remain impartial or independent in the future course of the proceedings under Article 9, that neutral shall resign and inform the parties and the ODR provider accordingly.*”

131. Another proposal was to retain the first two sentences plus the words of the third sentence up to and including “reach an agreement” and thereafter insert the wording from option 3 in the current draft text, while placing square brackets around the term “phases[s]” therein.

132. After deliberation, it was agreed that the first two sentences of draft article 8 would remain as drafted, that options 1 and 2, for which no support was expressed, would be deleted, and that the two proposals outlined above would be placed in square brackets for consideration at a future meeting.

Draft article 9 ([Issuing of] [Communication of] [decision] [award])

Paragraph (1)

133. It was agreed, in keeping with earlier deliberations in that regard, that the terms *[decision]* *[award]* in draft article 9 should remain in square brackets pending further discussion. A proposal was made to replace “*promptly*” with “*without delay*” in the first sentence. A question was raised as to what happened in the event that a neutral failed to render a decision within the time provided in the paragraph; it was agreed to defer that issue for future consideration. Following brief discussion as to

whether to amend the suggested time period, it was decided to retain the reference to seven calendar days and remove the square brackets.

134. Various views were expressed on the issue of extending the time for a neutral to render a decision/award: that a quick and practical ODR process called for no extension of the time limit; that a short extension of three calendar days maximum could be permitted in cases of exceptional complexity; that in the interests of having quality decisions extensions should be permitted; that seven calendar days was too short and fifteen calendar days more appropriate. After discussion, it was agreed to leave seven days as the deadline for decision, to insert a provision permitting a further seven day extension, to place square brackets around the numbers “seven” in each case, and to remove the brackets from “calendar”.

135. Views differed on the question of possible publication of a decision/award. It was said that such publication could guide potential users of ODR as to how cases were decided and thus reduce unnecessary disputes in future, and that certain other ODR systems published all their decisions. There was general agreement that any publication of a decision should remove references to identifying information related to the parties, and that it would be useful to keep and publish statistics on ODR outcomes. It was observed that the issue seemed to be not whether to publish, but how much information to disclose when publishing. It was concluded that publication was an issue for future consideration.

136. Suggestions for imposing reputation-based penalties on ODR parties defaulting on their obligations were deferred to a future meeting.

Paragraph (2)

137. After discussion, it was decided that draft article 9, paragraph (2) should remain as drafted. The question as to whether a neutral needed to provide grounds for his decision was raised, and was deferred for future consideration.

Paragraph (3)

138. It was proposed that, as with draft article 1, the phrase [*subject to the right of parties to pursue other forms of redress*] should be inserted at the end of the first sentence. After discussion, and for the reasons discussed under draft article 1 (see above, paras. 25-29), it was agreed that the text of draft paragraph (3) should be placed in square brackets.

Paragraph (4)

139. Views were expressed on whether or not a decision by a neutral should contain reasons. There was support for the notion that basic reasons in an award would make it useful to those referring to published decisions in future, though it was pointed out that in an environment of a high volume of cases, any such reasons needed to be kept very brief, including for the purposes of keeping the costs of proceedings low. A suggestion was made that the ODR platform could provide simple methods for the neutral to formulate such reasons. After discussion, it was agreed that the Secretariat would prepare draft wording providing for brief reasons to be inserted in paragraph (4) and discussed at a future session.

140. It was pointed out that the phrase “*or any error or omission of a similar nature*” was vague and gave the neutral too wide a discretion in correcting the award. In response, it was suggested that the present text should be maintained as it is from the view point of integrity with other UNCITRAL texts. After discussion, it was agreed that that phrase be placed in square brackets.

Paragraph (5)

141. It was suggested to delete the phrase “*and shall take into account any usage of trade applicable to the transaction*” since that phrase could be difficult for consumers to understand. Noting that the scope of the Rules included both B2B and B2C disputes, another suggestion was to put the phrase in square brackets. In response, it was suggested that the phrase could be redrafted to clearly reflect that it would be applicable for B2B disputes only or alternatively, that such clarification be included in the additional documents. A further suggestion was to delete the paragraph since it was more related to the substantive legal principles for deciding ODR cases.

142. After discussion, it was agreed to put the phrase in square brackets and discuss the appropriate location for that phrase at a future session.

6. Other provisions (A/CN.9/WG.III/WP.109, draft articles 10-13)

Draft article 10 (Language of proceedings)

143. It was proposed to include a new paragraph “*An ODR provider dealing with parties of different languages shall ensure its system, Rules and neutrals are sensitive to these differences and shall put in place mechanisms to address client needs in this regard*” in draft article 10. It was further proposed that the Secretariat suggest wording for that proposal consistent with the Rules.

144. It was clarified that draft article 10 addressed the issue of language used in the ODR proceeding and that the issue of how the ODR platform would ensure offering various languages was a separate issue to be considered either in the Rules or in additional documents.

145. It was proposed to insert the phrase “*unless the neutral decides otherwise*” in the first bracketed sentence after the word “parties”.

146. After discussion, the Working Group agreed, noting that these were sensitive and complex issues, to put draft article 10 and the two proposals made in square brackets for further deliberation taking into account the discussions above and the available technologies that might be of assistance.

Draft article 11 (Representation)

147. It was decided to leave draft article 11 as drafted, but to replace the term “addresses” therein with the term “designated electronic addresses” to ensure conformity with the language in annexes A and B to draft article 4. It was also decided that the words “[*authority to act*]” would remain in square brackets.

Draft article 12 (Exclusion of liability)

148. It was pointed out that the wording of draft article 12 was similar to that found in other sets of arbitration rules, although the fact that the Rules would cover consumers as parties to disputes added a new dimension. Concern was expressed that the bracketed text referring to “*any other persons involved in the ODR proceedings*” needed to be considered carefully, as it could be interpreted to provide immunity to a negligent legal practitioner advising a party. It was also cautioned that having too great a risk of liability in the Rules could discourage ODR providers by making the process potentially too expensive.

149. After discussion, it was concluded that opinions varied on the degree of exclusion of liability to be permitted and to whom it would extend. It was agreed to place the entire draft article in square brackets, while inserting the words “or gross negligence” after the word “wrongdoing”. The Secretariat was asked to propose alternative wording for the draft article which would cast it more in the language of a rule and less in contractual terms.

Draft article 13 (Costs)

150. It was clarified that the term “costs” meant an order by a neutral for the payment of money from one party to another party, and did not refer to the fees associated with commencing a proceeding. There were several expressions of concern that the provision as worded might be contentious and that it required further debate by the Working Group. After discussion, it was agreed to place the entire draft article in square brackets.

V. Future work

151. The Working Group noted that its twenty-fifth session was scheduled to take place in New York from 28 May to 1 June 2012 or if the resources required for the Secretariat to organize meetings in New York are not made available by the General Assembly, in Vienna from 7 to 11 May 2012.

**B. Note by the Secretariat on online dispute resolution for
cross-border electronic commerce transactions: draft procedural
rules, submitted to the Working Group on Online Dispute Resolution
at its twenty-fourth session**

(A/CN.9/WG.III/WP.109)

[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. It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.¹ At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering C2C transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

deliberations on consumer protection and report to the Commission at its next session.²

2. At its twenty-second session (Vienna, 13-17 December 2010),³ 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 ODR, including taking into account that the types of claims with which ODR would deal should be B2B and B2C cross-border low-value, high-volume transactions (A/CN.9/716, para. 115). At that session, the Working Group also requested the Secretariat to list available information regarding ODR known to the Secretariat with references to websites or other sources where they may be found (A/CN.9/716, para. 115). The Working Group may wish to note that that list is available on the UNCITRAL website.⁴

3. At its twenty-third session (New York, 23-27 May 2011),⁵ the Working Group considered draft generic procedural rules as contained in document A/CN.9/WG.III/WP.107. At that session, the Working Group requested that the Secretariat, subject to availability of resources, prepare a revised version of the draft generic procedural rules as well as documentation addressing issues of guidelines for neutrals, minimum standards for ODR providers, substantive legal principles for resolving disputes and a cross-border enforcement mechanism (A/CN.9/721, para. 140).

4. This note contains an annotated draft of generic procedural rules, taking into account the deliberations of the Working Group at its twenty-second and twenty-third sessions.

II. Online dispute resolution for cross-border electronic transactions: draft procedural rules

A. General remarks

5. Several issues relating to the design of an overall ODR framework arise when considering the draft procedural rules (the Rules). Document A/CN.9/WG.III/WP.110 addresses a number of these key issues, including the organization of ODR proceedings (see A/CN.9/WG.III/WP.110).

6. The Working Group may wish to take into account that the Rules have been prepared based on the assumption that the ODR proceedings include a negotiation phase, followed by a phase of facilitated settlement and, if that second phase is inconclusive, a final and binding decision by a neutral. Where relevant, indications have been given herein regarding variations to the Rules in the event parties are given discretion in choosing phases.

² *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 224 (Unedited text as adopted).

³ The report on the work of the Working Group at its twenty-second session is contained in document A/CN.9/716.

⁴ www.uncitral.org/uncitral/en/publications/online_resources_ODR.html.

⁵ The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

B. Notes on draft procedural rules

1. Introductory rules

7. 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 in whole or in part by the use of electronic means of 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 Annexes and form part of the Rules]:

“[(a) Guidelines for online dispute resolution providers;]

“[(b) Online dispute resolution provider supplemental rules;]

“[(c) Guidelines and minimum requirements for neutrals;]

“[(d) Substantive legal principles for resolving disputes;]

“[(e) Cross-border enforcement mechanism;]

“[...];

[“3. Any separate and additional [rules][documents] must conform to the Rules.”]

Remarks

8. The Working Group may wish to consider whether a short preamble should be included in the Rules to clarify the context in which the Rules are intended to be used, as well as the complementary instruments that are part of the ODR framework. Inclusion of a preamble could permit a simplification of draft article 1 (see below, para. 10).

9. The Working Group may wish to note that a discussion of general issues and questions regarding a global ODR framework can be found at A/CN.9/WG.III/WP.110).

Paragraph (1)

10. With respect to defining the term “cross-border transaction”, the Working Group may wish to note that the United Nations Convention on the Use of Electronic Communications in International Contracts adopted in 2005 (“Electronic Communications Convention” or “ECC”) applies to the “formation or performance of a contract between parties whose places of business are in different States.” This definition includes the term “place of business” which is defined in article 6 of the

Electronic Communications Convention.⁶ The Working Group may wish to consider whether that definition would also be appropriate in the context of the Rules.

Paragraph (2)

11. Paragraph (2) seeks to clarify that the Rules are one element in an overall ODR framework (see A/CN.9/WG.III/WP.110).

12. Draft article 1 (Scope of application)

“The Rules shall apply to ODR proceedings where parties to an online transaction have agreed that disputes in relation to that transaction shall be referred for settlement under the Rules, [subject to the right of the parties to pursue other forms of redress].”

Remarks

13. The Working Group may wish to consider how such an agreement between the parties would be reached, and how the Rules would be incorporated in any such agreement.

14. The term “online transaction” may refer to transactions conducted either partly or wholly by electronic means. The Working Group may wish to consider whether the Rules could be used for transactions conducted by use of electronic means of communication in whole or in part.

15. The Working Group may wish to further consider whether the Rules should provide greater detail as to types of claims to be covered by, or indeed excluded from, the operation of the Rules (A/CN.9/721, para. 51).

16. With respect to the bracketed text at the end of draft article 1 (“*[subject to the right of the parties to pursue other forms of redress]*”), the Working Group may wish to recall its discussion at its twenty-third session, and the diverging views expressed on the need to retain those words (A/CN.9/721, paras. 41-49). The bracketed text is intended to refer to situations where pre-dispute agreements to arbitrate might not be binding upon consumers and thus where only one party might be bound by such an agreement.

⁶ Article 6 of the Electronic Communications Convention:

1. For the purposes of this Convention, a party’s place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.
2. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
3. If a natural person does not have a place of business, reference is to be made to the person’s habitual residence.
4. A location is not a place of business merely because that is:
 - (a) Where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or
 - (b) Where the information system may be accessed by other parties.
5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

17. **Draft article 2 (Definitions)**

“For purposes of these Rules:

“1. ‘claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice;

“2. ‘communication’ means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom these Rules apply in connection with ODR;

Option 1 [“3. ‘electronic communication’ means any communication made by any person to whom these 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, telegram, telex, telecopy, [short message services (SMS), web-conferences, online chats, Internet forums, or microblogging];”]

Option 2 [“3. ‘digitized communication’ means 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;]

“4. ‘neutral’ means an individual that assists the parties in settling the dispute and/or renders a [decision] [award] regarding the dispute in accordance with the Rules;

“5. ‘respondent’ means any party to whom the notice is directed;

“6. ‘ODR’ means online dispute resolution which is a system for resolving disputes where the [procedural aspects of the dispute resolution mechanisms are] [procedure for dispute resolution is] conducted and facilitated through the use of [electronic communications] [digitized communications] and other information and communication technology;

“7. ‘ODR platform’ means [an] [one or more than one] online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing [electronic communications] [digitized communications] used in ODR;

“8. ‘ODR provider’ means an online dispute resolution provider which is an entity that administers ODR proceedings and provides an ODR platform for the parties to resolve their disputes in accordance with the Rules;

“[...]"

Remarks

Paragraph (1) “claimant”

18. The proposed definition of “claimant” clarifies that a claimant may be either the buyer or the seller.

Paragraph (2) “communication”

19. The definition of “communication” is derived from article 4 (a) of the Electronic Communications Convention, where it is confined to use of electronic

communications in connection with the formation or performance of a contract between parties. The definition has been modified so as to accommodate the context of ODR including both B2B and B2C transactions.

Paragraph (3) [“electronic communication”] [“digital communication”]

20. The definition of “electronic communication” is derived from articles 4 (b) and 4 (c) of the ECC and article 2 (a) of the UNCITRAL Model Law on Electronic Commerce (MLEC) adopted in 1996 (with additional article 5 bis adopted in 1998). That definition refers to “electronic mail, telegram, telex, or telecopy”. Since the adoption of the MLEC, other technological innovations have emerged, and therefore the Working Group may wish to consider whether the provision should be amended to include short message services (SMS), web-conferences, online chats, Internet forums, microblogging, and other information and communication technologies as examples of electronic communications.

21. The Working Group may also wish to consider whether a more abstract and technology-neutral concept, such as “digitized communication” might be used instead of “electronic communication”. Digitized communication refers to information in analogue form — such as documents, objects, images, texts and sounds — that is converted or transformed into a digital format so that it can be directly processed by a computer or other electronic devices. The broader concept of digitized communication may accommodate new technology such as automatic speech recognition that allows computers to interpret human speech and transcribe it to text or to translate text to speech and may also include radio-frequency identification that uses communication through the use of radio waves to transfer information between an electronic tag and a reader. These new technologies and other future technologies could be relevant to ODR proceedings. Further, the term digitized communication could be more suitable given that electronic communication for dispute resolution may require a one-on-one hearing in electronic form while a contract for an electronic transaction could be said to be mostly based on a written document in electronic format.

Paragraph (4) “neutral”

22. The Working Group may wish to note that general issues to be considered regarding neutrals are outlined in A/CN.9/WG.III/WP.110.

23. An issue arises as to the possibility of the neutral mingling the roles of conciliator (i.e. facilitating at the facilitated settlement stage) and arbitrator (i.e. rendering binding decisions) (A/CN.9/721, paras. 66-67). In commercial settings, the mediator/conciliator is normally not the arbitrator, unless the parties decide otherwise. The approach may be different for ODR, given the need for speed and simplicity (A/CN.9/716, paras. 61-65) and bearing in mind the considerations raised at paragraph 67 of A/CN.9/721. The Working Group may wish to consider this question in light of its decision on how the various steps in ODR proceedings are to be articulated.

24. The Working Group may wish to further consider which of the terms “arbitrator” or “neutral”, and “award” or “decision”, are more appropriate for use in the Rules (A/CN.9/721, para. 24).

Paragraph (6) “ODR”

25. At its twenty-second session, the Working Group agreed that consideration of a definition of ODR could usefully be deferred to a later point in the discussion, when the components of the concept had been more fully elaborated (A/CN.9/716, para. 40). It was also suggested that the definition of ODR be limited to instances where procedural aspects of a case are conducted online (A/CN.9/716, para. 35). The Working Group may wish to decide whether ODR could be conducted in whole or in part online and if so, define what “in part” means (A/CN.9/716, para. 37).

Paragraph (7) “ODR platform”

26. The Working Group may wish to note that general issues to be considered regarding ODR platform are outlined in A/CN.9/WG.III/WP.110.

27. Several issues arise regarding the definition of an ODR platform. One is whether an ODR provider is foreseen as operating more than one ODR platform. The platform might include an e-mail server where the parties and the ODR provider communicate, a web-based portal, a customized solution or internal enterprise resource planning system or any other type of format. An ODR platform might be a single system such as a website or more than one system such as a website and a mobile phone application linked to a website. In this regard, the Working Group may wish to consider inclusion of the bracketed text [*one or more than one*].

Paragraph (8) “ODR provider”

28. The Working Group may wish to note that general issues to be considered regarding ODR providers are outlined in A/CN.9/WG.III/WP.110.

29. The definition of ODR provider entails various issues such as role and responsibility, approval, and selection process. The Working Group may wish to consider the extent to which roles and responsibilities of ODR providers should be defined, and whether such definition should be included in the Rules or in the Guidelines.

30. Draft article 3 (Communications)

“1. All communications in the course of ODR proceedings shall be transmitted by electronic means to the ODR provider and shall be addressed through the ODR platform.”

“[2. The designated electronic address[es] of the claimant for the purpose of all communications arising under the Rules shall be that [those] set out in the notice of ODR (“the notice”), unless the claimant notifies the ODR provider or ODR platform otherwise.”

“3. The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be the address[es] for the respondent which has [have] been provided by the claimant. Thereafter, the designated electronic address[es] of the respondent for the purpose of all communications arising under the Rules shall be that [those] which the respondent notified to the ODR provider or ODR platform when accepting these Rules or any changes notified during the ODR proceeding.”

[“4. The time of the receipt of an electronic communication under the Rules is the time when it becomes capable of being retrieved by the addressee of the communication at the ODR platform.]

“5. The ODR provider shall communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic addresses.”

“6. The ODR provider shall notify all parties and the neutral of the availability of any electronic communication at the ODR platform.”

Remarks

Paragraphs (2) and (3)

31. The Working Group may wish to refer to the discussion at its twenty-third session suggesting the division of the paragraph on designated electronic addresses of parties (see A/CN.9/721, paras. 84-86). It may be noted that until the respondent files a response the only address the ODR provider has for the respondent is that provided by the claimant. Hence the definition takes account of this.

Paragraph (4)

32. Paragraph (4), which reflects article 10 of the Electronic Communications Convention, is relevant to the overall time frame of the ODR proceedings.⁷ Given that the Rules are intended to promote simplicity, speed and efficiency, and that the dispute resolution is cross-border, uncertainties over time of receipt of communications could delay proceedings and therefore it may be necessary to identify a consistent standard to identify the time of their receipt.

Paragraph (5)

33. Paragraph (5) deals with acknowledgement of receipt of electronic communications (A/CN.9/721, para. 89). Such acknowledgement has two functions: one is to communicate acknowledgement to the sender of the electronic communication; the second is to notify the other party and, where necessary, the neutral that the first party has communicated an electronic message.

34. It was suggested that the ODR provider also acknowledge the date and time of the receipt of communications, and that matters of calculation of time and acknowledgment of receipt could be handled at the ODR platform by the use of technical means (see A/CN.9/721, para. 100).

⁷ Article 10 of Electronic Communications Convention updates article 15 of MLEC. The amendments made to article 10 of Electronic Communications Convention are consistent with those prevailing in the paper world and limit the ability of an addressee to deliberately delay or impede delivery of a communication by not accessing it. They also take into account the fact that the information system of the addressee may not be reachable for reasons outside the control of the originator (for instance, the use of anti-spam filters for e-mails).

2. Commencement

35. Draft article 4 (Commencement)

“1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in annex A. 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 then be promptly communicated by the ODR provider to the respondent.

“3. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in annex B within [five (5)] [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.

“4. ODR proceedings shall be deemed to commence on the date of receipt by [the ODR provider at the ODR platform] [the respondent] of the notice referred to in paragraph (1).

“Annex A

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 addresses 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) the signature of the claimant and/or the claimant’s representative in electronic form [including any other identification and authentication methods];

“(f) Option 1 [statement that the claimant agrees to participate in ODR proceedings;]

Option 2 [statement identifying the stage[s] of ODR proceedings in which the claimant wishes to participate]

Option 3 [statement that the parties have an agreement to resort to ODR proceedings in case any dispute arises between them]

“(g) statement that the claimant is not currently pursuing other remedies against the respondent with regard to the transaction in issue;

“(h) statement that filing fee of [] has been paid;

“[(i) location of claimant;]

[...]”

*“Annex B**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 statement and allegations contained in the notice;**“(c) any solutions proposed to resolve the dispute;**“(d) a statement that the respondent agrees to participate in ODR proceedings;**“(e) the signature of the respondent and/or the respondent’s representative in electronic form;**“(f) statement that the respondent is not currently pursuing other remedies against the claimant with regard to the transaction in issue;**“[(g) location of respondent;]**[...]”**Remarks**Paragraphs (2) and (3)*

36. The Working Group may wish to note that, depending on how ODR provider and ODR platform are defined, it could be foreseen that notices may be communicated to the ODR provider or ODR platform. These paragraphs will have to be made consistent with the provisions on communications and with the definitions of ODR provider and ODR platform. The Working Group may wish to note that the designation of recipient of electronic communications, either ODR provider or ODR platform, may affect the time of receipt of electronic communications which in turn affects the time frame of ODR proceedings.

Paragraph (3)

37. The Working Group may wish to consider how the period of time under the Rules should be calculated and whether the calculation should be left to the ODR provider (see A/CN.9/WG.III/WP.110).

Paragraph (4)

38. Paragraph (4) deals with the commencement of ODR proceedings. The Working Group may wish to consider whether the proceedings should be deemed to commence when the ODR provider receives the notice from the claimant (Article 4 of World Intellectual Property Organization (WIPO) Mediation Rules) or when the respondent receives the notice (Internet Corporation for Assigned Names and Numbers, Uniform Domain Name Dispute Resolution Policy).

39. The Working Group may wish to consider, in the event that ODR is designed to allow the parties and/or ODR providers to select a specific phase or phases of proceedings, whether each specific phase of the ODR proceedings — negotiation,

facilitated settlement and arbitration — should contain its own definition of commencement.

40. The current wording of the paragraph makes commencement of proceedings dependent on receipt of the notice, either by the ODR provider or the respondent. Annex A (f) now contemplates a choice by the parties, or at least the claimant, of a particular stage of the ODR proceedings.

Annex A

Annex A (c) and (d)

41. The Working Group may wish to consider whether annex A should enumerate the grounds on which claims can be made and the available remedies. In a global cross-border environment for resolving low-value high-volume cases, it may be necessary to limit the types of cases to simple fact-based claims and basic remedies, to avoid the risk of overloading the system with complex cases, making it inefficient and expensive.

Annex A (e)

42. It should be noted that the term “electronic signature” differs from “digital signature”. Electronic signature⁸ refers to any type of signature that functions to identify and authenticate the user including identity management.⁹

Annex A (g)

43. In order to prevent multiplicity of proceedings relating to the same dispute, it was suggested that annex A (g) together with a companion provision in annex B could assist in that regard (see also reference to annex B (f)) (A/CN.9/721, para. 122).

Annex A (i)

44. Paragraph 1 of the preamble specifies that the Rules are applicable to “cross-border ... transactions”, which may indicate a need to ascertain the location of parties. The Working Group may therefore wish to consider including a requirement by the claimant to identify his location in the notice (see also reference to annex B (g)).

⁸ Article 2 (a) of Model Law on Electronic Signatures defines electronic signatures as “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message”. Digital signature generally uses cryptography technologies such as public key infrastructure (PKI), which require specific technology and ways of implementation to be effective.

⁹ Identity management could be defined as a system of procedures, policies and technologies to manage the life cycle and entitlements of users and their electronic credentials. It was illustrated that verifying the identity of person or entity that sought remote access to a system, that authored an electronic communication, or that signed an electronic document was the domain of what had come to be called “identity management”. It was illustrated that the functions of identity management were achieved by three processes: identification, authentication and authorization (see A/CN.9/692 and A/CN.9/728).

Annex B

45. Annex B deals with the response to the notice and mirrors the provisions of annex A.

Annex B (a)

46. As with annex A (a) and (b), the issue of data protection or privacy and online security in the context of communicating information relating to the parties in the course of ODR proceedings should be taken into consideration (A/CN.9/721, para. 108).

Annex B (b) and (c)

47. Annex B (b) and (c) mirror annex A (c) and (d) and similarly, the Working Group may wish to consider whether annex B should enumerate the responses to the statements, allegations and proposed solutions contained in the notice.

Annex B (d)

48. The Working Group may wish to consider modifying the language of paragraph (d) as set out below, in light of any views it may have on the issue of pre-dispute binding agreements to participate in ODR: “[*(d) statement that the respondent agrees, or where applicable has agreed (for example in a pre-dispute arbitration agreement) to participate in ODR proceedings*]”.

Annex B (e)

49. Annexes B (e), B (f) and B (g) mirror annexes A (e), A (g) and A (i) respectively and any discussion above regarding the former is applicable to the latter.

Other

50. The Working Group may wish to consider whether the Rules should contemplate the filing of counter-claims. The following paragraph is suggested:

[“5. The respondent may communicate a claim in response to the notice communicated by the claimant (‘counter-claim’). The counter-claim must be initiated [[with the same ODR provider] and regarding the same disputed transaction identified in the notice] no later than [five (5)] [calendar] days [after the notice of the first claim is communicated to the respondent]. [The counter-claim shall be decided by the neutral appointed to decide the first claim].”]

3. Negotiation**51. Draft article 5 (Negotiation)**

“1. [If the respondent responds to the notice and accepts one of the solutions proposed by the claimant] [if settlement is reached], the ODR provider shall communicate the acceptance to the claimant [and the ODR proceeding is [automatically] terminated].

“2. [If none of the solutions proposed by the party are accepted by the other party] [If the parties have not settled their dispute by negotiation within [ten (10)] [calendar] days of the response.] [If the parties have not reached an agreement] [If no settlement is reached], [one of the parties] [then either party] may request that the case be moved 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 below. [Either party may object, within [three (3)] [calendar] days from receiving the notice of appointment of the arbitrator, to providing the arbitrator with information generated during the negotiation stage].

Option 1 [“3. If the respondent does not respond to the notice within [five (5)] [calendar] days, he/she is presumed to have refused to negotiate and the case shall automatically move to the facilitated settlement [and arbitration] stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 below.]

Option 2 [“3. If the respondent does not respond to the notice within [five (5)] [calendar] days, he/she is presumed to have refused to negotiate and the negotiation shall automatically be terminated and either party shall have the option to proceed to the next phase[s] of the proceeding.]

“[4. The parties may agree to extend the deadline for the filing of the response however no such extension shall be for more than [--][calendar] days].”

Remarks

52. The Working Group may wish to note that the negotiation stage can involve assisted negotiation, automated negotiation or both. In assisted negotiation, the parties endeavour to reach a settlement communicating by electronic means offered by the ODR provider. In automated negotiation, each party offers a solution, usually in monetary terms, for settlement of the dispute which is not communicated to the other party. The software then compares the offers and aims to reach a settlement for the parties if the offers fall within a given range. The Rules may need to take into consideration the use of automated negotiation where it is the technology (software) that “negotiates” the settlement on the basis of proposals submitted by the parties. The Working Group may wish to consider whether the provisions on negotiation should include assisted negotiation and automated negotiation.

Paragraph (1)

53. Draft article 5, paragraph (1) refers to the termination of negotiations and the ODR proceedings in the case where the parties have reached an agreement. The Working Group may also consider that a negotiation should terminate by way of a settlement agreement either in all cases or where requested by a party. In that regard, consideration may be given to technical aspects regarding formation of settlement agreements, including in which part of the ODR framework these should be addressed.

Paragraph (2)

54. The Working Group may wish to decide whether the Rules should impose a time limit for the negotiation phase, in particular, the time within which the respondent must accept a solution or propose an alternative solution, and the time within which the claimant must notify acceptance or rejection of the respondent's solution. Another option is to set an overall time frame for negotiations, within which the parties are required to reach agreement. Putting such time pressure on the parties may act as an incentive for them to reach a settlement. The Working Group may wish to deliberate on the issue of time limits, the mechanism by which the provider can ascertain that a respondent has received the notice, and in which part of the global ODR framework the issue should be addressed.

Paragraph (3)

55. Paragraph (3) contains two options. Under option 1, the parties will be drawn from one phase of the proceedings to the next automatically. Under the second option, the transition from negotiation to facilitated settlement phase and then to arbitration will be the result of express consent by the parties.

Paragraph (4)

56. The Working Group may wish to consider whether the Rules should regulate extensions of time for filing a response.

57. The Working Group may also wish to consider whether the option to extend the negotiation phase should be at the discretion of the parties or whether such extension may be refused by the ODR provider.

4. Neutral**58. Draft article 6 (Appointment of neutral)**

"1. The ODR provider [through the ODR platform] shall [automatically] appoint the neutral by selection from a list of qualified neutrals maintained by the ODR provider.

"2. The neutral shall declare his independence and shall disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR provider shall communicate such information to the parties.

"3. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment and shall provide the neutral all communications and documents regarding the dispute received from the parties. [Either party may object, within [three (3)] [calendar] days from receiving the notice of appointment of the neutral, to providing the neutral with information generated during the negotiation stage"].

"4. Either party may object to the neutral's appointment within [two (2)] [calendar] days of the notice of appointment. In the event of an objection, the ODR provider will invite the non-objecting party to submit comments within [two (2)] [calendar] days and then either communicate the appointment of the neutral to the parties or appoint a new neutral.

“5. If the neutral has to be replaced during the course of the proceedings, the ODR provider [through the ODR platform] will [automatically] promptly appoint a neutral to replace him or her and will inform the parties. The proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.

“6. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the dispute resolution to be conducted and completed expeditiously in accordance with the Rules.

“[7. The number of neutrals shall be one unless the parties otherwise agree.]”

Remarks

59. The Working Group may wish to note that general issues to be considered regarding neutrals are outlined in A/CN.9/WG.III/WP.110.

Paragraph (1)

60. The selection of neutrals by the ODR provider should in practice be automatically handled by the ODR platform, which would have access to the list of neutrals. This would enhance the impartiality and independence of the neutral in that the automated selection process does not involve any decision by the ODR provider or any other parties. In order to clarify this in the procedural rules, the Working Group may wish to consider including the words *[through the ODR platform]* and *[automatically]* in paragraphs (1) and (5).

Paragraph (3)

61. The Working Group may wish to clarify whether “all communications and documents regarding the dispute received from the parties” should include the communications exchanged at the negotiation stage, since the claimant, upon filing, is required to submit relevant evidence and documents.

62. The Working Group may wish to include a phrase that gives the parties the option to object to providing the neutral with information generated during negotiation.

Paragraph (4)

63. At its twenty-second session, the Working Group agreed that providing an opportunity for parties to challenge the appointment of neutrals should be considered (A/CN.9/716, para. 70). The Working Group may wish to take into consideration the possibility of subsequent challenges to the neutral once the neutral has made disclosure pursuant to paragraph (2).

64. The Working Group may wish to consider providing an option for the ODR provider to reject an objection by a party, and whether to give reasons for such rejection, with a view to assuring parties that neutrals are being impartially appointed: *[“Where the ODR provider rejects an objection by a party, it shall communicate to the parties the reasons therefor”].*

65. Another option is to have a straightforward procedure with no possibility of comment or reasons: [*“Where a party objects to the appointment of a neutral, that neutral shall be automatically disqualified and another appointed in his place by the ODR provider. Each party shall have a maximum of [three (3)] such challenges to the appointment of a neutral, following which the appointment of a neutral by the ODR provider will be final.”*]

Paragraph (7)

66. At the twenty-second session of the Working Group, there was general agreement that, in the absence of agreement otherwise by the parties, there should be a sole neutral (A/CN.9/716, para. 62).

67. Draft article 7 (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, provided that the parties are treated equally. The neutral, in exercising his or her discretion, 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 act fairly and shall remain at all times wholly independent and impartial.

“2. The neutral shall [conduct the ODR proceedings] [decide the dispute] on the basis of documents filed 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. The neutral shall have the power to allow any party, upon such terms (as to costs and otherwise) as the neutral shall determine, to amend any document submitted. Each party shall have the burden of proving the facts relied on to support its claim or defence. At any time during the proceedings the neutral may require the parties to provide additional information, produce documents, exhibits or other evidence within such a 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, a dispute settlement clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A [decision] [award] by the neutral that the contract is null shall not automatically entail the invalidity of the dispute settlement clause.”

Remarks

Paragraph (2)

68. At the twenty-third session of the Working Group, it was suggested that emerging technology might make videoconference hearings fast and inexpensive, even when compared to procedures that relied only on filing of documents, and the possibility for conducting hearings therefore might be contemplated by the procedural rules on an exceptional basis, although it was pointed out that the cost

implications of holding hearings would have to be explored. For that reason and others, support was expressed for the view that the procedural rules should be forward-looking, and be able to accommodate any changes in technology and practice that might arise in the long-term future (A/CN.9/721, para. 22). In light of this, the Working Group may wish to consider including the bracketed text: *[unless the neutral decides otherwise]* so as to leave open the possibility for the neutral to use the above-mentioned technologies.

5. [Facilitated settlement and arbitration]

69. Draft article 8 (Facilitated Settlement)

“The neutral shall evaluate the dispute based on the information submitted and shall communicate with the parties to attempt to reach an agreement. If the parties reach an agreement, the ODR proceeding is [automatically] terminated. If the parties do not reach an agreement, [OPTION 1. the ODR provider shall promptly request the neutral to render a decision] [OPTION 2. either party may request the neutral to render a decision] [OPTION 3. the parties shall have the option to proceed to the next phase[s] of the proceeding.]”

Remarks

70. The current paragraph contains options for transition from facilitated settlement to the next phase of proceedings. The first option assumes that the parties have agreed to participate in all phases of ODR proceedings and therefore the ODR provider promptly proceeds to the next phase. Under the second and third options, it is a party that requests transition, the assumption being that such request — and acceptance of that request by the other party — constitute agreement to participate in that subsequent phase.

71. The Working Group may also wish to consider whether a facilitated settlement should terminate by way of a settlement agreement either in all cases or where requested by a party.

6. Decision by the neutral

72. Draft article 9 ([Issuing of] [Communication of] [decision] [award])

“1. The neutral shall render a [decision] [award] promptly and in any event within [seven (7)] [calendar] days after the parties make their final submissions to the neutral. The ODR provider shall communicate the [decision] [award] to the parties. Failure to adhere to this time limit shall not constitute a basis for challenging the [decision] [award].

“2. The [decision] [award] shall be made in writing and signed by the neutral, and shall contain the date on which it was made.

“3. The [decision] [award] shall be final and binding on the parties. The parties shall carry out the [decision] [award] without delay.

“4. Within [five (5)] [calendar] days after the receipt of the [decision] [award], a party, with notice to the other party, may request the neutral to correct in the [decision] [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 within [two (2)] [calendar] days of receipt of the request. Such corrections [shall be in writing and] shall form part of the [decision] [award].

“5. In all cases, the neutral shall decide 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)

73. Requests by the neutral for an extension of time in which to submit the decision are foreseeable. The Working Group may wish to consider whether to include provisions relating thereto.

74. The Working Group may wish to consider whether draft article 9 should contain a paragraph on publication of the decision by the neutral or the ODR provider.

Paragraph (5)

75. The issue of applicable law will be considered at a future meeting of the Working Group.

7. Other provisions

76. Draft article 10 (Language of proceedings)

“[The ODR proceedings shall be conducted in the language used in connection with the transaction in dispute, unless another language is agreed upon by the parties.] [In the event the parties do not agree on the language of proceedings, the language of proceedings shall be determined by the neutral.]”

Remarks

77. The Working Group may wish to note that in some situations, the language used in connection with a transaction may be different for the seller and buyer, depending on their respective locations. For instance, a seller may access a selling website in one language while the website automatically changes to another language depending on the buyer’s Internet protocol (IP) address, which reflects his location and the language commonly used there. In such a case, identifying the “language used in connection with the transaction” could be problematic.

78. A common argument against choosing the language of the transaction as the language of proceedings is that the level of understanding of a language needed to conclude a transaction may differ from that needed when making a claim. Technology may be able to overcome such language issues, making it possible for users to submit a claim while having little understanding of the language of the ODR platform.

79. Draft article 10 reflects the suggestion made by the Working Group that, where the parties have failed to reach an agreement on the language of proceeding, this

matter could be left to the discretion of the neutral (A/CN.9/716, para. 105). In that case, the Working Group may wish to consider how the language of proceedings is to be determined prior to the involvement of the neutral.

80. **Draft article 11 (Representation)**

“A party may be represented or assisted by a person or persons chosen by that party. The names and addresses of such persons [and the authority to act] must be communicated to the other party through the ODR provider.”

81. **Draft article 12 (Exclusion of liability)**

“Save for intentional wrongdoing, the parties waive any claim against the neutral, the ODR provider [and any other persons involved in the ODR proceedings] based on any act or omission in connection with the ODR proceedings.”

Remarks

82. Draft article 12 deals with the question of exclusion of liability of the persons involved in the ODR proceedings. It mirrors article 16 of the UNCITRAL Arbitration Rules, with necessary adjustments.

83. For discussion on persons or actors involved in the ODR proceedings, see A/CN.9/WP.110.

84. **Draft article 13 (Costs)**

“The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.”

Remarks

85. The Working Group may wish to consider, in the event the claimant is successful in ODR proceedings where the neutral is involved, whether his or her filing fee should be paid by the unsuccessful party.

86. For discussion on the funding of ODR providers and charges levied by ODR providers, see A/CN.9/WP.110.

C. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework, submitted to the Working Group on Online Dispute Resolution at its twenty-fourth session

(A/CN.9/WG.III/WP.110)

[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. It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.¹ At its forty-fourth session

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

(Vienna, 27 June-8 July 2011), 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 (Vienna, 13-17 December 2010) and twenty-third sessions (New York, 23-27 May 2011), the Working Group considered the subject of ODR and requested the Secretariat, subject to availability of resources, to undertake research and prepare various documents relating to an ODR framework (A/CN.9/716, para. 115 and A/CN.9/721, para. 140).

3. This note contains general remarks on the ODR framework as a whole and addresses a series of issues relevant to components of the framework including ODR proceedings, ODR provider, ODR platform, neutrals, questions of applicable law and cross-border enforcement.

II. Online dispute resolution for cross-border electronic transactions: issues for consideration in the conception of a global ODR framework

A. Global ODR framework

1. Design of global ODR

4. There are several factors in the conception of an ODR framework that may affect the formulation of procedural rules and complementary documents:

(a) The main actors in a global ODR framework identified so far are the ODR providers, the ODR platform, users of ODR, neutrals and possibly implementers of ODR decisions. The Working Group may wish to consider whether any other actor should be added and also consider the relationship between them and the other actors;

(b) It should be considered whether the ODR framework would function at a global level, a regional level, a domestic level or some combination of the three;

(c) It should be determined whether there would be one single global ODR provider, or several operating at an international, regional or domestic level? Once that matter is determined, the following questions should be considered:

(i) In the case of a single global provider, would that provider manage one or more ODR platforms?

(ii) If several ODR providers are envisaged, would each manage its own ODR platform, or could a provider use the services of a platform managed by another provider? In the latter case, how can interoperability be ensured?

(iii) Again, in the case of several ODR providers, will users be able to choose which one they use? If so, on what basis? And how are uniform standards of operation among ODR providers to be maintained?

(d) Will the global ODR framework operate in relation to a single, centralized ODR platform, or will there be several?

2. Components of ODR framework

5. In accordance with the decisions of the Working Group at its twenty-second and twenty-third sessions, the ODR framework is envisaged to consist of procedural rules (“Rules”) as well as a separate document that complements the Rules. The Rules regulate how ODR proceedings are commenced, conducted and terminated. The separate document may be in the form of guidelines for ODR providers and other actors. This document may deal with various aspects not included in the Rules and that may require different treatment for each ODR provider such as costs, definition of calendar days, responses to challenges to neutrals as well as a code of conduct and minimum requirements for neutrals.

6. Other key documents, separate from the Rules and necessary to the ODR framework, deal with rendering and implementing decisions. Substantive legal principles for resolving disputes may refer to general principles on which neutrals could base their decisions. A cross-border enforcement mechanism would address the problem of ensuring implementation of any decision or settlement.

7. Other relevant documents, such as those dealing with accreditation of ODR providers, operational standards for ODR providers, functional requirements for an ODR platform, technical specifications for an ODR platform, interoperability standards of ODR platforms and other related matters may be better dealt with at the domestic or regional level where the ODR framework is established.

8. Some questions arise:

(a) Which of these documents should the Working Group be preparing in the fulfilment of its mandate?

(b) Should the separate documents be attached to the Rules as Annexes or be set out separately elsewhere (A/CN.9/721, para. 53)? If the former, by what means will it be ensured that ODR users are adequately informed of the separate documents when they agree to use the Rules?

B. ODR proceedings

9. The Working Group may wish to note that the Rules provide for different phases in the resolution of a dispute: negotiation and facilitated settlement, which form part of the consensual stage; followed by arbitration, in which the neutral issues a binding decision.

10. At its twenty-third session, the Working Group noted that there could be two approaches to the organization of ODR proceedings.

11. Under the first approach, the phases can be seen as parts of a single mandatory procedure, requiring the parties to go through each one in the prescribed order. Under a second approach, parties could have the option to begin the process at a particular stage, for example to go straight to arbitration and a final and binding decision by a neutral (A/CN.9/721, para. 23).

12. Several questions arise with respect to the design of ODR proceedings:

(a) Should they be cast as a three-phase proceeding (as is currently the case) or, alternatively, as a two-phase proceeding, consisting of a consensual and a mandatory phase?

(b) Should a claimant have the option to enter the ODR process at a phase of his choosing and, if so, at what point should a claimant make that choice?

(c) Should an ODR provider be allowed to offer services for only certain phases of the proceedings (“cherry-picking”)? (A/CN.9/721, para. 90)

(d) Should the negotiation phase include more specific types of negotiation, such as automated negotiation and assisted negotiation?

(e) Should the Rules contemplate the possibility of filing counter-claims? Would this affect the efficiency of proceedings?

(f) If one party refuses to take part in negotiation, at what point can the other party force a move to the facilitated settlement stage?

(g) How is the move from negotiation to the facilitated settlement phase triggered?

C. ODR provider and ODR platform

1. ODR provider

13. The design of a global ODR framework is closely related to the definition and function of ODR provider and ODR platform. Many issues arise including the role, function, selection, accreditation and funding of an ODR provider and its relationship to the ODR platform as well as to (possibly) any national consumer protection authority:

(a) How would ODR providers operate and be funded?

(b) Would location of the ODR provider be relevant?

(c) How would ODR providers be approved and licensed, and how would they receive or be assigned cases?

(d) Would claimants select an ODR provider when filing their claims or would this be done through a third entity, such as a national consumer protection authority? If the latter, what would be the role and the status of that third entity?

(e) What, if any, charges will ODR providers levy for their services? (see A/CN.9/716, paras. 109-111)

14. Some issues arise in relation to the authority, responsibility and obligation of an ODR provider in the ODR proceedings:

(a) How much authority will be given to the ODR provider? Certain issues such as determining lateness of submissions, extensions of time and challenges to neutrals, contemplate intervention by the provider. How will the ODR framework provide for monitoring of such intervention?

(b) In the event the ODR procedural rules allow for extension of time for filing response and where the ODR provider rejects such request for extension, the ODR provider should be instructed to provide valid reason for the rejection;

(c) Should the ODR provider have the responsibility to oversee the implementation of the settlement or decision? If so, how?

2. Flow of communications between ODR provider and ODR platform

15. The main question to be addressed is the relationship between the ODR provider and the ODR platform, which depends on how these entities are defined and what their tasks are. It should be noted that however the flow of communications into and between provider and platform is ultimately decided, that flow must be taken into account in the Rules to ensure that they provide for a fast and efficient process. Once the definitions and tasks are settled, various issues relating to the flow of communications could be considered.

D. ODR neutrals

16. ODR neutrals are important actors in the ODR framework as their role is to decide disputes; several issues relating to neutrals are relevant to due process within the ODR framework.

17. Several questions arise as to the selection of neutrals:

(a) How will neutrals be selected?

(b) How will neutrals be accredited, and indeed re-accredited? Should there be a limit on their period of service, or the renewal thereof?

(c) Who will be tasked with the accreditation process?

(d) Can the parties challenge the appointment of a neutral? On what basis could such challenges be rejected?

(e) Will the list of neutrals be a global one maintained by a single ODR provider, or would there be several lists maintained by various providers?

(f) If a global list, who will have the authority to amend, add, or disqualify neutrals on the list?

18. Questions related to the authority of neutrals:

(a) Could a neutral preside over a case at both the facilitated settlement and arbitration stages?

(b) If the language of the proceedings is to be decided by the neutral, what guidelines from the provider might regulate such a decision?

(c) If extension of time is allowed for the neutral to make a decision, is there any rule to ensure neutrals will render decisions in a timely manner?

E. ODR users

19. In the current electronic commerce market, it is often difficult to discern whether buyers and sellers are consumers or businesses, and therefore the users of ODR may be both consumers and businesses. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering C2C transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation.² In line with the direction of the Commission, the Working Group may wish to note that the Rules have been prepared in a generic manner, so as to apply to B2B and B2C transactions, provided that those transactions have the common feature of being low-value. This is in line with the Commission's direction that work should focus on ODR relating to cross-border e-commerce transactions, including B2B and B2C transactions.³

F. Cross-border enforcement

20. Enforcement in the context of ODR concerns two matters: enforcement of settlement agreements reached by the parties through online negotiation or mediation, and enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention") of ODR arbitral decisions. As one of the benefits of ODR is to avoid lengthy and expensive procedures in a State court of a foreign jurisdiction, it may prove useful to avoid court enforcement by exploring other mechanisms to encourage self-compliance. What follows is a very preliminary analysis on enforcement issues, a matter on which more detailed notes will be presented at a later stage to the Working Group for its consideration.

1. Enforcement of ODR settlement agreements under the New York Convention

21. The question of enforcement of settlement agreements was discussed by UNCITRAL when adopting the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation"). In the preparation of the Model Law on Conciliation, the Commission was generally in agreement with the policy that fast and easy enforcement of settlement agreements should be promoted. However, it was realized that methods for achieving such expedited enforcement varied greatly between legal systems and were dependent upon the technicalities of domestic procedural law, which do not easily lend themselves to harmonization by way of uniform legislation.

22. Article 14 of the Model Law on Conciliation thus leaves issues of enforcement, defences to enforcement and designation of courts (or other authorities from whom enforcement of a settlement agreement might be sought) to applicable

² Ibid.

³ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

domestic law or to provisions to be formulated in the legislation enacting the Model Law on Conciliation. 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. The Guide to Enactment and Use of the Model Law on Conciliation (“the Guide to Enactment”) provides examples of varying treatments by jurisdictions of settlement agreements. As highlighted in the Guide to enactment, there are no harmonized solutions for the enforcement of settlement agreements, whether concluded offline or online.

23. The Working Group may wish to consider whether the fact that a settlement agreement is concluded online may raise specific issues with regard to its enforcement.

2. Enforcement of ODR arbitral decisions

24. At the twenty-second session of the Working Group, it was generally agreed that ODR arbitral 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 (A/CN.9/716, para. 99). At its twenty-third session, the Working Group engaged in an initial discussion of the appropriateness and applicability of the New York Convention to ODR arbitral decisions (A/CN.9/721, paras. 18 and 19).

(a) General remarks on the New York Convention and the Electronic Communications Convention

25. The New York Convention provides common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The New York Convention does not define the notion of an award. The form of an award is also not defined under the New York Convention.

26. The United Nations Convention on the Use of Electronic Communications in International Contracts (“Electronic Communications Convention” or “ECC”) adopts the functional equivalence principle by laying out criteria under which electronic communications may be considered equivalent to paper-based communications. In particular, it sets out the specific requirements that electronic communications need to meet in order to fulfil the same purposes and functions that certain notions in the traditional paper-based system — for example, “writing”, “original”, “signed” and “record” — seek to achieve.

27. Taking into consideration national legislation providing for functional equivalence between paper documents and electronic communications and between handwritten and electronic signatures, or on the basis of a liberal interpretation of the provisions of the New York Convention, an electronic award should be held to meet the form requirements. Therefore, online arbitral awards may be enforceable in court either in the form of a printed version, hand-signed by the arbitrators, and notified to the parties in paper form, or in the form of an electronic document signed and notified to the parties electronically.

(b) General remarks on arbitration agreement

28. The arbitration agreement is an important aspect of the ODR framework, since the place of arbitration — as well as how and when the arbitration agreement is concluded — influence the enforcement of ODR decisions and the determination of applicability of the New York Convention for ODR cases. Determining the place of arbitration may also have an impact on the question of applicable law (see A/CN.9/716, paras. 89-96 for discussion on place of arbitration).

(c) Arbitration agreement concluded online involving businesses (UNCITRAL Recommendation)

29. Article II(2) of the New York Convention, while it deals with the form requirement for an arbitration agreement, refers to the means of communication but does not specifically include any reference to electronic documents. The Electronic Communications Convention article 20(1) clarifies that the provisions of that Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which the New York Convention applies. The ECC prescribes that an electronic document is functionally equivalent to a paper document and thus satisfies the need for writing, and shall not be denied validity or enforceability (article 8(1)), provided it remains accessible for further reference (article 9(2)).

30. The Electronic Communications Convention makes electronically concluded arbitration agreements and clauses valid under the New York Convention and therefore, arbitration clauses in online B2B contracts would be recognized as valid in States party to the New York Convention and ECC.

31. In addition, the Commission adopted, at its thirty-ninth session in 2006, a Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention (“the Recommendation”).⁴ The Recommendation was drafted in recognition of the widening 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. The Recommendation encourages States to apply article II(2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. The Recommendation encourages States to adopt the revised article 7 of the UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006 (“Model Law on Arbitration”). Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention.

32. In this sense an arbitration clause included in B2C click-wrap agreement (i.e. “OK-box”) in electronic form may be considered as satisfying the writing requirement under national laws that have adopted article 7(2) of the Model Law on Arbitration, since electronic forms are capable of producing records.

⁴ *Official records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17), annex 2.*

(d) Arbitration agreements concluded online involving consumers

33. The scope of application of the Electronic Communications Convention does not extend to consumer contracts as article 2(1)(a) excludes application to “contracts concluded for personal, family or household purposes.” Therefore, it is still questionable whether electronically concluded arbitration agreements involving consumers are valid under the New York Convention.

34. Conditions for the validity of B2C agreements may be more stringent than for B2B agreements. Therefore, the question whether online B2C arbitration clauses satisfy the writing requirement under article II(2) of the New York Convention still constitutes a source of legal uncertainty for both consumers and businesses. So far, no case law involving a consumer in an enforcement proceeding under the New York Convention has been found.

3. Applicability of the New York Convention

(a) Article VII of the New York Convention

35. By virtue of the “more favourable law provision” contained in article VII(1) of the New York Convention, “any interested party” should be allowed “to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement”.

36. At the twenty-second session of the Working Group, it was noted that, should any ODR standard be developed under which a party with an arbitral award would be provided with a specific enforcement mechanism, then article VII(1) of the New York Convention might permit resort to such an enforcement mechanism and thus problems with enforcement through other provisions of the New York Convention might be avoided (A/CN.9/716, para. 100).

37. Courts, in many States, have established a clear position as to the circumstances in which article VII(1) might be applied to uphold arbitration agreements where the form requirement set out in article II(2) would otherwise not be met. The advantage of applying article VII(1) would be to avoid the application of article II(2) and, as States enacted more favourable provisions on the form requirement for arbitration agreements, article VII(1) would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations.

38. Therefore, reliance on article VII(1) can, to some extent, be an effective solution to overcome the uncertainty regarding the enforceability of online arbitration clauses under article II(2) of the New York Convention. Article VII(1) can also be used if a specific framework for enforcement of online awards is designed.

(b) Formal requirement: authentication and certification of an award under article IV of the New York Convention

39. Article IV(1) of the New York Convention requires either the original or certified copies of the award and of the arbitration agreement. The Electronic Communications Convention defines in article 9(4) an original of an electronic document.

40. In relation to signatures, when the law requires that a communication or a contract should be signed by a party, the ECC determines in article 9(3) the situations in which this requirement is met.

41. Article IV of the New York Convention provides for the production of certified copies to ensure that the documents produced were drafted by their alleged authors (authenticity) and that the contents are those originally drafted by the authors (integrity of content).

42. The non-fulfilment of the condition set forth in article IV can be cured after the request for enforcement is filed. If the enforcement court requires paper copies, the party seeking enforcement should be able to obtain copies from the arbitrators.

(c) Recognition and enforcement of arbitral awards in light of article V of the New York Convention

43. Article V(1)(a) — arbitration agreement not valid. 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.

44. Article V(1)(e) — arbitral award not yet binding. A question for consideration is whether the losing party may oppose enforcement on the grounds that the award is not yet binding because of its communication via electronic means (i.e., because the losing party has not been informed of the award in the manner required by the Convention). Even though the New York Convention does not require a notification of the award, one could consider that the autonomous concept of a binding award requires notification. Similarly, applicable national laws governing awards may well require notification for the award to acquire binding force. The question is therefore to find solutions for ensuring and proving that the parties are notified of awards made online.

45. Article V(2)(a) — arbitrability. A question arises as to the arbitrability of consumer disputes in the context of ODR. That question has received different solutions depending on the jurisdictions, and there is no harmonized approach to the matter.

46. Article V(2)(b) — public policy. Enforcement of arbitral awards may also be refused on the ground that the recognition and enforcement of the award would be contrary to the public policy of the country where enforcement is sought. In cases where, for instance, arbitration is prohibited when a consumer is a party to the arbitration agreement, an award may be refused enforcement on the ground of violation of public policy.

4. Means to encourage self-compliance

47. At the twenty-second session of the Working Group, there was a broad view that traditional dispute resolution mechanisms, including litigation through the courts, were inappropriate for addressing these online disputes, being too costly and time-consuming in relation to the value of the transaction. A need existed to address in a practical way disputes arising from the many low-value transactions, both B2B and B2C, which were occurring in very high volumes worldwide and required a dispute resolution response which was rapid, effective and low-cost.

48. The question was asked whether the Working Group could devise a simpler enforcement mechanism than that provided by the New York Convention, given the low value of the transactions involved and the need for a speedy resolution (A/CN.9/716, para. 43). Discussion centred on options other than enforcement through the New York Convention 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 (A/CN.9/716, para. 98).

49. Mechanisms aimed at self-compliance may still be the most effective means of ensuring enforcement for online arbitration. In parallel to legal procedures, the Working Group may wish to consider the development of other types of procedures. Built-in enforcement mechanisms, such as trustmarks, reputation management systems, exclusion of a party from the marketplace, penalties for delay in performance, escrow systems, and credit card chargebacks are possible solutions meriting further exploration.

G. Applicable law

50. At its twenty-second session, the Working Group engaged in an initial discussion on the issue of applicable law for ODR. One suggested approach was to use equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions as the basis for deciding cases, thus avoiding complex problems that may arise in the interpretation of rules as to applicable law (A/CN.9/716, para. 101). The Working Group will have before it at a future meeting a paper examining the issues relating to applicable law, taking account of previous discussions on this matter in the Working Group (A/CN.9/715, para. 103).

**D. Report of Working Group on Online Dispute Resolution on the
work of its twenty-fifth session (New York, 21-25 May 2012)**

(A/CN.9/744)

[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 relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.¹ It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission took note of a concern raised that, given that online dispute resolution was a somewhat novel subject for UNCITRAL and that it related at least in part to transactions involving consumers, the Working Group should adopt a prudent approach in its deliberations, bearing in mind the Commission's direction at its forty-third session that the Working Group's work should be carefully designed not to affect the rights

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

of consumers.² Further, the view was expressed that the Working Group should bear in mind the need to conduct its work in the most efficient manner, which included prioritizing its tasks and reporting back with a realistic time frame for their completion.

3. At that session, the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer (C2C) transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided 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 next session.

4. At its twenty-second session (Vienna, 13-17 December 2010), twenty-third session (New York, 23-27 May 2011) and twenty-fourth session (Vienna, 14-18 November 2011), the Working Group commenced its work on the preparation of legal standards on online dispute resolution for cross-border electronic transactions, in particular, procedural rules on online dispute resolution for cross-border electronic transactions.

5. 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.III/WP.111, paragraphs 5-14.

II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-fifth session in New York, from 21 to 25 May 2012. The session was attended by representatives of the following States members of the Working Group: Austria, Benin, Brazil, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, Germany, India, Israel, Japan, Kenya, Mexico, Nigeria, Philippines, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Croatia, Cuba, Finland, Indonesia, Iraq, Kuwait and Panama.

8. The session was also attended by observers from the Holy See.

9. The session was also attended by observers from the European Union.

10. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: United Nations Economic Commission for Africa (UNECA);

² Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 256; and *ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 215.

(b) *International non-governmental organizations*: American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRDP), Chartered Institute Of Arbitrators (CIARB), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), Institute of Commercial Law (Penn State Dickinson School of Law), Institute of International Commercial Law (IICL), Instituto Latinoamericano de Comercio Electrónico (ILCE), Inter-American Commercial Arbitration Commission, Internet Bar Organization (IBO), National Center for Technology and Dispute Resolution (NCTDR), New York State Bar Association (NYSBA), Regional Centre for International Commercial Arbitration — Lagos (RCICA), Willem C. Vis International Commercial Arbitration Moot (MAA).

11. The Working Group elected the following officers:

Chairman: Mr. Soo-geun OH (Republic of Korea)

Rapporteur: Mr. Walid Nabil TAHA (Egypt)

12. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.111);

(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.112 and Add.1);

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework (A/CN.9/WG.III/WP.113);

(d) A note submitted by the delegation of Canada on a proposal for the preparation of principles applicable to online dispute resolution providers and neutrals (A/CN.9/WG.III/WP.114); and

(e) A note submitted by the Center for International Legal Education (CILE) on analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules.

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legal standards on online dispute resolution.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group engaged in discussions on online dispute resolution for cross-border electronic transactions: draft procedural rules on the basis of

documents A/CN.9/WG.III/WP.112 and Add.1, A/CN.9/WG.III/WP.113, A/CN.9/WG.III/WP.114 and A/CN.9/WG.III/WP.115. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Online dispute resolution for cross-border electronic transactions: draft procedural rules

A. General remarks

15. There was broad support for the proposition that the 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, 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. It was pointed out that courts often quash agreements to arbitrate which involve consumers for the reason that engaging in the specified arbitration would be costly and complex for the consumer, and thus a hardship; but a cheap, easy and fast system of dispute resolution would not attract such criticism.

16. 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. There was also a general consensus that the Rules could not in effect prevent parties having access to the courts in those jurisdictions where such access was ensured by domestic law.

17. The Working Group took note of the ongoing work by the European Union, in particular, the proposed Directive on alternative dispute resolution for consumer disputes and amending Regulation and the proposed Regulation on online dispute resolution for consumer disputes. However, it was pointed out that the aim of the Working Group was to craft a global system which could be suitable for use by all the regions.

B. Notes on draft procedural rules

1. Introductory rules (A/CN.9/WG.III/WP.112, preamble, draft articles 1-3)

Draft article 1 (Scope of application)

Paragraph (1)

18. At the outset, the Working Group recalled its previous deliberations on the issue of pre-dispute agreements involving consumers. In order to address different concerns previously raised, a proposal was made to word draft article 1, paragraph (1) as follows, which was said to be preferable to either of the draft options:

“(1) The Rules shall apply where the parties to a transaction conducted by use of electronic communications have agreed, through clear and adequate

informed consent — either at the time of the transaction or after a dispute has arisen, and separately from the transaction — that disputes in relation to that transaction shall be submitted to online dispute resolution under the Rules.”

19. While there was broad agreement that the proposed paragraph reflected the divergent views and that it was a good starting basis for further deliberation, concerns were raised that it was not sufficient to address consumer protection under domestic legislation. It was also emphasized that the proposed paragraph would not sufficiently accommodate the concerns raised with respect to pre-dispute agreements to use ODR where a consumer was involved.

20. It was observed that, in making a claim pursuant to the Rules, a consumer could be said to be agreeing to their use on a “post-dispute” basis by the very making of the claim. Where a consumer was a respondent, its consent would have to be shown to the satisfaction of the neutral. It was pointed out that it was within the power of a neutral under the draft Rules to decide if a valid consent to the use of ODR existed in a particular case.

21. Concerns were raised about the use of the term “informed consent”, which was more commonly used in medico-legal jurisprudence. A concern was raised that a party unsuccessful in ODR may attempt to relitigate a case in a national court, on the basis that its consent to use ODR was not “informed”. It was noted that informed consent is generally understood, in common law countries, to mean that a patient’s consent to medical treatment has been obtained after he or she has been informed of the risks. However the intention of this paragraph of the Rules was to ensure that a party must clearly know that it is consenting to ODR when it enters into an online contract.

22. Views were advanced on the meaning of the term “informed consent”, and in particular whether a party must be made expressly aware of what it is giving up by consenting to the use of the Rules (e.g. the right to a trial in a national court). It was suggested that it be made clear that an ODR award did not preclude the bringing of a later action on a matter not covered by the Rules, such as bodily harm or consequential damages. It was further suggested that the term “informed consent” be replaced by other, more precise terminology.

23. One suggestion was to ensure that consent was both express and informed, the former meaning that a party understood that in agreeing to ODR it was concluding an agreement separate from the transaction in issue, the latter meaning that it understood the content and implications of that agreement. These were said to include the exclusion of recourse to the domestic legal system (but not for causes of actions which lay outside the Rules) and that the ODR result was final and binding and without appeal. Some doubts were expressed as to whether the meaning of the concepts of “express” and “informed” was clear enough to justify their inclusion in the Rules.

24. It was suggested that a better guarantee that the consumer was clearly informed would be to provide that the agreement to enter into ODR was an agreement separate from the transaction.

25. The Working Group deliberated whether to include examples of informed consent in the commentary to the Rules or to define it clearly in the Rules in view of

enhancing legal certainty and to promote the better understanding on the part of business parties.

26. In consideration of the above concerns, a modified proposal was made to replace the proposed paragraph (1) with the following two paragraphs:

“(1) The Rules shall apply where the parties to a transaction conducted by use of electronic communications have, either at the time of the transaction or after a dispute has arisen, explicitly agreed that disputes relating to that transaction within the scope of the ODR Rules shall be submitted to ODR 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 will be resolved through an ODR process under the ODR Rules.”

27. Subsequently, a suggestion was made to amend the second paragraph of that proposal by including the word “exclusively” so that it would read “will be exclusively resolved”. It was also suggested to include the phrase “within the scope of the ODR Rules” after the second use of the word “transaction” in the second paragraph. There were several suggestions that the proposed wording not be placed in draft article 1 under “scope of application”, but elsewhere in the Rules, for example in draft article 2 under “definitions”. It was also urged that, while illustrating the provision with examples of acceptable arbitration clauses could be helpful, care should be taken that the examples not become regarded as a standard against which any form of consent under the Rules might be strictly judged in future.

28. After discussion, it was agreed to amend draft article 1 with the proposal as modified, taking into account the suggestions made in the paragraph above, which draft provision would then serve as basis for further consideration by the Working Group.

29. The Working Group considered a proposal to supplement draft article 1, as amended, by adding the following paragraph after paragraph (1) of the amended draft article 1:

“The Rules shall not apply where the law of the buyer’s state 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.”

30. This was said to address the situation in those jurisdictions where pre-dispute agreements to arbitrate involving consumers were not binding upon consumers, in order to ensure that the ODR process went forward with a valid consent to its use by any involved consumer, and not in conflict with relevant national law. It was pointed out that such paragraph would also spare the parties engaging in arbitration proceedings when the resulting arbitral award was not enforceable in the consumer’s state of habitual residence, because that state’s law did not recognize pre-dispute arbitration agreements for consumers.

31. There were several expressions of support for such a provision; also, several concerns were expressed. These included the following observations: that since the Rules provide not only for arbitration but for negotiation and facilitated settlement as well, care should be taken not to render those aspects of the Rules inapplicable, particularly where the vast majority of cases are disposed of at the stages prior to arbitration; that to the extent the proposal purports to state a rule of substantive law its presence in a set of contractual rules may be problematic; that consideration could be given to recasting the Rules as facilitated settlement rules rather than arbitration rules and thus avoiding the problem that the proposal is intended to address; and that the intended result might be achieved by using wording found in a note to Article 1 of the UNCITRAL Model Law on Electronic Commerce to the effect that its provisions are not intended to derogate from legal norms aimed at consumer protection.

32. Other concerns included: that rendering the Rules inapplicable would preclude one of their important functions, namely to determine whether there is in fact a valid arbitration agreement; that the proposal raised issues, such as residence of a consumer and the laws of its country, which required further consideration; that the wording of the proposal was too complex for a set of Rules intended to be simple and useable by non-lawyers; that there was no universal agreement that the residence of the consumer/buyer was the governing consideration with regard to enforceability of agreements to arbitrate; and that the concept of “habitual residence” could be difficult to apply in a global environment of electronic transactions.

33. One suggestion was to include in draft article 8 a provision requiring an additional “click” from a party whose participation was limited by restrictions on pre-dispute agreements, thus keeping an unaffected “business” party bound to the process throughout. In response, it was recalled that vendors might also be claimants, for example small and medium enterprises in developing countries, which might be at a disadvantage compared to sophisticated buyers in developed countries.

34. After discussion, it was concluded that the proposal would be retained in square brackets, that comments thereon would be reflected in the commentary, and the whole considered in a document to be discussed at a future meeting.

35. It was also stated that the effects on consumers of ODR proceedings, including the possibility of a binding award or decision being issued against a consumer (which may not be enforceable in its jurisdiction), would need to be considered.

36. The Working Group also engaged in discussion on a proposal to add a separate and additional paragraph to complement the modified paragraph (1) and (1) bis:

“These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.”

37. It was suggested that that proposal, which was inspired by Article 1(3) of the UNCITRAL Arbitration Rules, should be modified to replace the word “arbitration” with “ODR proceedings”, since the Rules encompass matters other than arbitration.

38. After discussion, it was decided to put the proposed paragraph in brackets for future deliberation by the Working Group.

Paragraph (2)

39. There was general agreement to retain the provision, striking the word “seller” and removing the square brackets from around “parties”. Among other things, this was said to preserve the relevance of the Rules for situations other than “buyer-seller” disputes.

40. The Working Group recalled the principle of technological neutrality and noted that defining specific types of electronic address in the Rules would put the Rules at risk of being outdated in view of future technological advancements. In light of this, it was proposed that reference to different types of electronic addresses be included in the commentary to the Rules.

41. It was suggested to note in the commentary that parties should be required to reflect a current functioning electronic address in their contact information, to ensure that communications made pursuant to the Rules reached them as intended.

42. There were some suggestions to relocate the provision to draft article 3 or possibly draft article 4, one view being that those articles already disposed of the question. It was mentioned that identification of the time frame for the parties to submit the contact information may be useful in determining the suitable location for the paragraph.

43. Concerns were raised as to what, if any, sanctions should exist for a party that provided false or misleading contact information, and whether such sanctions should be expressed in the Rules themselves or in other law.

44. After discussion, it was agreed to maintain the provision, choosing the term “parties” over “seller” and revisit the issue of its location in the Rules after consideration of draft articles 3 and 4.

Draft article 2 (Definitions)

45. The Working Group considered whether to retain the order of the definitions, which in the present draft were ordered alphabetically and numbered accordingly, causing a discrepancy in the numbering of the definitions in draft article 2 as amongst the different language versions.

46. There was general support for the idea that each language version should have the same order of definitions.

47. After discussion it was decided that the Secretariat should order the definitions in a logical manner which would be consistent in each language, which order will be considered by the Working Group at a future session.

Paragraph (1) “claimant”

48. There were no objections to retaining the current text.

Paragraph (2) “communication”

49. There were no objections to retaining the current text.

Paragraph (3) “electronic communication”

50. The Working Group recalled its decision to include in the definition of “electronic communication” elements of digitized communication (A/CN.9/739, para. 32).

51. After discussion, it was agreed to retain the current text.

Paragraph (4) “neutral”

52. The determination of whether to use the word “award” and/or “decision” was considered.

53. Two suggestions were proposed in relation to the phrase “*renders a [decision] [award] regarding the dispute*”. The first was to replace this phrase with “*renders an award or other decision regarding the dispute*” (reflecting the language in Article 33(1) of the UNCITRAL Arbitration Rules); the second was to replace the same phrase with “*resolves the dispute*”.

54. It was agreed that both options would be placed in square brackets and the final language would be adopted at a later stage, bearing in mind that the purpose of this provision was to define the role of the neutral and not the nature of any determination he or she might make.

Paragraph (5) “respondent”

55. There were no objections to retaining the current text.

Paragraph (6) “ODR”

56. It was agreed that the square bracketed phrases “[system]” and “[through an information technology base platform and]” would be deleted and the square brackets around the word “[mechanism]” removed.

Paragraph (7) “ODR platform”

57. It was agreed to remove the square brackets around the word “[system]”.

Paragraph (8) “ODR provider”

58. The Working Group agreed to replace the existing draft paragraph with the following: “‘ODR provider’ means an online dispute resolution provider which is an entity that administers ODR proceedings for the parties to resolve their disputes in accordance with the Rules, whether or not it maintains an ODR platform.”

59. It was proposed that a definition for the word “writing” be added to the list of definitions. The following language, drawing upon Article 6 of the UNCITRAL Model Law on Electronic Commerce, was suggested: “*Writing means a data message containing information that is accessible so as to be useable for subsequent reference.*”

60. After discussion, it was agreed that this language would be placed in square brackets for future consideration.

Draft article 3 (Communications)*Paragraph (1)*

61. The Working Group considered whether all communications should go through the ODR platform, regardless of whether the ODR platform was owned and/or operated by the ODR provider.

62. There was strong support for the proposition that all communications in the ODR process take place through the ODR platform, which was said to provide the technical expertise to best support ODR processes, including oversight by the ODR provider and ensuring the absence of bias in the procedures. The maintaining of records to enable access to case information by parties and the neutral was seen as crucial in ensuring transparency. It was also noted that the ODR platform plays a critical role in guarding against fraud — for example the risk that a bad actor might seek to impersonate an ODR provider — by furnishing a technology infrastructure to prevent and detect such efforts. Other concerns in support of this proposition included: ensuring data security; facilitating record availability and record maintenance; and tracking issues of timing.

63. Accordingly, it was agreed that paragraph (1) be replaced with the following: *“All communications in the course of ODR proceedings shall be submitted by electronic means via the ODR platform designated by the ODR provider.”*

64. A suggestion was made, to consider at some future point, moving technical aspects, such as platform design and case flow matters, out of the Rules to a separate document in order to simplify the Rules, to make them more user-friendly and to accommodate ongoing developments in technology.

Paragraph (2)

65. The Working Group agreed to retain the paragraph, with square bracketed text to be considered at a future meeting.

Paragraph (3)

66. A proposal was made to replace paragraph (3) with the following text: *“The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be the address[es] published by the respondent in a manner clearly and readily available to the public when accepting the Rules; or notified to the ODR provider when the parties have agreed to online dispute proceedings under the Rules, or, if the respondent has not yet agreed to such proceedings, the address[es] which have been provided by the claimant. Thereafter, the designated address[es] of the respondent for the purpose of all communications arising under the Rules shall be that [those] which the respondent notified to the ODR provider when accepting the Rules or any changes notified during the ODR proceeding.”*

67. Concerns were expressed that that language was too complex for the ordinary user, and a preference was expressed for simpler language.

68. A further proposal was made to modify paragraphs (2) and (3) with wording indicating that the designated contact addresses should be those specified by the parties at the time the parties agreed to submit their dispute to ODR under the Rules, rather than those set out in the “notice”. This proposal received support on

the basis that it avoided the potentially confusing use of the term “notice” before it was formally defined in the Rules (which definition can be found in draft article 4) and furthermore encapsulated the principle that when parties accepted the Rules, the contact address used at that stage (as updated to the ODR provider from time to time), should be the address used.

69. A suggestion was made that it might be helpful to provide a definition of “notice” in article 2.

70. The Working Group identified a key policy issue relevant to this provision, (currently addressed in one form in the second sentence of paragraph 3), namely that where the respondent’s address has changed in the period between the agreement to submit a dispute to ODR, and the time of a dispute arising in practice, but where such change has not been communicated to the ODR provider, the claimant may face a challenge in initiating a claim.

71. The Working Group requested that the Secretariat prepare draft language to reflect different options with regard to draft articles 3, paragraphs (2) and (3) for consideration at a future session.

Paragraph (4)

72. There was a suggestion to delete the words “*at the ODR platform*”. There was a further suggestion to add, at the end of the paragraph (and irrespective of whether those words were deleted), the following words: “*provided that the addressee has been notified thereof*”. It was agreed that both phrases would be placed in square brackets, to be considered at a further session.

73. The Working Group requested that the Secretariat prepare suggestions as to draft language for paragraph (4), bearing in mind the considerations raised in paragraph (6). It was further suggested that Article 2(5) of the UNCITRAL Arbitration Rules, with relevant modifications for use for ODR rather than for arbitration, be considered in any further drafting.

74. A concern was raised that in the event a party did not receive a communication from the provider, that the provider should make further efforts to contact that party by other means.

Paragraphs (5) and (6)

75. The Working Group agreed to consider the square bracketed text at a future meeting.

2. Commencement (A/CN.9/WG.III/WP.112, draft article 4)

Draft article 4 (Commencement)

76. Having heard the proposal to restructure draft article 4 and split it into two separate articles for purposes of clarity and simplicity, the Working Group agreed that the Rules would include a separate article on notice and another on response. In addition, the Working Group agreed to incorporate the contents of existing annexes by reflecting them as paragraphs in the respective articles.

77. It was further suggested to consider adding options as to the time of receipt of notice as discussed in paragraphs 32 and 33 of A/CN.9/WG.III/WP.112.

3. Negotiation (A/CN.9/WG.III/WP.112, draft article 5)

Draft article 5 (Negotiation)

Paragraph (1)

78. Noting that every encouragement should be given to parties to negotiate a settlement, the point was made that ODR providers should provide the technical means to parties to facilitate negotiations between them, and should do so even before the involvement of the neutral. It was stated that as contractual rules, the Rules cannot impose obligations on third parties such as the ODR provider. A caution was expressed that while the Rules should facilitate negotiation, they should not force the parties to negotiate at this stage.

79. The Working Group considered rewording paragraph (1) in order to more clearly define the negotiation stage. One suggestion was as follows: *“Upon receipt of the response referred to in article [–], the parties shall attempt in good faith to settle their dispute through direct negotiation including, where appropriate, through the communication methods available on the ODR platform.”*

80. A further suggestion, in order to make clear that the Rules support implementation of negotiated settlements, was to reword paragraph (1) as follows: *“If settlement is reached, and subject to Article 5, paragraph (5), then the ODR proceeding is automatically terminated.”*

81. The Working Group requested the Secretariat to draft a new paragraph (1), in light of these suggestions, and taking into account the types of assistance offered by existing ODR providers.

Paragraph (2)

82. Views differed as to which of the square bracketed options in paragraph (2) should be retained. It was decided that, pending further discussion on the design of the ODR procedure, including the type and number of stages therein, that all options should remain in square brackets. It was also agreed to strike the square brackets around “[ten (10)]”.

Paragraph (3)

83. It was agreed to delete the square bracketed text “[five (5)]” and retain “[seven (7)]” removing the square brackets in order to maintain consistency with draft article 4, paragraph (3). It was further agreed to remove the square brackets around the last bracketed phrase, “[, at which point the ODR provider shall [promptly][without delay] proceed with the appointment of the neutral in accordance with article 6 below]”, but to retain the internal bracketed text “[promptly][without delay]” for further deliberation.

Paragraph (4)

84. The Working Group recalled its previous decision that limiting the time period during which an extension could be agreed between the parties would be preferable in order to keep low-value, high-volume cases proceeding efficiently and to encourage parties to resolve their disputes in a timely manner.

85. A query was raised in relation to the difference in practical terms between an extension “[for the filing of the response]” and “[for reaching settlement]”. It was clarified that the two options were not mutually exclusive, and one or both could be used. There was consensus that only one of these phrases should be used, but different views were expressed as to whether the former or latter would be most effective in facilitating expeditious proceedings. Some views were expressed that the paragraph should govern only the commencement of proceedings, and hence be applicable only to a response, and other views were expressed that there should be some limitation on the capacity of the parties to negotiate through the ODR system (without prejudice to their ability to negotiate outside the ODR system in any event). It was agreed to leave both options in square brackets, to be discussed at a future session.

86. It was further agreed that the time limit for an extension in the paragraph should be “[ten (10)]” days, and the square brackets around this removed, and that the options of “[five (5)]” and “[seven (7)]” days should be deleted.

Paragraph (5)

87. It was recalled that the purpose of the paragraph was to allow a party to recommence proceedings for the sole purpose of obtaining an award or decision with which it could seek enforcement.

88. Although it was acknowledged that a provision for the failure of a party to implement an agreed settlement should be included in the Rules, it was agreed that paragraph (5) as drafted was not adequate to fulfil this purpose.

89. A concern was expressed that this paragraph raised two important legal issues. Namely, a settlement agreement might need to include a separate provision providing for disputes arising out of that settlement, and that resolving a dispute arising out of settlement might not be achievable via the same ODR proceedings giving rise to that settlement agreement. A second concern was expressed as to the legal feasibility of opening new proceedings to render an award on agreed terms.

90. After discussion, the Working Group requested the Secretariat to redraft this paragraph, taking into account the following matters expressed by the Working Group: (i) the relationship between this paragraph and paragraph (1); (ii) that short time periods for implementation of settlement and/or recommencement could encourage compliance on the part of a defaulting party; (iii) that the phrase “re-open” better captures the intent of the paragraph than “re-commence”, as it would not require restarting the ODR procedure from the beginning; (iv) the possibility for forum shopping between ODR providers if it was not made clear in the paragraph that the same ODR provider must be used; (v) the need to have settlements clearly recorded on the ODR platform. It was agreed that the options set out in this redrafted paragraph should be placed in square brackets for discussion at a future session.

4. Neutral (A/CN.9/WG.III/WP.112/Add.1, draft articles 6-7)

Draft article 6 (Appointment of neutral)

Paragraph (1)

91. Having heard no comments, it was agreed that paragraph (1) would be retained in its current form.

Paragraph (2)

92. It was expressed that the neutral's duty of independence and impartiality was an ongoing one. The Working Group requested that the Secretariat modify the second paragraph to reflect this.

Paragraph (3)

93. It was recalled that the background to this paragraph was to ensure the appointment of the neutral at this stage was a simple, automatic process. However, it was agreed that the intention was not to limit any right of a party which might have a justified objection to his or her continued involvement. It was agreed that such a right could arise at any point during the ODR process.

94. The Working Group requested the Secretariat to draft a separate provision permitting a party to object to the appointment of a neutral at any stage of proceedings where there was a justification for such an objection.

95. With regard to the number of objections to which a party was entitled, and to the number of days within which objections may be made, there was some disagreement, and therefore the square bracketed text would remain, with the respective numbers to be discussed at a future session.

Paragraph (4)

96. It was pointed out that appointment of a neutral does not become final until after any challenge process has been completed pursuant to paragraph (3). The Working Group requested the Secretariat to revisit the paragraph to remove any ambiguity about when appointment becomes effective.

97. A concern was expressed that the first sentence appeared to preclude the application of the second sentence. The Working Group requested the Secretariat to redraft the paragraph to reflect the principle that within a three-day period the parties may object to the provision of information to the neutral, but that after the expiration of that three-day period and in the absence of any objections, the full set of information would be conveyed to the neutral.

98. It was suggested to add, at the end of the paragraph, the words "except in a situation to which Article 5(5) applies".

99. After discussion, it was agreed to remove brackets around "[three (3) days]".

Paragraph (5)

100. In order to provide the parties with the same rights to challenge a replacement neutral as they have with regard to the original neutral, the Working Group agreed

that a provision mirroring paragraph (3) should be added to permit challenges to a replacement neutral, and that the language so added be placed in square brackets.

Paragraph (6)

101. There was consensus regarding the need for flexibility in the number of neutrals, in light of inter alia the evolving nature of ODR. It was agreed that the language of the current draft encompassed a certain degree of flexibility whilst retaining certainty, and should be retained, and the square brackets removed.

102. The Working Group agreed to remove square brackets from this paragraph.

103. In order to accommodate access to a wider range of neutrals, including neutrals from arbitral institutions, it was suggested that the Secretariat include the following draft language in square brackets for consideration at a future session (it was deemed that the best place for this language was at the end of the current paragraph (1)): “[or belonging to other arbitral institutions]”.

Draft article 7 (Power of the neutral)

Paragraph (1)

104. It was agreed that this paragraph was more closely related to the appointment of the neutral and should be moved to draft article 6.

Paragraph (2)

105. It was considered that the paragraph contained two concepts — the function of the neutral, and principles of conduct to which the neutral is subject. It was agreed that these could be more clearly expressed as separate concepts, and repetition in the current draft reduced.

106. Consequently, the Working Group requested the Secretariat to rephrase this paragraph and to include the rephrased paragraph in square brackets for consideration at a future session.

107. The importance of maintaining the spirit of UNCITRAL texts was agreed; at the same time, the language could be modified where necessary to suit the needs of ODR.

Paragraph (3)

108. It was suggested that there might be some inconsistency between this paragraph and the ability of parties to object to the provision of documents generated during the negotiation stage to the neutral under draft article 6, paragraph (4). It was agreed that the following wording would be added to the beginning of the paragraph to resolve this inconsistency: “*Subject to any objections under article 6, paragraph (4)*”.

Paragraph (4)

109. In relation to the non-square bracketed language, there was a suggestion to replace the phrase “may require” in the first sentence to “may request”, in order to modify slightly the powers of the neutral.

110. In relation to the square bracketed language, there was wide consensus that the Rules should retain a provision on the principle of burden of proof. However, two primary concerns were addressed regarding the current language.

111. First, it was expressed that the current formulation did not reflect the varying concepts of burden of proof in consumer cases in different jurisdictions, and the unique circumstances surrounding the proof of facts in an online environment. It was agreed that the Working Group would discuss this paragraph at a future session in order to consider further the formulation of the concept of “burden of proof”.

112. Second, it was agreed that the Secretariat find a new location for the square bracketed language, to reflect its importance as a substantive principle with legal consequences and obligations of the parties.

Paragraph (5)

113. A proposal was made to make the language of the paragraph more user-friendly by referring to the concept of “eligibility” when identifying the types of cases that the neutral may consider. In response, it was pointed out that adding the concept of eligibility could lead to ambiguity.

114. After discussion, it was agreed to retain the paragraph, which had already been the subject of Working Group discussions, as currently drafted.

Paragraph (6)

115. It was suggested that the paragraph should be modified to reflect the perceived need for a neutral to have the discretion to make enquiries or take necessary steps to determine whether receipt had taken place in respect of any communication from any party, rather than only in respect of the receipt of the notice by the respondent. Another suggestion was to make the obligation on the neutral a positive one, such that the neutral would be required to make enquiries where receipt of any communication was disputed.

116. The Working Group agreed that this paragraph should be modified to oblige the neutral to conduct enquiries where there was any doubt regarding whether the notice had been received, and to give the neutral the discretion to do so regarding all other communications. It was also suggested to bear in mind the situation of consumers who may not be able to check their electronic mails in a timely way.

117. The Working Group requested the Secretariat to draft language reflecting this agreement and to place such language in square brackets.

5. Facilitated settlement and arbitration (A/CN.9/WG.III/WP.112/Add.1, draft article 8)

Draft article 8 (Facilitated settlement)

Paragraph (1)

118. There was agreement that consumers were unlikely to undertake enforcement proceedings in a foreign country, and also that the Rules were intended to ensure that businesses comply with any outcomes reached.

119. The point was made that the intent was to devise an ODR system which would operate globally, taking into account the needs of developing countries and that final

and binding decisions were required in order to secure the compliance of businesses with the outcomes. In that regard, the absence of a binding award would require consumers to, in effect, seek relief through the courts. The Working Group was reminded that there exists no international treaty providing for cross-border enforcement of court awards, underlining the importance of binding decisions under ODR. Consumers as well as small and medium enterprises in developing countries would, it was said, have no other avenues of redress in the absence of binding decisions.

120. It was suggested that private enforcement mechanisms could be effective in many instances, particularly at the early stages of ODR. It was suggested that all enforcement mechanisms depend for their effectiveness on a final and binding award, although other views were expressed to the effect that private enforcement mechanisms in the absence of a binding award could be effective, particularly where private enforcement mechanisms existed. It was also expressed that public and private enforcement mechanisms are not mutually exclusive and that without a mandatory outcome, the process would not be effective and its integrity could not be ensured.

121. It was clarified that the square bracketed language in this paragraph was intended to determine whether, after failure of facilitated settlement, the proceedings should automatically move to the final stage or whether the parties should have the option to move to the next stage.

122. The view was expressed that movement to the next stage should not be automatic if the final outcome could be a binding decision.

123. There was some support for the need for agreement or an additional requirement to move to the next stage, on the basis that the timing of such acceptance would amount to a post-dispute agreement to arbitrate.

124. One view was that even if an award against a consumer could be set aside, a consumer seeking to do so would suffer hardship, including incurring costs that it would be unable to recover. A contrary view was expressed to the effect that there is little risk to a consumer of being affected by an invalid award against him.

125. A concern was raised regarding the word “evaluate”, as to whether, at this stage of the proceedings that was the neutral’s function; if not, then another word might be considered.

126. It was recalled that this paragraph is closely related to the question in draft article 1 regarding the staged nature of ODR proceedings.

127. A further question was raised as to whether, where an agreement was made and not implemented, similar language to that proposed in relation to article 5(5) (“re-commencement” in the event of non-implementation of settlement) might be added to this paragraph, to permit the reopening of proceedings in such circumstances. In response, it was suggested a solution might be to include in the annex an option for “non-payment of settlement” as a cause of action.

128. The Working Group agreed that ODR is a process involving three stages, and that the stage of decision by a neutral is part of that process. The Working Group noted that it has not yet been decided how to move from the second to the third stage or in fact whether the second and third stages might be compressed into a single phase.

129. It was further recalled that the vast majority of low-value, high-volume cases settle at the negotiation or facilitated settlement stage.

130. It was reiterated that these Rules are contractual rules and are not intended to override consumer law at the national level.

V. Consideration of the impact of the Working Group's deliberation on consumer protection; reporting to the Commission

131. The Working Group recalled the request by the Commission at its forty-fourth 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 next session.”³

132. The Working Group recalled its deliberations in previous Working Group sessions on the subject of consumer protection as summarized in paragraphs 15 and 16 of A/CN.9/WG.III/WP.113 and expressed the following considerations:

(a) That ODR would have an impact on consumers not only as claimants but potentially as respondents as well;

(b) That the Working Group has, throughout its deliberations, been very mindful of consumer protection issues and has been working hard to examine various options to accommodate consumer protection; and

(c) That 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.

VI. Future work

133. The Working Group noted that its twenty-sixth session was scheduled to take place in Vienna from 10-14 December 2012.

³ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 218.

**E. Note by the Secretariat on online dispute resolution for
cross-border electronic commerce transactions: draft procedural
rules, submitted to the Working Group on Online Dispute Resolution
at its twenty-fifth session**

(A/CN.9/WG.III/WP.112 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. It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.¹ At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering C2C transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided 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 report to the Commission at its next session.²

2. At its twenty-second session (Vienna, 13-17 December 2010),³ 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

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

² *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 218.

³ The report on the work of the Working Group at its twenty-second session is contained in document A/CN.9/716.

rules for ODR, including taking into account that the types of claims with which ODR would deal should be B2B and B2C cross-border low-value, high-volume transactions (A/CN.9/716, para. 115). At that session, the Working Group also requested the Secretariat to list available information regarding ODR known to the Secretariat with references to websites or other sources where they may be found (A/CN.9/716, para. 115). The Working Group may wish to note that that list is available on the UNCITRAL website.⁴

3. At its twenty-third session (New York, 23-27 May 2011)⁵ and its twenty-fourth session (Vienna, 14-18 November 2011),⁶ the Working Group considered draft generic procedural rules as contained in documents A/CN.9/WG.III/WP.107, and A/CN.9/WG.III/WP.109, respectively. At that session, the Working Group requested that the Secretariat, subject to availability of resources, prepare a revised version of the draft generic procedural rules as well as documentation addressing issues of guidelines for neutrals, minimum standards for ODR providers, substantive legal principles for resolving disputes and a cross-border enforcement mechanism (A/CN.9/721, para. 140 and A/CN.9/739, para. 151).

4. This note contains an annotated draft of generic procedural rules, taking into account the deliberations of the Working Group at its twenty-second, twenty-third, and twenty-fourth sessions.

II. Online dispute resolution for cross-border electronic transactions: draft procedural rules

A. General remarks

5. These Rules have been prepared in accordance with the decision of the Working Group to draft generic procedural rules for ODR, taking into account that the types of claims with which ODR would deal should be B2B and B2C low-value, high-volume cross-border electronic transactions. Rules prepared in this format — and the application of which, per draft article 1 thereof, requires the agreement of the parties — are of a contractual nature, and subject to mandatory law.

6. Several issues relating to the design of an overall ODR framework arise when considering the draft procedural rules (the Rules). Document A/CN.9/WG.III/WP.113 addresses a number of these issues, including guidelines and minimum standards for ODR providers and neutrals, and substantive principles for deciding cases.

7. The Working Group may wish to take into account that the Rules have been prepared based on the assumption that the ODR proceedings include a negotiation phase, followed by a phase of facilitated settlement and, if that second phase is inconclusive, a final and binding decision by a neutral. Where relevant, indications

⁴ www.uncitral.org/uncitral/en/publications/online_resources_ODR.html.

⁵ The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

⁶ The report on the work of the Working Group at its twenty-fourth session is contained in document A/CN.9/739.

have been given herein regarding variations to the Rules in the event parties are given discretion in choosing phases.

B. Notes on draft procedural rules

1. Introductory rules

8. 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 use 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

Paragraph (1)

9. In accordance with the decision by the Working Group, the Rules do not include definitions of the terms “low-value” and “cross-border” (A/CN.9/739, paras. 16 and 20) but the definition of “low-value” could be dealt with in a commentary or other additional document for the purpose of illustrating one or more examples of low-value cases (A/CN.9/WG.III/WP.113, para. ...).

10. The Working Group may wish to note that at the previous session a proposal was made to include in the draft preamble that the Rules were intended to apply to disputes relating to the “sale of goods and performance of services” (A/CN.9/739, para. 19).

Paragraph (2)

11. The Working Group agreed to proceed with deliberation as to the contents of the documents enumerated in paragraph (2) noting that the list of documents is not exhaustive (A/CN.9/739, para. 21). The Working Group may wish to consider which of these documents and any additional documents the Working Group should be preparing in the fulfilment of its mandate. The Working Group may wish to note that A/CN.9/WG.III/WP.113 addresses issues related to the documents identified in paragraph (2) (see above, para. 6).

Paragraph (3)

12. Another complementary — and optional — document would contain supplemental rules adopted by ODR providers. An ODR provider may choose to adopt supplemental rules to deal with issues that are not included in the Rules and that may require different treatment for each ODR provider — e.g. costs, definition of calendar days, responses to challenge of neutrals.

13. **Draft article 1 (Scope of application)**

Option 1 — “[1. The Rules shall apply to ODR proceedings where parties to a transaction conducted by use of electronic communication have agreed that disputes in relation to that transaction shall be referred for settlement under the Rules, [subject to the right of the parties to pursue other forms of redress].]”

Option 2 — “[1. Where parties to a transaction conducted by use of electronic communications have agreed, either at the time of the transaction or afterwards, that disputes in relation to that transaction shall be submitted to online dispute resolution under the Rules (“agreement”), the Rules shall apply if the parties were given clear and adequate notice of the agreement. [Such notice needs to provide for a consent of a party to the ODR proceedings and the Rules separate from the underlying transaction, in order to ensure that that party knowingly agreed to arbitrate the dispute under the Rules].]”

“[2. As a condition to using the Rules the [seller] [parties] must list its contact information.]”

*Remarks**Paragraph (1)*

14. Option 1 is a more generally worded provision that does not explicitly state the time of the agreement to refer the dispute for settlement under the Rules. Option 2 refers to two possible time periods when an agreement to resort to ODR under the Rules could have been reached, namely pre-dispute and post-dispute. The consent of the parties might be so expressed in the form of a separate OK box (click-wrap agreement) accessible from or linked to the underlying transaction. The Working Group may wish to consider including the last square bracketed sentence in Option 2 in guidelines and minimum requirements for ODR providers.

15. With respect to the square bracketed text at the end of Option 1 (“*[subject to the right of the parties to pursue other forms of redress]*”), the Working Group may wish to recall its discussion at its twenty-third session, and the diverging views expressed on the need to retain those words (A/CN.9/721, paras. 41-49 and A/CN.9/739, paras. 27-29). The square bracketed text is intended to refer to situations where pre-dispute agreements to arbitrate might not be binding upon consumers and thus where only one party might be bound by such an agreement.

Paragraph (2)

16. At its twenty-fourth session, the Working Group agreed to include paragraph (2) in square brackets (A/CN.9/739, paras. 26 and 29). Should the Working Group decide to include this paragraph, in the Rules, it may wish to

consider where it should be located (i.e. in draft article 1 or elsewhere) and that business parties may have different sets of contact information for different purposes.

17. **Draft article 2 (Definitions)**

“For purposes of these Rules:

“1. ‘claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice.

“2. ‘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.

“3. ‘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.

“4. ‘neutral’ means an individual that assists the parties in settling the dispute and/or renders a [decision] [award] regarding the dispute in accordance with the Rules.

“5. ‘respondent’ means any party to whom the notice is directed.

“6. ‘ODR’ means online dispute resolution which is a [system] [mechanism] for resolving disputes [through an information technology based platform and] facilitated through the use of electronic communications and other information and communication technology.

“7. ‘ODR platform’ means one or more than one online dispute resolution platform which is a [system] for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.

“[8. ‘ODR provider’ means an online dispute resolution provider which is an entity that administers ODR proceedings [and] [and/or] provides an ODR platform[, or both,] for the parties to resolve their disputes in accordance with the Rules.]”

[...]

Remarks

Paragraph (1) “claimant”

18. The Working Group agreed to retain the text as the Rules are intended to apply to B2B as well as B2C in which case it would be open to both parties to the transaction to bring a claim (A/CN.9/739, para. 30).

Paragraph (3) “electronic communication”

19. In line with the principle of technological neutrality enshrined in UNCITRAL texts on electronic commerce, the definition of the term “electronic communication” is intended to provide guidance without excluding any existing or future method of electronic communication. More concretely, the definition is intended to encompass the broader concept of digitized communication and accommodates new technologies, including those facilitating one-on-one hearing in electronic form such as automatic speech recognition that allows computers to interpret human speech and transcribe it to text or to translate text to speech, and may also include radio-frequency identification that uses communication through the use of radio waves to transfer information between an electronic tag and a reader.

Paragraph (6) “ODR”

20. The Working Group may wish to note that the term “system” is used both here and in the definition of ODR platform in paragraph (7), with meanings that obviously differ, and to consider whether, to avoid inconsistencies that could cause confusion to a reader, use of the term should be aligned throughout the Rules.

Paragraph (8) “ODR provider”

21. The Working Group may wish to note that at its twenty-fourth session, it had noted that: (a) the definition of the term “ODR provider” should be flexible, simple and clear; (b) the Working Group should bear in mind the effect of any change in the definition of the term “ODR provider” on the use of that term throughout the Rules, in order to ensure consistent use of terminology and thus to avoid any confusion (A/CN.9/739, para. 47). The Working Group may also wish to note that the definition of the term “ODR provider” should be broad enough to cover various designs of the ODR process and combinations thereof.

22. The Working Group may note that the square bracketed phrases [and] and [and/or] are to address the possibility of the definition of “ODR provider” including an operator of an ODR platform (i.e. ODR platform provider) (A/CN.9/739, para. 44).

23. The Working Group may wish to note that at its twenty-fourth session the concern had been expressed that the definition of the term “ODR provider” encompassed the roles of ODR administrator and ODR platform provider, and that these roles might need to be defined separately (A/CN.9/739, para. 40).

24. The Working Group may also wish to note that the definition of the term “ODR provider” could change depending on the stage at which the Rules contemplated the first involvement of the ODR provider in the proceedings (A/CN.9/739, para. 38).

25. Draft article 3 (Communications)

“1. All communications in the course of ODR proceedings shall be transmitted by electronic means [to the ODR provider and shall be addressed through the ODR platform] [to the ODR provider or through the ODR platform to be re-transmitted to the ODR provider].

“2. The designated electronic address[es] of the claimant for the purpose of all communications arising under the Rules shall be [that] [those] set out in the notice of ODR (“the notice”), unless the claimant notifies the ODR provider otherwise.

“3. The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be the address[es] for the respondent which has [have] been provided by the claimant. Thereafter, the designated electronic address[es] of the respondent for the purpose of all communications arising under the Rules shall be that [those] which the respondent notified to the ODR provider when accepting the Rules or any changes notified during the ODR proceeding.

“[4. The time of the receipt of an electronic communication under the Rules is the time when it becomes capable of being retrieved by the addressee of the communication at the ODR platform.]

“5. The ODR provider shall [promptly] [without delay] communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic addresses.

“6. The ODR provider shall [promptly] [without delay] notify all parties and the neutral of the availability of any electronic communication at the ODR platform.”

Remarks

Paragraph (4)

26. Paragraph (4) reflects article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”) and is relevant to the overall time frame of the ODR proceedings.⁷ The Rules are intended to promote simplicity, speed and efficiency, and relate to the resolution of disputes arising from cross-border transactions. This means that uncertainties as to the time of receipt of communications could delay proceedings and thus it may be necessary to identify a consistent standard to determine the time of their receipt. The Working Group may wish to note that the scope of the Rules includes disputes arising from B2B and B2C transactions, and to consider whether any adjustment may be necessary in light of the fact that the Electronic Communications Convention refers to B2B transactions. The Working Group may wish to note that there are various options to ascertain the time of receipt of an electronic communication communicated through the ODR platform. The general rule found in article 10 of the Electronic Communications Convention requires that an electronic communication be capable of being retrieved by the

⁷ Article 10 of Electronic Communications Convention updates article 15 of Model Law on Electronic Commerce. The amendments made to article 10 of Electronic Communications Convention are consistent with those prevailing in the paper world and limit the ability of an addressee to deliberately delay or impede delivery of a communication by not accessing it. They also take into account the fact that the information system of the addressee may not be reachable for reasons outside the control of the originator (for instance, the use of anti-spam filters for e-mails).

addressee at an electronic address designated by the addressee in order to be deemed to have been received by him. This is presumed to occur when the communication reaches the addressee's electronic address.

27. In light of the above, requiring a more specific time of receipt, as proposed at the twenty-fourth Working Group session (A/CN.9/739, para 52) might in fact create further uncertainties. The Working Group may wish to consider the following instances when defining the time of dispatch and receipt of electronic communication:

(a) The time when the ODR provider dispatches the electronic communication, that is the time when it leaves an information system under the control of the originator (article 10(1) of Electronic Communications Convention);

(b) The time the ODR platform (information system) dispatches the electronic communication to the addressee;

(c) The time when the ODR provider notifies that the electronic communication is capable of being retrieved by the addressee at the ODR platform;

(d) The time when the ODR platform dispatches the notification that the communication is capable of being retrieved by the addressee;

(e) The time when the addressee accesses the ODR platform and opens the electronic communication;

(f) The time when the addressee receives the notification that the communication is capable of being retrieved; and

(g) The time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee (article 10(2) of Electronic Communications Convention).

2. Commencement

28. Draft article 4 (Commencement)

"1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in annex A. 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 then be communicated by the ODR provider to the respondent [promptly] [without delay].

"3. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in annex B 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.

"4. ODR proceedings shall be deemed to commence on the date of receipt by the ODR provider at the ODR platform of the notice referred to in paragraph (1).

"[5. The respondent may, in response to the notice communicated by the claimant, communicate a claim which arises out of the same transaction [or

same factual circumstances] identified by the claimant in the notice [with the same ODR provider] ('counter-claim').] The counter-claim shall be initiated no later than [seven (7)] calendar days [after the notice of the first claim is [communicated to] [received by] the respondent]. [The counter-claim shall be dealt with in the ODR proceeding together with the [first claim] [notice by the claimant].]"

Annex A

"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 addresses 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 agrees to participate in ODR proceedings [or, if applicable, a statement that the parties have an agreement to resort to ODR proceedings in case of any dispute arising between them];"

"(f) 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;

"(g) the location of the claimant;

"[(h) the preferred language of proceedings;]

"(i) the signature of the claimant and/or the claimant's representative in electronic form including any other identification and authentication methods;

"[...]"

Annex B

"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 statement and allegations contained in the notice;

"(c) any solutions proposed to resolve the dispute;

"[(d) a statement that the respondent agrees to participate in ODR proceedings];"

"(e) 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;

"(f) the location of the respondent;

“[(g) the preferred language of proceedings:]

“(h) the signature of the respondent and/or the respondent’s representative in electronic form including any other identification and authentication methods;

“[...]”

Remarks

Paragraphs (2) and (3)

29. The Working Group may wish to note that, depending on how the terms “ODR provider” and “ODR platform” are defined, it could be foreseen that notices may be communicated to the ODR provider or ODR platform. These paragraphs will have to be made consistent with the provisions on communications and with the definitions of ODR provider and ODR platform. The Working Group may also wish to note that the designation of the recipient of an electronic communication, whether ODR provider or ODR platform, may affect the time of receipt of electronic communications which in turn affects the time frame of ODR proceedings.

Paragraph (3)

30. At its twenty-fourth session, the Working Group agreed to retain the term “calendar” throughout the Rules. The Working Group may wish to note that UNCITRAL texts do not contain a definition of “calendar” days, however article 2(6) of the UNCITRAL Arbitration Rules, deals with extensions of time when the last day of a period of time is an official holiday or non-business day and provides that official holidays or non-business days occurring during the running of the period of time are included in calculating the time period.

31. The Working Group may wish to recall its decision to provide in an additional document that time should be construed liberally in the procedural rules to ensure fairness to both parties, and that ODR providers might make their own rules with regard to time so long as they are not inconsistent with the Rules (A/CN.9/721, para. 99). The Working Group may wish to consider whether these matters should be addressed in the Rules together with the relevant questions of how the period of time under the Rules should be calculated and whether the calculation should be left to the ODR provider and addressed in guidelines and minimum requirements for ODR providers.

Paragraph (4)

32. Paragraph (4) deals with the commencement of ODR proceedings. The current wording of the paragraph makes commencement of proceedings dependent on receipt of the notice from the claimant, either by the ODR provider or the respondent.

33. The Working Group may wish to consider, in the event that ODR is designed to allow the parties and/or ODR providers to select a specific phase or phases of proceedings, whether each specific phase of the ODR proceedings — negotiation, facilitated settlement and arbitration — should contain its own definition of commencement.

Paragraph (5)

34. Draft article 4, paragraph (5) reflects the Working Group's decision to include a provision on counterclaims in the Rules (A/CN.9/739, para.93). In response to its request for a definition of counterclaim (A/CN.9/739, para. 93), the Working Group may wish to include the following definition in paragraph (5) or in draft article 2: “[‘Counter-claim’ means a[n independent] claim by the respondent against the claimant which arises out of the same transaction or same factual circumstances identified by the claimant in the notice [with the same ODR provider]]”.

35. The Working Group may wish to note that several questions arise in relation to counter-claims:

(a) Should the respondent file a new claim or include the counter-claim in the response? Can the response to the notice be presumed to encompass any counter-claim? Should this be made apparent to the claimant, for instance by way of the respondent indicating same by clicking a separate check-box? Will the neutral have the discretion to decide that a response encompasses or constitutes a counter-claim, in the absence of an express statement to that effect by the respondent?

(b) Will there be an option for the claimant to file a response to the counter-claim, or might the neutral have the discretion to request that the claimant do so?

(c) Who decides whether the counter-claim falls within the ambit of the initial claim in the notice by the claimant? (A/CN.9/739, para. 92). The Working Group may wish to consider the extent to which this question is addressed by draft article 7 and in particular paragraph (4) thereof (power of the neutral to rule on his own jurisdiction).

(d) Should the Rules or additional documents regulate the grounds for deciding whether a counter-claim falls within the ambit of the initial claim?

(e) Does the filing of a counter-claim prevent the respondent from filing a new claim on the same transaction and with a different ODR provider?

*Annex A**Annex A (c) and (d)*

36. The Working Group may wish to consider whether annex A should enumerate the grounds on which claims can be made and the available remedies. In a global cross-border environment for resolving low-value high-volume cases, it may be necessary to limit the types of cases to simple fact-based claims and basic remedies, to avoid the risk of overloading the system with complex cases, making it inefficient and expensive.

Annex A (f)

37. The Working Group may wish to note that, at its twenty-third session, it was suggested that annex A, paragraph (f), together with a companion provision in annex B could assist in preventing a multiplicity of proceedings relating to the same dispute (see also reference to annex B (d)) (A/CN.9/721, para. 122).

Annex A (h)

38. In the interest of efficiency of proceedings, the Working Group may wish to consider requiring the parties to select a preferred language of the proceedings, in the event they wish to use a language different from that used in connection with the transaction in dispute (see A/CN.9/WG.III/WP.112/Add.1, paras. 20-25).

Annex A (i)

39. The Working Group may wish to recall its discussion that complex identification and authentication methods may not be necessary for the purposes of ODR, and that current UNCITRAL texts on electronic commerce already addressed methods that were reliable and appropriate for the purposes for which they were used (article 7(2)(b) of UNCITRAL Model Law on Electronic Commerce, A/CN.9/716, para. 49). The issue of identification and authentication of parties in ODR might be more appropriately dealt with in a document separate from the Rules such as guidelines and minimum standards for ODR providers. It should also be noted that the term “electronic signature” differs from “digital signature”. Electronic signature⁸ refers to any type of signature that functions to identify and authenticate the user including identity management.⁹

Annex B

40. Annex B deals with the response to the notice and mirrors the provisions of annex A.

Annex B (a)

41. As with annex A (a) and (b), the issue of data protection or privacy and online security in the context of communicating information relating to the parties in the course of ODR proceedings should be taken into consideration (A/CN.9/721, para. 108).

Annex B (b) and (c)

42. Annex B (b) and (c) mirror annex A (c) and (d) and similarly, the Working Group may wish to consider whether annex B should enumerate the responses to the statements, allegations and proposed solutions contained in the notice.

⁸ Article 2 (a) of Model Law on Electronic Signatures defines electronic signatures as “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message”. Digital signature generally uses cryptography technologies such as public key infrastructure (PKI), which require specific technology and means of implementation to be effective.

⁹ Identity management could be defined as a system of procedures, policies and technologies to manage the life cycle and entitlements of users and their electronic credentials. It was illustrated that verifying the identity of person or entity that sought remote access to a system, that authored an electronic communication, or that signed an electronic document was the domain of what had come to be called “identity management”. It was illustrated that the functions of identity management were achieved by three processes: identification, authentication and authorization (see A/CN.9/692 and A/CN.9/728).

Annex B (d)

43. The Working Group may wish to consider modifying the language of paragraph (d) as set out below, in light of any views it may have on the issue of pre-dispute binding agreements to participate in ODR: “[*(d) a statement that the respondent agrees, or where applicable has agreed (for example in a pre-dispute arbitration agreement) to participate in ODR proceedings*]”.

Annex B (e)-(h)

44. Annex B (e) to (h) mirrors discussion on Annex A (f) to (i), respectively.

3. Negotiation**45. Draft article 5 (Negotiation)**

“1. *If settlement is reached, then the ODR proceeding is automatically terminated.*

“2. *If the parties have not settled their dispute by negotiation within [ten (10)] calendar days of the response, then the ODR proceeding shall automatically move to the [next] [facilitated settlement [and arbitration]] stage[s].*

“3. *If the respondent does not respond to the notice within [five (5)] [seven (7)] calendar days, he/she is presumed to have refused to negotiate and the ODR proceeding shall automatically move to the [next] [facilitated settlement [and arbitration]] stage[s] [, at which point the ODR provider shall [promptly] [without delay] proceed with the appointment of the neutral in accordance with article 6 below].*

“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)] [five (5)] [seven (7)] calendar days.*

“[5. *Where a party has failed to implement any settlement reached under paragraph (1), either party may re-commence ODR proceedings to seek a [decision] [award] reflecting the terms of the settlement which [decision] [award] a neutral shall have the power to grant.*]”

Remarks

46. The Working Group may wish to note that the Rules take into account several working assumptions related to negotiation: that direct negotiation by the parties through the ODR platform was one stage of ODR proceedings; that the ODR proceeding was composed of three stages — negotiation, facilitated settlement and arbitration — while keeping in mind that compression to a two-stage process could be considered; that a party could refuse negotiation and request to move to the next stage; and that there were different types of negotiation including automated and assisted negotiation (A/CN.9/739, para. 94). Other working assumptions include: that if the parties failed to reach a settlement at the negotiation stage, then the case would proceed automatically to the next stage (A/CN.9/739, para. 103); that commencement of ODR proceedings encompassed the commencement

of negotiation, and in this respect it was recognized that ODR proceedings are one package (A/CN.9/739, para. 95).

47. The Working Group may wish to note that the negotiation stage can involve assisted negotiation, automated negotiation or both. In assisted negotiation, the parties endeavour to reach a settlement communicating by electronic means offered by the ODR provider. In automated negotiation, each party offers a solution, usually in monetary terms, for settlement of the dispute which is not communicated to the other party. The software then compares the offers and aims to reach a settlement for the parties if the offers fall within a given range. The Rules may need to take into consideration the use of automated negotiation where it is the technology (software) that “negotiates” the settlement on the basis of proposals submitted by the parties. The Working Group may wish to consider whether the provisions on negotiation should include assisted negotiation and automated negotiation.

Paragraph (2)

48. The current draft takes into account that parties are required to settle their dispute by negotiation within a period of ten days following which the case should move automatically to the next stage, with all references to the appointment of a neutral removed from the paragraph (A/CN.9/739, para. 97).

49. The current draft does not provide the parties the option to choose or request that the proceeding be moved to the next stage, nor does it specify the action of the ODR provider when so moving the proceeding, namely “[at which point the ODR provider shall [promptly] proceed with the appointment of the neutral [without delay] in accordance with article 6 below]”, which language has now been deleted. Thus far in the proceeding no neutral has yet been appointed under the Rules (A/CN.9/739, para. 97). The Working Group may wish to consider including the above phrase in paragraph (2) or elsewhere in the Rules.

Paragraph (3)

50. Where there has been no response to the notice, paragraph (3) requires that the proceedings move to the next stage automatically. This is in line with paragraph (2) and the decision by the Working Group (A/CN.9/739, para. 97). The Working Group may wish to consider the following alternative option where the transition from negotiation to facilitated settlement phase and then to arbitration will be the result of express consent by the parties: “3. *If the respondent does not respond to the notice within [five (5)] [seven (7)] calendar days, he/she is presumed to have refused to negotiate and either party shall have the option to move to the [next] [facilitated settlement [and arbitration]] stage[s]*”.

Paragraph (4)

51. The Working Group may wish to consider whether the intent is to extend the deadline for filing a response (under draft article 4, paragraph (3)) or for reaching a settlement (under draft article 5, paragraph (2)), or both. Both options are offered, and they could be expressed in separate paragraphs, should the decision be to offer both.

52. The Working Group may also wish to consider whether the option to extend the negotiation phase should be at the discretion of the parties or whether such extension may be refused by the ODR provider.

Paragraph (5)

53. The Working Group may wish to consider whether there should be a time limit within which proceedings must be recommenced following failure to implement the settlement (A/CN.9/739, paras. 107-110).

(A/CN.9/WG.III/WP.112/Add.1) (Original: English)

Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution at its twenty-fifth session

ADDENDUM

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4. Neutral**1. Draft article 6 (Appointment of neutral)**

“1. The ODR provider through the ODR platform shall appoint the neutral by selection from a list of qualified neutrals maintained by the ODR provider.

“2. The neutral shall declare his or her independence and shall disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR provider shall communicate such information to the parties.

“3. Either party may object to the neutral’s appointment within [two (2)] calendar days of the notice of appointment. Where a party objects to the appointment of a neutral, 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)] such challenges to the appointment of a neutral, following which the appointment of a neutral by the ODR provider will be final.

“4. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment and shall provide the neutral all communications and documents regarding the dispute received from the parties. Either party may object, within [three (3)] calendar days from receiving the notice of appointment of the neutral, to providing the neutral with information generated during the negotiation stage.

“5. If the neutral has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform will appoint a neutral to replace him or her and will inform the parties [promptly][without delay]. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.

“[6. The number of neutrals shall be one unless the parties otherwise agree.]”

*Remarks**Paragraph (3)*

2. The Working Group may wish to consider including the words “the receipt of” between “calendar days of” and “the notice of appointment” to clarify when the time period begins to run.

Paragraph (4)

3. The Working Group may wish to clarify whether “all communications and documents regarding the dispute received from the parties” should include the communications exchanged at the negotiation stage, since the claimant, upon filing, is required to submit relevant evidence and documents.

4. The Working Group may also wish to consider retaining the square bracketed phrase that gives the parties the option to object to providing the neutral with information generated during the negotiation stage.

Paragraph (6)

5. At its twenty-second session, the Working Group agreed that, in the absence of agreement otherwise by the parties, there should be a sole neutral (A/CN.9/716, para. 62).

6. **Draft article 7 (Power of the neutral)**

“1. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the ODR proceeding to be conducted and completed expeditiously in accordance with the Rules.

“2. Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate, [subject to safeguards to preserve impartiality of the neutral and the integrity of the process,] provided that the parties are treated equally. The neutral, in exercising his or her discretion, 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 act fairly and shall remain at all times wholly independent and impartial.

“3. The neutral shall conduct the ODR proceedings on the basis of documents filed 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.

“4. At any time during the proceedings the neutral may require 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. [Each party shall have the burden of proving the facts relied on to support its claim or defence.]

“5. 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, a dispute settlement clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A [decision] [award] by the neutral that the contract is null shall not automatically entail the invalidity of the dispute settlement clause.

“[6. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice [or any other communication] under the Rules, the neutral may make such inquiries or take such steps as he deems necessary to satisfy himself with regard to such receipt, and in doing so he may where necessary extend any time period provided for in the Rules.]”

Remarks

Paragraph (1)

7. Draft article 6, paragraph (6) has been moved to draft article 7, paragraph (1) to reflect the determination that the availability of the neutral to undertake ODR cases is more suitably identified as an obligation of the neutral rather than a precondition to his appointment (A/CN.9/739, para. 123).

Paragraph (4)

8. The Working Group may wish to move the square bracketed sentence, which raises issues of proof, to another place in the Rules (A/CN.9/739, para. 127).

Paragraph (6)

9. Draft article 7, paragraph (6) reflects the Working Group's agreement to include a provision to allow for the neutral to decide on issues related to non-receipt of communications by a respondent (A/CN.9/739, para. 101). The Working Group may wish to consider whether the proposed provision is suitable in draft article 7 or as part of draft article 4.

5. [Facilitated settlement and arbitration]

10. Draft article 8 (Facilitated settlement)

“1. The neutral shall evaluate the dispute based on the information submitted and shall communicate with the parties to attempt to reach an agreement. If the parties reach an agreement, then the ODR proceeding is automatically terminated. If the parties do not reach an agreement within ten (10) calendar days, [the parties shall have the option to move to the next [stage[s]] of the ODR proceeding] [the neutral shall render a [decision] [award] pursuant to Article 9].

“[2. If, as a consequence of his or her involvement in the facilitation of settlement, any neutral develops doubts as to his or her ability to remain impartial or independent in the future course of the ODR proceedings under Article 9, that neutral shall resign and inform the parties and the ODR provider accordingly.]”

*Remarks**Paragraph (2)*

11. The Working Group may wish to consider whether paragraph (2) is suitable to be included in draft article 8 or in draft article 6, paragraph (2). The Working Group may also wish to consider including an equivalent provision in draft article 9 in the event the neutral at the arbitration stage is different from that in the facilitated settlement stage.

12. The Working Group may also wish to consider whether a facilitated settlement should terminate by way of a settlement agreement either in all cases or where requested by a party.

6. Decision by the neutral**13. Draft article 9 ([Issuing of] [Communication of] [decision] [award])**

“1. The neutral shall render a [decision] [award] [promptly][without delay] and in any event within seven (7) calendar days [with possible extension of additional seven (7) calendar days] after the parties make their final submissions to the neutral. The ODR provider shall communicate the [decision] [award] to the parties. Failure to adhere to this time limit shall not constitute a basis for challenging the [decision] [award].

“2. The [decision] [award] shall be made in writing and signed by the neutral, and shall contain the date on which it was made [and brief grounds for the [decision] [award]].

“[3. The [decision] [award] shall be final and binding on the parties. The parties shall [promptly] carry out the [decision] [award] without delay].

“4. Within [five (5)] calendar days after the receipt of the [decision] [award], a party, with notice to the other party, may request the neutral to correct in the [decision] [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 therefore] within [two (2)] calendar days of receipt of the request. Such corrections [shall be in writing and] shall form part of the [decision] [award].

“5. In all cases, the neutral shall decide 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)*

14. The Working Group may wish to deliberate on what happens in the event that a neutral fails to render a decision within the time provided in the paragraph (A/CN.9/739, para. 133) as well as to consider the suggestion to impose reputation-based penalties on ODR parties defaulting on their obligations (A/CN.9/739, para. 136).

Paragraph (2)

15. The Working Group may wish to address the question whether a neutral needs to provide grounds for his decision (A/CN.9/739, para. 137).

Paragraph (3)

16. The Working Group may wish to note that paragraph (3) has been placed in square brackets as it relates to issues raised under draft article 1 and the square bracketed text therein [*“subject to the right of parties to pursue other forms of redress”*] (A/CN.9/739, para. 138).

Paragraph (4)

17. The Working Group may wish to address the question whether a neutral needs to provide grounds for his correction to the decision (A/CN.9/739, para. 139).

Paragraph (5)

18. The Working Group may wish to note that, as paragraph (5) relates to substantive legal principles for resolving disputes, it was suggested to delete it from draft article 9 and to include it elsewhere (A/CN.9/739, para. 141). The Working Group may also wish to note that this issue is discussed in A/CN.9/WG.III/WP.113.

7. Other provisions**19. Draft article 10 (Language of proceedings)**

“[The ODR proceedings shall be conducted in the language used in connection with the transaction in dispute, [unless another language is agreed upon by the parties] [unless the neutral decides otherwise]. [In the event the parties do not agree on the language of proceedings, the language of proceedings shall be determined by the neutral.]]”

Remarks

20. The Working Group may wish to note that in some situations, the language used in connection with a transaction may be different for the seller and buyer, depending on their respective locations. For instance, a seller may access a selling website in one language while the website automatically changes to another language depending on the buyer’s Internet protocol (IP) address, which reflects his location and the language commonly used there. In such a case, identifying the “language used in connection with the transaction” could be problematic.

21. In addition, a common argument against choosing the language of the transaction as the language of proceedings is that the level of understanding of a language needed to conclude a transaction may differ from that needed when making a claim. Technology may assist parties in overcoming such language issues, making it possible for users to submit a claim while having little understanding of the language of the ODR platform. However, it should be borne in mind that a given ODR platform may not have the capacity to provide such technology-based services, and may not be able to accommodate the full range of languages.

22. In order to facilitate agreement on the language of proceedings, the Working Group may wish to provide for selection of language by the parties in annexes A and B of draft article 4 (see A/CN.9/WG.III/WP.112, para. 38).

23. Draft article 10 reflects the suggestion made by the Working Group that, where the parties have failed to reach an agreement on the language of proceeding, this matter could be left to the discretion of the neutral (A/CN.9/716, para. 105). In that case, the Working Group may wish to consider how the language of proceedings is to be determined prior to the involvement of the neutral and on what grounds the neutral will decide on the language of proceedings.

24. The Working Group may also wish to note that in cases where the neutral needs to review supporting documentation submitted by the parties, the ODR provider may need to appoint a neutral who has understanding of the relevant language(s).

25. A proposal was made to include a separate paragraph along the following lines (A/CN.9/739, para. 143): “*An ODR provider dealing with parties using different languages shall ensure that its system, Rules and neutrals are sensitive to these differences and shall put in place mechanisms to address the needs of parties in this regard*”. The Working Group may wish to consider whether such a reference is more appropriately placed in guidelines and minimum requirements for ODR providers.

26. 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.”

27. Draft article 12 (Exclusion of liability)

“[Save for intentional wrongdoing or gross negligence, neither the neutral nor the ODR provider shall be liable to the parties for any act or omission in connection with any ODR proceedings under the Rules.]”

Remarks

28. Draft article 12 deals with the question of exclusion of liability of the persons involved in the ODR proceedings. It mirrors article 16 of the UNCITRAL Arbitration Rules, with necessary adjustments.

29. Draft article 13 (Costs)

“[The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.]”

Remarks

30. The term “costs” refers to an order by a neutral for the payment of money from one party (usually the losing party) to another (usually the successful party) in compensation for the successful party’s expenses in bringing its case.

31. The Working Group may wish to consider, in the event the claimant is successful in ODR proceedings where the neutral is involved, whether his or her filing fee should be paid by the unsuccessful party.

F. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework, submitted to the Working Group on Online Dispute Resolution at its twenty-fifth session

(A/CN.9/WG.III/WP.113)

[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. It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.¹ At its forty-fourth session (Vienna, 27 June-8 July 2011), 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 (Vienna, 13-17 December 2010) and twenty-third sessions (New York, 23-27 May 2011), the Working Group considered the subject of ODR and requested the Secretariat, subject to availability of resources, to undertake research and prepare various documents relating to an ODR framework (A/CN.9/716, para. 115 and A/CN.9/721, para. 140).

3. Further to document A/CN.9/WG.III/WP.110 addressing issues in the concept of a global ODR framework, this note contains further issues for consideration in the concept of a global ODR framework and general remarks relating to documents referred to in the ODR draft Procedural Rules as Appendices (A/CN.9/WG.III/WP.112, paras. 8 and 11) including guidelines for ODR providers,

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

guidelines for neutrals and principles for resolving disputes through the global ODR framework.

II. Online dispute resolution for cross-border electronic transactions: issues for consideration in the conception of a global ODR framework

A. General remarks on the global ODR framework

4. The overall ODR framework may consist of ODR Procedural Rules (the Rules) for resolving disputes and separate and additional documents that complement the Rules. The Rules regulate how ODR proceedings are commenced, processed, decided and terminated (see A/CN.9/WG.III/WP.112). One complementary document is a guideline and minimum requirement for ODR providers, which would include how an ODR provider should administer proceedings and operate an ODR platform in accordance with the Rules. Another complementary document may deal with a code of conduct and minimum requirements for persons serving as neutrals in ODR. All complementary documents should be in conformity with the Rules and are influenced by how the Rules are formulated.

5. Further complementary documents are foreseen to deal with principles for resolving disputes and a cross-border enforcement mechanism (see A/CN.9/WG.III/WP.110, paras. 20-49).

6. The final form of those documents, and whether they should form part of the Rules or be separate, are matters yet to be decided by the Working Group (draft preamble, A/CN.9/WG.III/WP.112, para. 8).

B. Guidelines and minimum requirements for ODR providers

7. The Guidelines and minimum requirements for ODR providers (“Guidelines for providers”) might address such matters as how the provider is to administer ODR proceedings and operate the ODR platform in accordance with the Rules, and may include explanations on how such measures complement and facilitate the operation of the Rules. The Guidelines for providers are intended to further clarify the Rules in matters relating to technical and design aspects of ODR platforms (A/CN.9/WG.III/WP.107, para. 14). Further, the Guidelines for providers could specify adherence to general principles such as technological neutrality and accommodating interoperability and scalability of technologies (A/CN.9/WG.III/WP.107, para. 20, see A/CN.9/WG.III/WP.114 submission by the Government of Canada on proposal for the preparation of principles applicable to Online Dispute Resolution providers and neutrals).

8. Although the Guidelines for providers are to be read in conjunction with the Rules, their content depends to some extent on which matters the Working Group decides to exclude from the Rules. The Working Group may wish to note that issues dealing with functional requirements and technical specifications for ODR providers

in relation to the operation of an ODR platform and related matters might be more effectively dealt outside of the Rules themselves.²

C. Guidelines and minimum requirements for ODR neutrals

9. The guidelines and minimum requirements for ODR neutrals (“Guidelines for neutrals”) presumably contemplate a code of conduct (A/CN.9/716, para. 67); basic principles that are essential attributes for neutrals include independence, neutrality and impartiality (A/CN.9/716, para. 66) (A/CN.9/WG.III/WP.114 submission by the Government of Canada on proposal for the preparation of principles applicable to Online Dispute Resolution providers and neutrals); as well as possession of required professional and dispute resolution skills (A/CN.9/716, para. 63). The document may specify a system of accreditation and re-accreditation for neutrals, possibly with two phases: an initial phase focusing on relevant experience of the neutral and a second involving periodic review taking account of feedback from ODR users (A/CN.9/716, para. 65).

D. Principles for resolving ODR disputes

10. The Working Group may wish to recall its discussion and the suggestion of an approach using equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions as the basis for deciding cases in order to avoid complex problems that may arise in the interpretation of rules as to applicable law. Views have also been expressed that most of the cases dealt with in ODR could be decided on the basis of the terms of the contract, with little need for resort to complex legal principles, and that any rules devised for ODR should be simple, expeditious and flexible. Some characterized the need as being for a body of general legal principles applicable to a limited fact-based system (A/CN.9/716, para. 101).

11. The Working Group may wish to note that in a global cross-border environment for resolving low-value, high-volume cases, it may be necessary to limit the types of cases dealt with to simple fact-based claims and basic remedies, to avoid the risk of overloading the system with complex cases, making it inefficient and expensive (A/CN.9/716, para. 101).

12. The global ODR framework is intended to be used for resolving disputes arising from low-value, high-volume electronic transactions of which a large portion of the claims are based on a limited number of problems such as goods not ordered, not delivered/provided, not as described, etc. The ODR framework is not intended to address certain types of claims such as bodily harm, consequential damages and debt collection (A/CN.9/739, para. 18). The Working Group may wish to refer to its deliberations on whether the Rules should include an exhaustive list of types of cases falling within or outside the scope of the Rules (A/CN.9/721, para. 50).

² These issues may include: (a) legal or jurisdictional basis for the establishment of ODR providers and/or maintenance and operation of ODR platforms; (b) technical specifications, standards or specific technologies used for identification, authentication or other requirements of an ODR platform; (c) specifications relating to ODR facilities and equipment including any specific technologies to be used (e.g., algorithms or software based thereon).

13. The Working Group may wish to consider — with a view to simplifying the process and ensuring that ODR is straightforward and efficient for users — that draft annexes A and B of the Rules (A/CN.9/WG.III/WP.112, para. 28) set out a list of possible claims, and responses thereto, to be included respectively in the notice and response under draft Article 4. The suggested wording in these annexes — using check boxes and pre-drafted text — would aim to specify the types of claims that may be advanced by claimants and the types of responses available to respondents. This in turn could assist in determining which of a limited number of available remedies were appropriate for disposition of a particular case (A/CN.9/721, para. 109).

14. Should the Working Group decide to adopt the approach of enumerating possible claims and remedies in Article 4 of the Rules, it may wish to consider the necessity of maintaining reference to the additional document on principles for resolving disputes that is now listed in the draft preamble to the Rules (A/CN.9/WG.III/WP.112, para. 8).

E. Consideration of the impact of the Working Group's deliberations on consumer protection; reporting to the Commission

15. At its forty-fourth session, the Commission "... decided 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 next session".³

16. In its twenty-second to twenty-fourth sessions, the Working Group has commented at various times on consumer issues.⁴ The Working Group may wish to take note that key points raised, and views expressed, in those discussions included the following:

(a) As consumer protection was an important public policy consideration, legislation in that field was highly specific to particular jurisdictions, and care should be taken that any approach to ODR not detract from consumer rights at the national level. Non-interference with the rights of consumers under national consumer protection laws would help inspire a climate of confidence in ODR among consumers, and it was not within the remit of the Working Group to address harmonization of national consumer protection laws;

(b) The goal of the current work was to create a separate global system for the resolution of cross-border disputes involving high-volume, low-value cross-border transactions. In such cases, consumers were unlikely to exercise any rights they might have as the cost of doing so was prohibitive in relation to the value of the purchase and furthermore, enforcement of an award would prove difficult. As at present in the case of most cross-border consumer transactions consumers had, in practice, no rights, the creation of an ODR standard could have the effect of creating such rights. With the use of "amicable" dispute resolution

³ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 218.

⁴ A/CN.9/716, paras. 4, 19, 23, 42-45, 48, 50, 52-54, 76, 87, 89, 90, 96, 101, 104 and 106; A/CN.9/721, paras. 41-43, 46 and 86; A/CN.9/739, para. 25-28 and 73.

methods such as complaint-handling, negotiation and conciliation, parties would be freely consenting to a settlement and thus their rights under consumer laws would not be imperilled. In the case of arbitration, a standard would be needed to preserve the protections of consumer laws and this raised the larger question of what would be the applicable law in an ODR arbitration. An ODR standard might embody “core principles” of consumer protection law. Principles for deciding cases should contemplate the need for high consumer protection content;

(c) Clear and adequate notice of any dispute resolution agreement should be given to make it plain to the consumer what obligations he/she will be taking on and the implications of any choice of law being made; such an agreement should be separate from the main provisions of the contract to better draw the consumer’s attention to it. Consumer protection agencies might assist or represent consumers entering into the dispute resolution process;

(d) The language of ODR proceedings, and thus a full comprehension of the process, were crucial for consumers; the level of understanding required for conclusion of contracts through electronic transactions on the one hand, and for the process of ODR on the other hand, differed.

G. Note by the Secretariat on the proposal on principles applicable to Online Dispute Resolution providers and neutrals — Proposal by the Canadian delegation, submitted to the Working Group on Online Dispute Resolution at its twenty-fifth session

(A/CN.9/WG.III/WP.114)

[Original: English]

In preparation for the twenty-fifth session of Working Group III (Online Dispute Resolution), the Government of Canada on 12 March 2012 submitted to the Secretariat the note attached hereto as an annex concerning a proposal on principles applicable to online dispute resolution providers and neutrals.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

I. Background

The UNCITRAL Secretariat prepared draft Procedural Rules (A/CN.9/WG.III/WP.109), which cover the online dispute resolution (ODR) process through three successive stages: (1) negotiation, (2) conciliation and (3) decision by a neutral. The draft Procedural Rules constitute simplified rules of procedure similar to the UNCITRAL Arbitration Rules, but adapted to the ODR context.

ODR providers operate dispute resolution systems online. They may have a place of business in one or more jurisdictions. They offer services — in particular ODR for cross-border transactions — directly to consumers and businesses. An important aspect for ODR providers is the presence of trust marks in relation to their services, such as a reference to the draft Principles below or surveys by users published online.

There is a certain level of overlap between the proposed Principles and the draft Procedural Rules. They reinforce each other but have different objectives: the Procedural Rules are aimed at establishing a procedure for ODR and the Principles are aimed at promoting a best practices model for ODR providers and neutrals. Some of the best practices proposed in the Principles below will be adopted or reflected in agreements between the ODR provider and the parties to the ODR proceedings or third parties.

A proposal concerning Principles Applicable to Online Dispute Resolution Providers and Neutrals was circulated informally by the Canadian delegation during the 24th session of Working Group III in November 2011. The Principles found in this document are based on the informal submission.

Canada submits this document as a starting point for the discussions of the Working Group on issues relating to best practices for ODR providers and neutrals. Canada recognizes that the document will evolve as the Working Group's discussions progress and that the Principles set out in this document will need to be adapted to reflect policy choices made by the Working Group. For example, the Working Group may wish to expand or limit any of the Principles or provide more details with respect to their scope; to elaborate or combine the Principles on competence, neutrality and impartiality of neutrals; or to provide more guidance

with respect to the information that is required to be provided such as guidance on the anticipated length of time for a decision to be rendered after a complaint has been filed, on whether a decision is final and binding and on whether communications in the ODR process will be accessible to others. In addition, the Principles need to be considered in light of the law applicable to the various aspects of the transactions, to the decision process and to the enforcement of the resulting decision.

II. Draft Principles applicable to ODR Providers and Neutrals

Principle 1 — Maintaining a Roster of Competent Neutrals

- (1) The ODR provider shall select individuals for the roster of neutrals on the basis of competence, independence and impartiality.
- (2) The ODR provider shall publish and maintain an up-to-date list of neutrals, which shall include information on their experience and expertise.
- (3) The ODR provider shall ensure that the competence of neutrals is maintained through appropriate training including training on subject-matters relating to ODR cases and on the technology used by the ODR system.
- (4) The ODR provider shall put in place processes to deal with complaints concerning the roster of neutrals, such as disqualification of neutrals on the basis of a demonstrated lack of required skills [*or expertise*].¹
- (5) The ODR provider shall ensure, to the extent feasible, that an arm's length body is available to users to hear complaints about rules, practices or administrative decisions by the ODR provider.²

Principle 2 — Independence

- (1) [*Neutrals are selected by agreement between the parties.*]
- (2) [*The ODR provider may randomly appoint the neutral [where the parties agree to this selection process].*]³
- (3) The ODR provider and the neutral shall maintain independence from the parties throughout the ODR process and shall put in place processes to deal with complaints concerning a neutral, such as disqualification on the basis of a demonstrated lack of independence.
- (4) The ODR provider or neutral shall promptly disclose to the parties any relation, contractual or other, that may reasonably be perceived as affecting their independence [*in relation to the parties*].

¹ The term “expertise” may be considered too broad and leading to disqualification in many situations. Consideration could be given to specifying the type of expertise that is expected from neutrals.

² It is understood that such review body may not currently be available. As ODR expands, such bodies may be created or existing institutions may decide to offer these services.

³ Paragraphs (1) and (2) may appear as belonging to ODR Procedural Rules rather than to these Principles. They are nonetheless suggested as random selection of neutrals may be unusual in some jurisdictions.

(5) An ODR provider that is captive of a single seller, a limited number of sellers or a single industry is not considered independent.

[Alternatively: *An ODR provider is not required to be independent from the parties, but it shall disclose any circumstances affecting its independence.*]⁴

(6) Funding sources and payment arrangements for the ODR services shall be disclosed to the parties.

Principle 3 — Impartiality

(1) [*The neutral shall be impartial throughout the ODR process.*]

(2) [*The ODR provider shall put in place processes to deal with complaints concerning a neutral, such as disqualification on the basis of a demonstrated lack of impartiality.*]⁵

Principle 4 — Disclosure of Terms of Service and Confidentiality

(1) 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.

(2) The ODR provider shall take measures to ensure confidential information is protected and stored with restricted access.⁶

(3) Except where required by law, the ODR provider shall not disclose to third parties settlement offers and settlements made during the ODR process.⁷

Principle 5 — Establishing Identity of the Parties

(1) The ODR provider shall take appropriate measures to facilitate identification of the parties and may require confirmation or evidence from the parties to establish their identity.⁸

⁴ The alternative language might be more appropriate in circumstances for example where ODR providers are set up and funded by associations of sellers.

⁵ The Working Group may wish to consider incorporating the requirement for the ODR providers to put in place processes similar to those found under Principles 1(4) and 2(3) dealing with complaints regarding a neutral's lack of impartiality.

⁶ The ODR process is somewhat different from a traditional court process. It is not anticipated that all documents be available to the general public. Specific rules may be required with respect to "personal information" in particular under Principle 5. Duties and liabilities with respect to personal information under domestic law may impose a higher standard which could be reflected in the Principles.

⁷ This rule is commonly found in common law and civil law jurisdictions with respect to settlement offers made in the course of mediation. It aims at fostering amicable resolution of disputes and encouraging parties to make reasonable proposals.

⁸ In traditional court systems, a party is entitled to know the identity of the opposing party. The rule confirms that a party also has the right to seek confirmation of the identity of the opposing party in an online environment.

(2) A party shall not be denied access to information relevant to establish or confirm the identity of another party to the ODR process on the basis that the information is confidential.⁹

Principle 6 — Accessibility, System Reliability and Security

(1) The ODR provider shall put in place measures to ensure reliability and security in the ODR process, such as the use of usernames and passwords.¹⁰

(2) The ODR provider shall use technologies that are accessible and understandable for common users.

(3) The ODR provider shall ensure information is presented prominently and in a comprehensible manner.

(4) *[The ODR provider is encouraged to obtain sufficient insurance and guarantees to cover potential liability for a security breach or from an inadvertent release of personal information.]*

Principle 7 — Record and Publication of Decisions

(1) The ODR provider shall maintain a record of the ODR proceedings and settlement agreements in a manner that allows subsequent reference by the parties for a period of [three]¹¹ years.

(2) *[The ODR provider [may] publish[es] the decision except where the party is a consumer; in which case, a consent for publication of the consumer's name [shall] first be obtained from the consumer.]*¹²

(3) The ODR provider shall publish statistics on the percentage of complaints decided in favour of and against the complaining party, the average time period for resolving cases and the number of cases that remain unresolved.¹³

⁹ Some could argue there is a conflict or an overlap between the rules on confidentiality and those for establishing identity. This Principle clarifies any expectation by one party that keeping information confidential does not extend to documents or information concerning his or her identity when it is requested by the opposing party. This principle also limits the liability of ODR providers as concerned disclosure of confidential information.

¹⁰ Reliability and security measures adopted by ODR providers will depend on the circumstances and will evolve overtime as technology and risks change. The level of security required for an ODR system will depend on the circumstances such as the sensitivity of information, the applicable law and the parties' expectations. As such, it was considered unpractical to attempt to define what the measures could be. Usernames and passwords are illustrative and may be considered a strict minimum under which the ODR provider could be exposed to liability.

¹¹ A three-year period is suggested as it is the time limitation period in many jurisdictions for claims in relation to consumer goods. In practice ODR providers may easily exceed this requirement because of the availability at low cost of data storage.

¹² This paragraph is bracketed because publication raises issues of confidentiality and privacy. It also requires the examination of the practicality of collecting ODR decisions for the purposes of legal interpretation of future cases.

¹³ Publication of information relating to the ODR decisions and execution of those decisions is considered important for a well-functioning system as publication encourages compliance to decisions. Paragraph (2) provides a best practice to publish information generally. A special rule is proposed in relation to consumers, which recognizes that consumers may not want their name to be published. Paragraph (2) also limits the liability of the ODR provider. Paragraph (3) sets the minimum publication requirements by ODR providers under the Principles.

(4) [Alternatively: *The ODR provider shall publish [at least once a year] statistics on the number of complaints received and the percentages of these complaints that have been accepted, examined, resolved or decided in favour or against the complaining party, including the detail of those that have been decided wholly in favour of the complaining party, the average length of time for the resolution and the number of requests that are outstanding and the number of decisions for which a party has refused to comply with the award.*]

Principle 8 — Sensitivity to Language and Culture

(1) An ODR provider dealing with individuals of different cultural backgrounds or languages shall ensure its system, rules and neutrals are sensitive to these differences, and shall put in place mechanisms to address client needs in these regards.

(2) An ODR provider shall not actively solicit clients where linguistic or cultural needs cannot be accommodated.

(3) The ODR provider shall divulge the languages in which its services are offered.

Principle 9 — Fees and Costs

(1) The fees for the ODR service shall be reasonable with regards the value of the dispute, to the parties involved and their bargaining position at the time of concluding the contract under dispute.

(2) All fees of the ODR process must be disclosed to the parties before its commencement.

(3) The neutral shall not award costs to one party or another.

[Principle 10 — Decisions]

(1) *Decisions shall state the reasons upon which they are based.*]

Principle 11 — Enforcement

(1) The 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 parties at the outset of the ODR process; or facilitating payment of awards.

Principle 12 — Redress

The ODR provider shall not propose in its offer for service contractual clauses waiving consumer rights or legal recourses afforded by the domestic law of the parties.¹⁴

¹⁴ This provision ensures that agreeing to ODR will not affect the rights of the parties. This best practice for ODR providers ensure that ODR clauses which are agreed to by the parties are not waiving rights recognized by the applicable law. This provision also protects ODR providers by clarifying the extent of the services provided (i.e., they do not guarantee that recourses available under domestic law will not be commenced although the ODR process has been agreed upon).

**H. Note by the Secretariat on the Analysis and Proposal for
Incorporation of Substantive Principles for ODR Claims and Relief
into Article 4 of the Draft Procedural Rules — Note submitted by the
Center for International Legal Education (CILE), to the Working
Group on Online Dispute Resolution at its twenty-fifth session**

(A/CN.9/WG.III/WP.115)

[Original: English]

In preparation for the twenty-fifth session of Working Group III (Online Dispute Resolution), the Center for International Legal Education (CILE) on 12 March 2012 submitted to the Secretariat the note attached hereto as an annex concerning an analysis and proposal for incorporation of substantive principles for ODR claims and relief into article 4 of the draft procedural rules.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

I. The Purpose of This Note

UNCITRAL Working Group III has undertaken to prepare a framework for a global system of online dispute resolution (ODR). This work began in December 2010, with additional sessions in May 2011 and November 2011. The next session is scheduled for 21-25 May 2012.

While the work to date has focused on the procedural rules, the full set of instruments must be based on common understandings of what can, and cannot, be accomplished in an ODR system that is designed to be **simple, efficient, effective, transparent, and fair**.

The Center for International Legal Education of the University of Pittsburgh School of Law has undertaken, in particular, consideration of the third document indicated by the Working Group, substantive legal principles for resolving disputes. This analysis has led to the conclusion that the goals of simplicity, efficiency, effectiveness, transparency, and fairness might be achieved by replacing a separate document on substantive legal principles with an expanded approach to the forms now included as annexes to Article 4 of the Draft Procedural Rules.

This note proposes that, instead of a separate document on substantive legal principles, the same goals be accomplished by providing clear and transparent methods for submitting specific fact-based claims and requesting specific relief in the forms now included as annexes to Article 4 of the Draft Procedural Rules. Thus, the substantive rules for resolving these fact based claims would be implied in the structure of claims that may be brought and relief that may be granted in the ODR system. This structure would reduce (and perhaps eliminate) the need for reference to and determination of applicable substantive national law or the need to develop more extensive substantive non-national rules for resolving disputes. See Article 35 of the UNCITRAL Arbitration Rules and Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration.

Because it is helpful first to understand the background to the decision to develop non-national substantive legal principles as well as the core principles on which the proposal in this Note is based, the following discussion begins with a discussion of the background (Part II), and a review of core principles (Part III), and then follows with a draft of the forms required under Article 4 of the Draft Procedural Rules (Part IV). Those draft forms incorporate what we hope are clear, transparent, and easily applied options for asserting specific claims and requests for relief.

This proposal results, in part, from a previous CILE analysis of the types of claims and options for relief that are used most commonly in existing ODR systems, and in particular those provided in credit card charge-back arrangements. The report of this earlier analysis by CILE is available upon request from Professor Ronald A. Brand (rbrand@pitt.edu).

II. Background

In the concluding remarks to the 23 April 2010 Note by the Secretariat, Possible future work on online dispute resolution in cross-border electronic commerce transactions, A/CN.9/706, at para. 50, noting the colloquium, entitled “A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant),” which was held in Vienna on 29 and 30 March 2010, it was stated:

50. **The commonly shared view expressed during the Colloquium was that traditional judicial mechanisms for legal recourse do not offer an adequate solution for cross-border electronic commerce disputes, and that the solution — providing a quick resolution and enforcement of disputes across borders — lies in a global online dispute resolution system for small value, high volume business-to-business and business-to-consumer disputes. It was also underlined that electronic commerce cross-border disputes, which will form a significant proportion of complaints in the coming years, require tailored mechanisms that do not impose costs, delays and burdens that are disproportionate to the economic value at stake.** It was acknowledged that many challenges face the creation of a system that would meet the needs of all parties involved, and take account of cultural, jurisdictional and linguistic differences.

In the same document (A/CN.9/706) at para. 16, the benefits of consumer choice based on clear and adequate notice, and the ability to use a set of rules not requiring reference to any one national legal system were noted:

16. Some regulatory options for furthering development of European consumer and contract laws, including online dispute resolution, were mentioned. **One of the most feasible, it was said, would be an optional instrument for resolution of business-to-consumer transactions (referred to as the “Blue Button”).** The proposed blue button online dispute resolution system would not be applicable automatically. **Adoption of this procedure would be made by party agreement. For instance, a seller could display on the e-shop website an icon indicating that the client (whether consumer or otherwise) could agree by clicking on the “Blue Button” to make the substantive and procedural legal principles contained in the optional**

instrument applicable to the transaction concluded between the parties. Participants to the Colloquium explained that adoption of this online procedure would facilitate expeditious and economical resolution of disputes based on the agreement of the parties and thereby eliminate the need to resolve difficult problems such as those pertaining to jurisdiction and applicable law.

In the 13 October 2010 Note by the Secretariat, Online dispute resolution for cross-border electronic commerce transactions, A/CN.9/WG.III/WP.105, at para. 76, it was stated:

76. Arbitrations are conducted under the applicable substantive and procedural laws that may be agreed upon by the parties or designated otherwise. **An effective instrument on international ODR might address the issue of certainty as to the applicable law.**

In the 17 January 2011 Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session (Vienna, 13-17 December 2010), A/CN.9/716, at paras. 101 and 103, it was further stated:

101. Many delegations supported the approach of using equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions — bearing in mind the need for a high consumer protection content — as the basis for deciding cases, thus avoiding complex problems that may arise in the interpretation of rules as to applicable law. Reference was made in this regard to the GDBe-Consumers International Agreement. **It was said that in any event most of the cases dealt with in ODR could be decided on the basis of the terms of the contract, with little need for resort to complex legal principles, and that any rules devised for ODR should be simple, expeditious and flexible.** Some delegations characterized the need as being for a body of general legal principles applicable to a limited fact-based system, which would avoid having to deal with issues of applicable law and jurisdiction.

103. It was suggested that the Secretariat could present options on the issue of applicable law — taking into account the suggestions that had been made during the discussion — to the Working Group at a future meeting, and also that consideration be given as to what interim measures might apply in the period before work on substantive provisions was completed.

In the same document, at para. 115 (a), it was further stated:

115. **The Working Group requested that the Secretariat, subject to availability of resources, prepare the following for a future meeting:**

(a) **Draft generic procedural rules for ODR**, including taking into account: the types of claims with which ODR would deal (B2B and B2C cross-border low value, high-volume transactions); initiation of the online procedure; alerting parties to any agreement with regard to dispute settlement that might be entered into at the time of contracting; stages in the dispute settlement process — including negotiation, conciliation and arbitration; **describing substantive legal principles, including equitable principles, for deciding cases and making awards**; addressing procedural matters such as representation and language of proceedings; the application of the New York

Convention, as discussed; reference to rules of other ODR systems; setting out options, where appropriate;

In the 3 June 2011 Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011), A/CN.9/721, at para. 52, it was further stated:

52. There was broad support for a proposal to replace the current wording of paragraph (4) [of Article 1 of the Draft Procedural Rules] with the following:

“The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which are attached to these Rules as Annexes and form part of these Rules:”

“(a) Substantive legal principles for deciding cases;”

“(b) Guidelines for ODR providers and arbitrators;”

“(c) Minimum requirements for ODR providers and arbitrators, including common communication standards and formats and also including accreditation and quality control; and”

“(d) Cross-border enforcement mechanism.”

In the 28 February 2012 Note by the Secretariat, Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, A/CN.WG.III/WP.112, at para. 8, it was noted that the draft preamble to the procedural rules now reads:

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 use 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;]

[...];

In the 21 November 2011 Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14-18 November 2011), A/CN.9/739, at para. 21, it was noted that, in considering these documents to be created.

21. The Working Group considered whether the separate documents should be attached to the Rules as annexes or be set out separately elsewhere (A/CN.9/721, para. 53). After discussion, it was agreed to remove

the square brackets from the phrase “which are attached to the Rules as Annexes and form part of the Rules” and to proceed with deliberation as to the contents of the documents enumerated in paragraph (2). It was noted that the list of documents was not exhaustive and that additional documents might be added.

Thus, the current approach is to create four separate documents to accompany the procedural rules.

III. Core Principles Underlying a Global ODR System

The following is a list of those core principles, which are relied upon in the creation of the proposal set forth in Part IV of this note:

(1) **The ODR system must recognize that alternatives for efficient and effective dispute resolution do not currently exist for cross-border, high-volume, low-value electronic transactions.**

(2) **The ODR system will not work unless it is simple, efficient, effective, transparent, and fair.** Only a system that has these characteristics will invite the trust of both merchants and purchasers (including consumers) to enter into cross-border, high-volume, low-value electronic transactions that otherwise create risks that keep both sellers and buyers from entering into such transactions. The process of developing the system must recognize that both sellers and buyers require insurance that their interests will be protected in order to generate the proper level of trust in that system. If either sellers or buyers opt out of, or are inadequately protected by, the system, then it simply will not work.

(3) **Simplicity and efficiency require as few exclusions from scope as possible.** A system that begins with computer-based communication and analysis will not easily allow determinations that require human discretion or the application of difficult definitions designed to distinguish between types of parties to a dispute. As has been repeatedly recognized in the Commission and in Working Group III, it is practically and theoretically difficult to make a distinction not only between business-to-business and business-to-consumer transactions but also between merchants and consumers. See July 2010 Report of the United Nations Commission on International Trade Law, A/65/17, at para. 256; 3 June 2011 Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011), A/CN.9/721, at para. 37.

(4) **Simplicity, efficiency and effectiveness require that the ODR system be self-contained and avoid the need for reference to national rules of private international law.** A uniform system that relies on the differences that exist in national rules of private international law will create disparate results depending on factors such as the location of parties and the need to “locate” the transaction. This would create difficulties that should not occur in the system. Additionally, there is no clear understanding internationally on how such determinations of applicable national law should be made (e.g. country-of-contract, country-of-origin, country-of-destination, or most significant relationship approach). Stated more simply, **efficiency and effectiveness** require that the system avoid the trap of

thinking that rules of private international law can be used to protect the weaker party in cross-border, high-volume, low-value electronic transactions.

(5) **Efficiency, effectiveness, and transparency require that the ODR system encourage dispute resolution that results in a binding decision.** It does little good to provide dispute settlement that still allows parties to relitigate what has already been decided. This is very different, however, from the question of retaining the option to go to national courts or utilize other dispute resolution mechanisms for resolution of claims that are outside the ODR system. (See Principle 9, below.)

(6) **Efficiency, effectiveness, and transparency require that the ODR system allow ODR providers to incorporate automatic methods for the enforcement of decisions** (e.g., charge-back methods or automatic payment reversal).

(7) **Transparency and fairness require** that a party to a cross-border, high-volume, low-value electronic transaction receive **clear notice of the dispute resolution option and a separate opportunity to choose not to engage in a transaction** if that party decides to avoid the dispute resolution process that is offered.

(8) **Fairness** requires that the ODR system be **designed so that states may agree that the system itself is simple, efficient, effective, and transparent.** Private international law rules that exist to protect “weaker” parties from unfair procedures are not necessary when states agree at the outset that the system of dispute resolution operates to provide adequate protection of the weaker party. Thus, the fairness of the system itself is the ultimate test of the simplicity, efficiency, effectiveness, and transparency required to replace protective rules of private international law. If states find the system to meet these tests, then the system itself will replace the need for “protective” rules of private international law, and will itself result in the type of consumer (and other) protection often sought by such rules of national law. This is one of those instances where a uniform system of rules applied on a comprehensive basis is much better than reliance on national rules of private international law or national rules of consumer protection. **Simplicity, efficiency, effectiveness, and transparency can only result if there is a single, self-contained system, with as few opportunities as possible for divergence from that system through national law.**

(9) **Simplicity and effectiveness require** that, at the outset, the substantive legal principles to be applied in the ODR process relate to **a focused and limited set of fact based claims** that may be brought and **a focused and limited set of remedies** that may be assessed. Existing ODR systems for online transactions have demonstrated that the vast majority of disputes in high-volume, low-value online transactions lend themselves to a small, discrete set of claims and remedies. More complex issues and claims (e.g., bodily harm, consequential damages, and debt collection) should be excluded from the ODR system. See 21 November 2011 Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14-18 November 2011), A/CN.9/739, at paras. 18-19 and 76.

IV. Proposal for Inclusion of Substantive Principles in the Forms to be Annexed to Article 4 of the Draft Procedural Rules

A. The Current Draft of Article 4 of the Procedural Rules

Article 4 of the Draft Procedure Rules, reads as follows (including changes resulting from the November 2011 Working Group session):

Draft article 4 (Commencement)

“1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in annex A. 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 then be communicated by the ODR provider to the respondent[promptly] [without delay].

“3. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in annex B 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.

“4. ODR proceedings shall be deemed to commence on the date of receipt by the ODR provider at the ODR platform of the notice referred to in paragraph (1).

“[5. The respondent may, in response to the notice communicated by the claimant, communicate a claim which arises out of the same transaction [or same factual circumstances] identified by the claimant in the notice [with the same ODR provider] (‘counter-claim’).] The counter-claim shall be initiated no later than [seven (7)] calendar days [after the notice of the first claim is [communicated to][received by] the respondent]. [The counter-claim shall be dealt with in the ODR proceeding together with the [first claim][notice by the claimant].]”

Annex A

“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 addresses 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 agrees to participate in ODR proceedings [or, if applicable, a statement that the parties have an agreement to resort to ODR proceedings in case of any dispute arising between them];”

“(f) 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;

“(g) the location of the claimant;

“[(h) the preferred language of proceedings;]

“(i) the signature of the claimant and/or the claimant’s representative in electronic form including any other identification and authentication methods;

“[...]”

Annex B

“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 statement and allegations contained in the notice;

“(c) any solutions proposed to resolve the dispute;

“[(d) a statement that the respondent agrees to participate in ODR proceedings];

“(e) 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;

“(f) the location of the respondent;

“[(g) the preferred language of proceedings;]

“(h) the signature of the respondent and/or the respondent’s representative in electronic form including any other identification and authentication methods;

“[...]”

B. The Proposal

The proposal here is to use the forms for submission of claims to the ODR system to both state and limit the types of claims that may be brought and the types of relief that may be granted in the ODR system. Thus, a party to an online transaction may initiate a claim by using the requisite form. Because that form will provide a clear list of claims that may be brought, and a clear list of relief that may be requested, it will serve to:

- (1) effectively define the substantive rules to be applied by listing the claims and relief available;

- (2) eliminate the need for reference to additional substantive rules outside those implied in the forms;
- (3) avoid the need for reference to applicable law outside the system because there will be no need for consideration of claims or relief not listed on the forms; and
- (4) make clear (by allowing no other claims or relief) that types of relief not available through submission of the forms is not available in the ODR system and is thus left to other dispute resolution methods.

Set forth below is a partial draft of possible forms to be provided as annexes to Article 4 of the Draft Procedural Rules. This is by no means intended to be complete. It includes proposed claim forms to be submitted by a buyer of goods as well as a buyer of services. It also includes proposed claim forms to be submitted by a seller in response to such claims. ** A more complete analysis may determine that full drafts of possible reply forms for a buyer will not be necessary, as the claim and relief checked by the claimant-seller will necessarily narrow the available responses. At this stage, it may be that the ODR provider should be given some latitude in determining the way the reply is made and how its particular system works.

An alternative approach may be to set out in the annexes to Article 4 the list of claims and remedies available within the system — letting each ODR provider develop its own forms consistent with (and limited by) that list. This would have a similar effect of giving practical implementation to the substantive rules indicated by each type of claim and each type of relief that would be available — through incorporation into Article 4 of the Procedural Rules.

The advantage to this type of approach, over a separate set of substantive legal principles, is that it makes the system fully self-contained, removing the need for any possible gap-filling in a set of substantive legal principles that might require reference to national law through rules of applicable law. This could remove a number of the more difficult issues from the ODR system (e.g., whether we would have any special rules or distinctions for consumer transactions, the cumbersomeness of addressing rules of applicable law in a system designed to be simple).

Annex A1

Claim to be filed by Buyer as Claimant

(a) Claimant (buyer) information

Identity of buyer disclosed in original purchase transaction:

Electronic address for purposes of notification in ODR proceedings:

Name of Claimant's representative (if any) authorized to act for claimant in the ODR proceedings (including representative's electronic address if different from above):

- (b) **the name and electronic addresses of the Respondent and of the Respondent's representative (if any) known to the Claimant**

- (c) **order number, date of purchase, and other information available that identifies the transaction from which the dispute has arisen**

- (d) **source of the agreement to submit to this online dispute resolution**

- (e) **Complaint and Remedy Requested**

- (1) **If the transaction was for the sale of goods, complete this section:**

- (A) **Complaint by Claimant-Buyer of Goods:**

Claimant (buyer) must check one (and only one) numbered item out of the following list:

- (1) ☐ I did not receive the goods at all
- (2) ☐ I received the goods, but only after _____ (date) on which they should have been delivered. The actual date of receipt was _____.
- (3) ☐ I received the goods in the time required, but (check only one lettered item from the following list):
- (a) ☐ what I received was entirely different from what I ordered
- (b) ☐ the item was the wrong
____ size
____ colour
____ (other: explain _____)
- (c) ☐ the item is missing parts or components

(d) ___ the item was found to be defective during the first use in the following way:

(e) ___ the item is a different version or edition than that displayed in the listing for which the contract was formed

(f) ___ the item was described as authentic, but was not

(g) ___ the item is missing major parts or features, and this was not described in the listing

(h) ___ the item was damaged during shipment

(i) ___ the buyer received the incorrect number/amount of the item

(4) ___ I cancelled the purchase, but was charged anyway

(5) ___ I paid for the goods, but the seller charged me multiple times instead of only once

(6) ___ I did not purchase the goods at all, but was charged anyway

(B) Request for Relief by Claimant-Buyer of Goods:

Claimant (buyer) must check one (and only one) numbered item out of the following list:

(1) ___ I want a full refund of the money I paid to the Respondent (seller) and will return any goods I have received to the Respondent (seller)

(2) ___ I want to receive the goods I originally ordered from the Respondent (seller)

(3) ___ I want to have the goods I received repaired by the Respondent (seller) to the quality I ordered

(4) ___ I want to keep the goods and receive a partial refund of the purchase price from the Respondent (seller), in the amount of _____ (which is the excess of the price I paid over the value of the goods I actually received)

(C) Claimant's signature (or the signature of Claimant's representative listed above) in electronic form [including any other identification and authentication methods]

Date: _____

(2) If the transaction was for the sale of services, complete this section:

(A) Complaint by Claimant-Buyer of Services:

Claimant (buyer) must check one (and only one) numbered item out of the following list:

- (1) ☐ I did not receive the services at all
- (2) ☐ I received the services, but only after _____ (date) on which they should have been delivered. The actual date of receipt was _____.
- (3) ☐ I received the services in the time required, but (check only one lettered item from the following list):
 - (a) ☐ what I received was entirely different from what I ordered
 - (b) ☐ the services received were defective in the following way:

- (4) ☐ I cancelled the purchase before the services were performed, but was charged anyway
- (5) ☐ I paid for the services, but the seller charged me multiple times instead of only once
- (6) ☐ I did not purchase the services at all, but was charged anyway

(B) Request for Relief by Claimant-Buyer of Services:

Claimant (buyer) must check one (and only one) numbered item out of the following list:

- (1) ☐ I want a full refund of the money I paid to the Respondent (seller)
- (2) ☐ I want to receive the services I originally ordered from the Respondent (seller)
- (3) ☐ I want to have additional services performed so that what I receive corresponds exactly to what I contracted to receive
- (4) ☐ I want to keep the services I received and receive a partial refund of the purchase price from the Respondent (seller), in the amount of _____ (which is the excess of the price I paid over the value of the services I actually received)

Claimant's signature (or the signature of Claimant's representative listed above) in electronic form [including any other identification and authentication methods]:

Date: _____

Annex B1**Response to be Filed by Seller as Respondent****(a) Respondent (seller) information**

Name and address:

Electronic address for purposes of notification in ODR proceedings:

Name of Respondent's representative authorized to act for claimant in the ODR proceedings (including representative's electronic address if different from above):

(b) Response to Complaint and Position Regarding Remedy Requested**A. If the transaction was for the sale of goods, complete this section:****Response by Respondent Seller of Goods:**

Respondent (seller) will be given the option to respond only to the claim claimed breach asserted by the Claimant (buyer). Thus, the Respondent will receive only one of the following options, and must select only one response to the option from the options provided:

If the Claimant (buyer) selected

(1) ☐ I did not receive the goods at all

Then the Respondent (seller) must check one of the following:

(1) ☐ The ordered item was delivered/sent to the buyer on _____ (date)

(2) ☐ Please wait a few more days, the ordered item was shipped to you on _____ (date)

(3) ☐ The ordered item was not delivered and a full refund of the purchase price will be made

If the Claimant (buyer) selected

(2) ☐ I received the goods, but only after _____ (date) on which they should have been delivered. The actual date of receipt was _____.

Then the Respondent (seller) must check one of the following:

(1) ___ The ordered item was delivered/sent to the buyer on _____ (date).
This ___ was/___ was not (check one) within the time required by the contract.

If the Claimant (buyer) selected

(3) ___ I received the goods in the time required, but (check only one lettered item from the following list):

(a) ___ what I received was entirely different from what I ordered

(b) ___ the item was the wrong

___ size

___ colour

___ (other: explain _____)

(c) ___ the item is missing parts or components

(d) ___ the item was found to be defective during the first use in the following way:

(e) ___ the item is a different version or edition than that displayed in the listing for which the contract was formed

(f) ___ the item was described as authentic, but was not

(g) ___ the item is missing major parts or features, and this was not described in the listing

(h) ___ the item was damaged during shipment

(i) ___ the buyer received the incorrect number/amount of the item

Then the Respondent (seller) must check one of the following:

If the Claimant (buyer) selected

(4) ___ I cancelled the purchase, but was charged anyway

Then the Respondent (seller) must check one of the following:

If the Claimant (buyer) selected

(5) ___ I paid for the goods, but the seller charged me multiple times instead of only once

Then the Respondent (seller) must check one of the following:

If the Claimant (buyer) selected

(6) ___ I did not purchase the goods at all, but was charged anyway

Then the Respondent (seller) must check one of the following:

Request for Relief by Respondent-Seller of Goods:

Respondent (seller) must check one (and only one) numbered item out of the following list:

If the Claimant (buyer) selected

(1) ___ I want a full refund of the money I paid to the Respondent (seller) and will return any goods I have received to the Respondent (seller)

Then the Respondent (seller) must check one of the following:

If the Claimant (buyer) selected

(2) ___ I want to receive the goods I originally ordered from the Respondent (seller)

Then the Respondent (seller) must check one of the following:

If the Claimant (buyer) selected

(3) ___ I want to have the goods I received repaired by the Respondent (seller) to the quality I ordered

Then the Respondent (seller) must check one of the following:

If the Claimant (buyer) selected

(4) ___ I want to keep the goods and receive a partial refund of the purchase price from the Respondent (seller), in the amount of _____ (which is the excess of the price I paid over the value of the goods I actually received)

Then the Respondent (seller) must check one of the following:

(d) The Respondent-Seller agrees to participate in ODR proceedings;

(f) The Respondent-Seller is not currently pursuing other remedies against the claimant with regard to the transaction in issue;

Respondent's signature (or the signature of Respondent's representative listed above) in electronic form [including any other identification and authentication methods]:

Date: _____

If the Claimant (buyer) selected

(3) ___ I want to have the goods I received repaired by the Respondent (seller) to the quality I ordered

Then the Respondent (seller) must check one of the following:**If the Claimant (buyer) selected**

(4) ___ I want to keep the goods and receive a partial refund of the purchase price from the Respondent (seller), in the amount of _____ (which is the excess of the price I paid over the value of the goods I actually received)

Then the Respondent (seller) must check one of the following

- (d) The Respondent-Seller agrees to participate in ODR proceedings;
- (f) The Respondent-Seller is not currently pursuing other remedies against the claimant with regard to the transaction in issue;

Respondent's signature (or the signature of Respondent's representative listed above) in electronic form [including any other identification and authentication methods]:

Date: _____

Annex A2
Claim to be filed by Seller as Claimant

(a) Claimant (seller) information

Name and address:

Electronic address for purposes of notification in ODR proceedings:

Name of Claimant's representative (if any) authorized to act for claimant in the ODR proceedings (including representative's electronic address if different from above):

(b) the name and electronic addresses of the Respondent and of the Respondent's representative (if any) known to the Claimant

(c) order number, date of purchase, and other information available that identifies the transaction from which the dispute has arisen

(d) source of the agreement to submit to this online dispute resolution

(e) Complaint and Remedy Requested

(1) If the transaction was for the sale of goods, complete this section:

(A) Complaint by Claimant-Seller of Goods:

Claimant (seller) must check one (and only one) numbered item out of the following list:

- (1) ☐ I did not receive any payment for the goods provided
- (2) ☐ I received only _____ of the total purchase price of _____

(B) Request for Relief by Claimant-Seller of Goods:

Claimant (seller) must check one (and only one) numbered item out of the following list:

- (1) ☐ I want to receive payment of the unpaid portion of the purchase price
- (2) ☐ I want the goods to be returned in the original condition

(2) If the transaction was for the sale of services, complete this section:

(A) Complaint by Claimant-Seller of Services:

Claimant (seller) must check one (and only one) numbered item out of the following list:

- (1) ☐ I did not receive any payment for the services provided
- (2) ☐ I received only _____ of the total price of _____

(B) Request for Relief by Claimant-Seller of Services:

Claimant (seller) must check one (and only one) numbered item out of the following list:

- (1) ☐ I want to receive payment of the unpaid portion of price of the services provided

(2) __ I want the following alternative relief:

Claimant's signature (or the signature of Claimant's representative listed above) in electronic form [including any other identification and authentication methods]:

Date: _____

Annex B2
Response to be Filed by Seller as Respondent

(a) Respondent (buyer) information

Identity of buyer disclosed in original purchase transaction:

Electronic address for purposes of notification in ODR proceedings:

Name of Respondent's representative authorized to act for claimant in the ODR proceedings (including representative's electronic address if different from above):

(b) Response to Complaint and Position Regarding Remedy Requested

A. If the transaction was for the sale of goods, complete this section:

Response by Respondent Buyer of Goods:

(A) Response by Respondent-Buyer of Goods:

Respondent (buyer) must check one (and only one) numbered item out of the following list:

- (1) __ I have paid the purchase price in full
- (2) __ I am ready to pay the unpaid portion of the purchase price
- (3) __ I believe I am not obligated to pay the unpaid portion of the purchase price for the following reason:

(2) If the transaction was for the sale of services, complete this section:

(A) Complaint by Respondent-Buyer of Services:

Respondent (buyer) must check one (and only one) numbered item out of the following list:

- (1) ☐ I have paid the purchase price in full
- (2) ☐ I am ready to pay the unpaid portion of the purchase price
- (3) ☐ I believe I am not obligated to pay the unpaid portion of the purchase price for the following reason:

Respondent's signature (or the signature of Respondent's representative listed above) in electronic form [including any other identification and authentication methods]:

Date: _____

V. SECURITY INTERESTS

A. Report of the Working Group on Security Interests on the work of its twentieth session (Vienna, 12-16 December 2011)

(A/CN.9/740)

[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 text on the registration of security rights in movable assets, pursuant to a decision taken by the Commission at its forty-third session, in 2010.¹ The Commission's decision was based on its understanding that such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of a security rights registry.²

2. At its forty-third session in 2010, the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at an international colloquium on secured transactions (Vienna, 1-3 March 2010), namely registration of notices with respect to security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions.³ The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.⁴ At that session, the Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *UNCITRAL Legislative Guide on Secured Transactions* (the "*Guide*"),⁵ texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Guide*.⁶

3. At its eighteenth session (Vienna, 8-12 November 2010), the Working Group began its work on the preparation of a text on the registration of notices with respect

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 268.

² *Ibid.*, para. 265.

³ The papers presented at the colloquium are available at www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html.

⁴ *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 264 and 273.

⁵ United Nations publication, Sales No. E.09.V.12.

⁶ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 266-267.

to security rights in movable assets by considering a note by the Secretariat entitled “Registration of security rights in movable assets” (A/CN.9/WG.VI/WP.44 and Addenda 1 and 2). At that session, the Working Group adopted the working assumption that the text would take the form of a guide on the implementation of a registry of notices with respect to security rights in movable assets and that the text should be consistent with the *Guide*, while, at the same time, taking into account the approaches taken in modern security rights registration systems, national and international (A/CN.9/714, para. 13). Having agreed that the *Guide* was consistent with the guiding principles of UNCITRAL texts on e-commerce, the Working Group also considered certain issues arising from the use of electronic communications in security rights registries to ensure that, like the *Guide*, the text on registration would also be consistent with those principles (A/CN.9/714, paras. 34-47).

4. At the nineteenth session (New York, 11-15 April 2011), the Working Group considered a note by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.46 and Addenda 1 to 3). At that session, differing views were expressed as to the form and content of the text to be prepared (A/CN.9/719, paras. 13-14), as well as with respect to the question whether the text should include model regulations or recommendations (A/CN.9/719, para. 46). Upon completing the first reading of the draft Security Rights Registry Guide, the Working Group requested the Secretariat to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group (A/CN.9/719, para. 12).

5. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission emphasized the significance of the Working Group’s work in particular in view of efforts undertaken by States towards establishing a registry, as well as the potential beneficial impact of such a registry on the availability and the cost of credit. With respect to the form and content of the text to be prepared, while a suggestion was made that the text should be formulated in the form of a guide with commentary and recommendations following the approach taken in the *Guide*, rather than as a text with model regulations and commentary thereon, the Commission agreed that the mandate of the Working Group, leaving the specific form and content of the text to the Working Group, did not need to be modified. It was further agreed, that, in any case, the Commission would make a final decision once the Working Group had completed its work and submitted the text to the Commission.⁷

6. After discussion, the Commission, noting the significant progress made by the Working Group in its work and the guidance urgently needed by a number of States, requested the Working Group to proceed with its work expeditiously and to try to complete its work, hopefully, and submit the text for final approval and adoption at its forty-fifth session of the Commission, in 2012.⁸

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its twentieth session in Vienna from 12 to 16 December 2011. The session was attended by representatives of the following States members of the

⁷ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 237.

⁸ Ibid., para. 238.

Working Group: Austria, Bahrain, Bolivia (Plurinational State of), Cameroon, Canada, Chile, Colombia, Egypt, El Salvador, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Norway, Poland, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Uganda, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Croatia, Democratic Republic of the Congo, Dominican Republic, Ghana, Indonesia, Romania, Slovakia, Switzerland and Syrian Arab Republic. The session was also attended by observers from Palestine and the European Union.

9. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: The World Bank;

(b) *Intergovernmental organizations*: Asian Clearing Union (ACU), Energy Charter Secretariat (ECS), Intergovernmental Organisation for International Carriage by Rail (OTIF) and Islamic Development Bank (IDB);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Commercial Finance Association (CFA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), International Insolvency Institute (III), National Law Centre for Inter-American Free Trade (NLCIFT) and New York State Bar Association (NYSBA).

10. The Working Group elected the following officers:

Chairman: Mr. Rodrigo LABARDINI FLORES (Mexico)

Rapporteur: Ms. Kaggwa Ann Margaret KASULE (Uganda)

11. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.47 (Annotated Provisional Agenda), A/CN.9/WG.VI/WP.48 and Addenda 1 to 3 (Draft Security Rights Registry Guide).

12. 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. Registration of security rights in movable assets.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group considered a note by the Secretariat entitled "Draft Security Right Registry Guide" (A/CN.9/WG.VI/WP.48/Add.3). The deliberations and decisions of the Working Group are set forth below in chapter IV. The

Secretariat was requested to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group.

IV. Registration of security rights in movable assets: Draft Security Rights Registry Guide

A. General

14. The Working Group first considered the form of the text to be prepared. At the outset, it was generally felt that the text should be a stand-alone comprehensive, useful and reader-friendly text. The Working Group also recalled the agreement reached at its previous sessions that the text should be consistent with the *Guide* and in particular the recommendations of the *Guide*, while also offering options where necessary.

15. As to the form of the text though, differing views were expressed. One view was that the text should take the form of model regulations with commentary (or a guide to enactment) thereon. It was stated that model regulations would provide a set of rules that States enacting the law recommended in the *Guide* could easily adopt. In that connection, it was pointed out that the experience gained with the adoption of the Model Registry Regulations of the Organization of American States (OAS) by States implementing the OAS Model Law on Secured Transactions supported that conclusion. In addition, it was observed that a guide with commentary and recommendations might not necessarily have the impact model regulations might have, as indicated in secured transactions law reform projects currently underway in various jurisdictions. Moreover, it was said that model regulations could also provide flexibility by offering options and examples, and would be easier to prepare than a guide.

16. However, the prevailing view was that the text should take the form of a guide with commentary and recommendations. It was stated that such an approach would be consistent with the approach taken in the *Guide*, which was a text that allowed more discretion to the legislator than a model law or model regulations. In addition, it was observed that such an approach would be more beneficial to the legislator as it would combine the certainty of specific and detailed recommendations with the flexibility inherent in general commentary. Moreover, it was pointed out that a guide should be preferred to model regulations because it would provide more flexibility and would be easier than model regulations for the Working Group to reach consensus on.

17. In the discussion, the suggestion was made that, where the recommendations offered options, examples of model regulations could be included in an annex to the text.

18. After discussion, the Working Group agreed that the text should take the form of a guide with commentary and recommendations (the “draft Registry Guide”) along the lines of the *Guide*. In addition, it was agreed that, where the text offered options, examples of model regulations could be included in an annex to the draft Registry Guide.

B. Draft recommendations (A/CN.9/WG.VI/WP.48/Add.3)

19. The Working Group then turned to the draft recommendations contained in document A/CN.9/WG.VI/WP.48/Add.3, on the understanding that, once it had completed its consideration of the draft recommendations, it could more easily finalize the commentary contained in documents A/CN.9/WG.VI/WP.48 and Add.1 and 2.

1. Article 1: Definitions

20. With regard to the definitions in article 1, it was suggested that:

(a) In the chapeau, the word “modifications” should be deleted, as subsidiary administrative rules such as those relating to registry regulations could not modify the applicable secured transactions law;

(b) In the definition of the term “address”, reference should also be made to an electronic address, as it was as permanent or tentative as a physical address or a post office box;

(c) In the definition of the term “amendment”: (i) consideration should be given to including reference to addition, deletion and modification of information; (ii) the list of examples should be deleted and included in the commentary (that would clarify, *inter alia*, that, under the *Guide*, it was not required to register a notice of an assignment of the secured obligation, a subrogation or a subordination, and the latter two and their legal effects were not discussed in the *Guide*); and (iii) the commentary should distinguish between the deletion of some information (such as the deletion of a grantor or encumbered asset, which could amount to cancellation) and cancellation of the entire notice;

(d) The definition of the term “registrant” should be revised to ensure that the registrant was the secured creditor or its representative, but not a courier or an employee (for subsequent decisions on that matter, see paras. 40, 64 and 89 below);

(e) From the definition of the term “registrar”, the adjectives “natural or legal”, qualifying the word “person”, should be deleted as a person could be natural or legal (a matter that was left to other national law);

(f) From the definition of the term “registration”, the bracketed text should be deleted as it repeated what was included in the definition of the term “notice”, namely that, notice included an initial, a cancellation and an amendment notice;

(g) In the definition of the term “registration number”, reference should be made to the number of the initial notice only, which should be assigned by the registry and provided by the registrant in the case of an amendment or cancellation of a notice, rather than multiple registration numbers;

(h) From the definition of the term “registry record”, the words “electronically” or “manually in paper files of the registry” should be deleted as redundant, since the *Guide* recommended electronic registration, if possible;

(i) The definitions of the terms “serial number” and “serial number assets” should be deleted (since the use of serial number as an indexing and search criterion was not recommended in the *Guide* and, if they were to be retained, their scope

should be broadened to encompass all types of asset that were serial number assets under the law of the enacting State), and the relevant matters should be discussed in the commentary.

21. Subject to the above-mentioned changes, the Working Group adopted the substance of the above-mentioned definitions. The Working Group also adopted the substance of the definitions of the terms “law” and “notice” unchanged. Noting that, as defined, the term “notice” encompassed an initial, a cancellation and an amendment notice and that not all uses of the term in the draft recommendations were consistent with that definition, the Working Group also agreed that the draft recommendations should adequately distinguish among the three types of notice encompassed in that definition.

22. The Working Group next turned to the question of the function and placement of the definitions in the draft Registry Guide. Differing views were expressed. One view was that the definitions should appear together with the recommendations. It was stated that that approach was appropriate as the definitions were necessary for the reader to understand the draft recommendations (and any draft model regulations). It was also observed that the definitions did not necessarily apply to the entire draft Registry Guide, which fulfilled a different, educational function. It was also observed that, otherwise, the entire commentary of the draft Registry Guide should be reviewed with a view to ensuring that the terminology used throughout the draft Registry Guide was consistent with the definitions.

23. However, the prevailing view was that, in line with the approach followed in the *Guide*, the definitions should be reformulated as terminology to assist the reader of the entire draft Registry Guide and be placed in the introduction to the draft Registry Guide and in the annex together with the draft recommendations, but not in the form of draft recommendations. It was stated that definitions belonged in legislation but not in recommendations to the legislator. In addition, it was observed that, not only the terminology of the draft Registry Guide, but also the terminology of the *Guide* would apply to the entire draft Registry Guide. Moreover, it was said that the terminology in the draft Registry Guide could only supplement, but not modify, the terminology of the *Guide*.

24. In response to a question, it was noted that the draft Registry Guide used the term “notice” in the same sense as the *Guide* (see term “notice” in the introduction to the *Guide*, and recommendations 54, subparagraph (d), 57 and 72-75). It was observed, however, that the term “notice” in the draft recommendations had a narrower meaning than it had in the terminology of the *Guide*.

25. In the discussion about the function and the placement of the terminology, a fundamental question was raised as to whether the draft Registry Guide should be presented as a supplement to the *Guide* similar to the Supplement on Security Rights in Intellectual Property (the “Supplement”) or a separate, stand-alone, comprehensive guide.

26. At the outset, it was generally agreed that the draft Registry Guide should complement the *Guide*, in particular, its chapter IV on the Registry System, and elaborate further on the various aspects of a general security rights registry to assist States in the establishment and operation of such a registry. It was also agreed that, while the draft Registry Guide should include cross-references to the commentary or recommendations of the *Guide*, it need not repeat all registration-related aspects of

the *Guide*, as it was to be prepared as a reference tool to assist States in the implementation of the general security rights registry recommended in the *Guide*.

27. Differing views were expressed as to the exact title and the precise nature of the draft Registry Guide. One view was that, in line with its generally agreed overall objective, the draft Registry Guide should be presented in the form of a supplement to the *Guide*. It was stated that, as was the case with the Supplement, such a supplement could be consistent with the *Guide*, explain registration-related issues in a more detailed commentary and include recommendations with regard to registry regulations. In addition, it was observed that, like the Supplement, such a supplement could complement the *Guide* and be, at the same time, a comprehensive, stand-alone text that would include extensive cross-references to the *Guide*. Moreover, it was pointed out that, to the extent the recommendations of the *Guide* dealt also with registration-related issues and the recommendations of the draft Registry Guide reiterated some of the most fundamental registration-related recommendations of the *Guide*, there was already a large degree of overlap between the two guides.

28. However, the prevailing view was that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive guide. It was stated that, from a promotion or commercial impact point of view, a guide would be more appropriate than a supplement. In addition, it was observed that, to the extent the draft Registry Guide referred to subsidiary legislation (that is, registry regulations) rather than to law, it differed from the Supplement that contained legislative recommendations. Moreover, it was pointed out that the *Guide* was lengthy and, therefore, the reader of the draft Registry Guide should not have to read the entire *Guide*. It was also said that the draft Registry Guide could include selective cross-references to the *Guide*, without paraphrasing or repeating the entire *Guide*.

29. Finally, it was mentioned that a separate, stand-alone, comprehensive text would allow States to implement the draft Registry Guide without necessarily having to also implement the law recommended in the *Guide*. In that connection, a note of caution was struck that, while the secured transactions law of a State enacting the draft Registry Guide did not need to be exactly the same as the law recommended in the *Guide*, that law needed to be in line, at least, with the key objectives, fundamental policies and general principles of the law recommended in the *Guide*. For example, it was noted, if a State had generally enacted the law recommended in the *Guide*, while providing for document- rather than notice-registration or registration for creation rather than for third-party effectiveness purposes, that State would not be able to implement the substance of the draft Registry Guide.

30. After discussion, the Working Group tentatively agreed that the draft Registry Guide should be presented in the form of a separate, stand-alone, comprehensive text that would be consistent with the *Guide*, refer selectively to the *Guide* and be tentatively entitled “Technical Legislative Guide on the Implementation of a Security Rights Registry”. The Working Group also agreed to revisit the issue of the presentation of the material and its title once it had completed its work. In that connection, it was noted that, in taking a final decision, the Working Group might wish to take into account: (a) the mandate of UNCITRAL as a legislative body; (b) the types of guide prepared by UNCITRAL in the past (contractual guides, legislative guides and guides to enactment of a model law); and (c) that legislative

guides related to legislation, irrespective of whether that legislation was to be enacted by a federal or state parliament, ministry or other body that had the authority to legislate under national law.

31. The Working Group proceeded with its discussions of the articles on the understanding that they would be reformulated in the form of draft recommendations with text along the following lines: “The regulations should provide that ...” together with any other necessary adjustments.

2. Article 2: Registry

32. The suggestion was made that article 2 should refer to the need for the registry to be centralized. That suggestion was objected to. It was stated that, in line with the *Guide* (see recommendation 54, subparagraphs (e) and (k)), the “record of the registry” should be centralized, while users should be able to access the registry record online or through multiple points of access (see the *Guide*, chapter IV paragraphs 21-24 and 38-41). After discussion, the Working Group approved the substance of article 2, unchanged.

3. Article 3: Appointment [and duties] of registrar

33. As a matter of drafting, it was suggested that paragraph 1 should refer to the fact that the relevant Government authority “determined” the duties and “monitored” the performance of those duties by the registrar. It was also suggested that the heading of the article that referred to the “registrar” should be aligned with its contents that referred to the “registry”. It was also suggested that paragraph 2 of alternative B should be deleted. It was stated that the issues of identification and verification of the identity of the registrant or authorization for registration were more appropriately dealt with in articles 6, subparagraph 1 (a), and 16. There was sufficient support for those suggestions.

34. Differing views were expressed, however, as to whether paragraph 3 of alternative B should be retained. One view was that it should be retained as it offered a useful overview of the duties of the registrar. It was stated that, if paragraph 3 were retained, the commentary should explain: (a) why a copy of any changes to a notice should be sent only to the person identified in the notice as the secured creditor; and (b) that the term “user” referred to a registrant or a searcher, but not to a grantor. Another view was that it should be deleted as it might inadvertently give the impression that it was an exclusive list of the duties of the registrar. After discussion, it was agreed that paragraph 3 should be retained in square brackets for the Working Group to revisit it once it had completed its consideration of all the articles that dealt with the duties of the registrar. It was also agreed that the word “duties” in the heading of the article should also be retained in square brackets, pending a decision of the Working Group with regard to paragraph 3.

35. Subject to the changes mentioned above, the Working Group approved the substance of article 3.

4. Article 4: Public access to the registry services

36. The Working Group approved the substance of article 4 unchanged.

5. Article 5: Operating hours of the registry

37. A suggestion was made that article 5 should be deleted. It was stated that the operating hours of the registry were a matter that should be left to the general rules in place in each State about normal business hours. It was also observed that article 4, which essentially dealt with the same matter, was sufficient to the extent that it enshrined the principle of public access to the registry. That suggestion was objected to. It was observed that article 4 dealt with the right of a person to have access to the registry service, while article 5 dealt with the way in which the registry would permit a person to exercise that right. It was also stated that article 5 was also useful in clarifying, in line with recommendation 54, subparagraph (l), the continuous operation of an electronic registry, subject to limited exceptions. After discussion, it was agreed that article 5 should be retained. In addition, it was agreed paragraph 1 should be revised to make it clear that the words in square brackets meant that each enacting State could set the operating days and hours of the registry. Moreover, it was agreed that paragraph 2 should make reference to the continuous operation of electronic registries.

38. Differing views were expressed as to whether paragraphs 2 and 3 should be merged. One view was that they should not be merged. It was stated that maintenance related not only to an electronic but also to a paper-based registry. It was also observed that force majeure events (earthquakes, fires, floods) could affect both electronic and paper-based registries. The prevailing view, however, was that paragraphs 2 and 3 should be merged. It was observed that maintenance was a matter that involved only an electronic registry in view of its continuous operation. In addition, it was stated that, under recommendation 54, subparagraph (l), a paper-based registry was to operate during normal business hours, which would normally make it possible for maintenance to take place outside business hours. Moreover, it was pointed out that force majeure was not addressed in the relevant recommendation 54, subparagraph (l), as that was a general matter left to other law. After discussion, the Working Group agreed that paragraphs 2 and 3 should be merged, while the introductory words of paragraph 3 (“notwithstanding ... article”) and the reference to force majeure should be deleted. It was also agreed that force majeure events and their potential impact on the operation of electronic or paper-based registries should be discussed in the commentary.

39. Subject to the above-mentioned changes, the Working Group approved the substance of article 5.

6. Article 6: Access to registration services

40. While there was general support for the substance of paragraph 1, a number of suggestions were made as to its precise formulation. One suggestion was that reference might be made in the chapeau to the “registrant”, rather than to “a person entitled to register”. It was stated that the term “registrant” meant the person effecting the registration that could be the secured creditor, its representative or a third party acting on behalf of the secured creditor or its representative. It was also observed that caution should be exercised in using the term “registrant” in the draft Registry Guide, particularly when reference should actually be made only to the secured creditor or its representative (see para. 20 (d), above and paras. 64 and 89 below). Another suggestion was that, in subparagraph 1 (a), reference should be made to the identifier of the secured creditor as required by law and article 21. Yet

another suggestion was that, in subparagraph 1 (b), the words “if any” should be retained outside square brackets to account for the possibility provided in article 33 (in line with recommendation 54, subparagraph (i)) that no registration fees might be charged. There was sufficient support for those suggestions.

41. Differing views were expressed as to whether paragraphs 2-4 should be retained. One view was that paragraphs 2-4 should be retained. It was stated that: (a) paragraph 2 appropriately stated the principle that a notice could be in an electronic or paper form; (b) paragraph 3 referred to the useful concepts of a user account and to the terms and conditions of use of the registry; and (c) paragraph 4 clarified how a natural person should identify himself or herself in a paper notice (as the registrant or as the registrant and the representative of a legal person).

42. However, the prevailing view was that paragraphs 2-4 should be deleted. With respect to paragraph 2, it was stated that it appeared as recommending a mixed, paper and electronic, registry system, thus inadvertently running counter to the *Guide* that recommended an electronic registry, if possible (see recommendation 54 (j)). With respect to paragraph 3, it was observed that: (a) the meaning and the purpose of a “user account” was not clear and, in any case, if it was a method of identifying the registrant or facilitating payment, those matters were already covered in paragraph 1; (b) there was no reason to limit the application of the concept of a user account to an electronic context; and (c) reference to a user account might inadvertently result in a violation of the principle of technology neutrality. With respect to paragraph 4, it was pointed out that it was superfluous as the identification of a natural person was already addressed in articles 6, paragraph 1, and 21.

43. Subject to the above-mentioned changes, the Working Group approved the substance of article 6.

7. Article 7: Access to searching services

44. There was general support for the substance of article 7. As to its formulation, a number of suggestions were made. One suggestion was that the reference to search certificate should be deleted. It was stated that, while article 32 made reference to search certificates and, in a paper-based registry system, a searcher might request a copy of the search results, reference to a search was sufficient in that regard. Another suggestion was that option A should be deleted and option B should be retained outside square brackets with a reference to search fees qualified, in line with recommendation 54, subparagraph (i), by the words “if any”. Yet another suggestion was that reference should be made to the rule that, unlike a registrant, a searcher did not need to identify himself or herself. There was sufficient support for those suggestions.

45. Yet another suggestion was that the words “without having to provide reasons for the search” should be deleted as that was a matter for the law. That suggestion was objected to. It was widely felt that the rule that a searcher did not need to give reasons for the search was sufficiently important to justify its repetition in article 7 of the draft recommendations.

46. Subject to the above-mentioned changes, the Working Group approved the substance of article 7.

8. Article 8: Authorization and presumption as to the source of a notice

47. There was general support for the substance of paragraph 1. It was widely felt that registration had to be authorized by the grantor and that the registry could not request verification of such authorization. It was also agreed that the last two sentences of article 12 should be merged with article 8 as they also related to the authorization of registration (see recommendation 71; and para. 72 below).

48. As a matter of drafting, it was suggested that the word “however” might be deleted as the first and the second sentence of paragraph 1 addressed two distinct issues. It was also suggested that paragraph 1 should be aligned with recommendation 54, subparagraph (d), which referred to the fact that the registry did not require verification of the identity of the registrant. There was sufficient support for those suggestions.

49. However, there was no support for the bracketed text in paragraph 1, dealing with evidence matters. It was generally agreed that that matter was a matter of law and could be discussed in the commentary. It was also agreed that the commentary could discuss the burden of proof and provide guidance, in particular, in view of the fact that, under the law recommended in the *Guide*, registration was permitted in advance of the creation of a security right or the conclusion of a security agreement. In that connection, reference was made to article 30, paragraph 1, subparagraph (c), which dealt with the compulsory cancellation when the registration had not been authorized by the grantor.

50. Differing views were expressed as to whether paragraph 2 should be retained. One view was that it should be retained to clarify, for example, that registration by a branch of a bank using the bank’s master user account details was a registration by the bank. The prevailing view, however, was that paragraph 2 should be deleted. It was stated that that matter was a matter for procedural or material law, but not the draft recommendations. In addition, it was observed that no presumption flowed from registration by a person using the assigned user account details, as a user account was simply meant to facilitate payment of fees. Moreover, it was pointed out that the matter required a more nuanced approach, possibly along the lines of article 13 of the UNCITRAL Model Law on Electronic Commerce. It was agreed, however, that the matter could possibly be discussed in the commentary. Further to the deletion of paragraph 2, the Working Group agreed that the reference word “presumption” in the heading of the article should also be deleted.

51. Subject to the above-mentioned changes, the Working Group approved the substance of article 8.

9. Article 9: Rejection of a notice or search request

52. It was noted that paragraph 1 was intended to provide an exhaustive list of reasons permitting the registry to reject a registration of a notice or a search request. In order to further clarify that point, it was agreed that the chapeau of paragraph 1 should include language along the lines “only if”. As a matter of drafting, it was also suggested that: (a) reference might be made in the chapeau of paragraph 1 to the rejection of a notice as a fact, rather than as a possibility; (b) the words “paper or electronic” in subparagraph 1 (a) were superfluous and could be deleted. There was sufficient support for those suggestions.

53. With respect to subparagraph 1 (b), while the view was expressed that the term “illegible” might apply only to information in a paper notice, the prevailing view was that it was equally relevant with respect to information in an electronic notice. It was widely felt data might be illegible because the electronic registry might not recognize certain characters or because data might be corrupted.

54. With respect to subparagraph 1 (c), various suggestions were made. One suggestion was that it should be confined to the failure to pay any required fees. It was stated that failure to communicate a notice in one of the authorized media, incompleteness or illegibility of the information in the notice and failure to pay any required fees were the only reasons justifying rejection of a registration or search request. That suggestion was objected to. It was observed that there might be other reasons justifying rejection of a registration or a search request by the registry (for example, information in a notice was not expressed in the language specified in the law; see article 17, paragraph 2).

55. As to paragraph 2, while there was support for its substance, as a matter of drafting, the suggestion was made that it should be revised to refer to the obligation of the registry to communicate to the registrant or the searcher the grounds for rejection as soon as practicable.

56. Subject to the above-mentioned changes, the Working Group approved the substance of article 9.

10. Article 10: Date and time of registration

57. It was generally agreed that the main objective of article 10 was to implement recommendation 70 of the *Guide* (providing that the registration of a notice was effective when the information contained in the notice was entered into the registry record so as to be available to searchers). However, differing views were expressed as to how that result might be best achieved. One view was that article 10 should be confined to stating the rule contained in recommendation 70. It was stated that the time of effectiveness of a registration determined priority, not only as between competing secured creditors, but also between a secured creditor and a competing claimant that did not need to register a notice (for example, a transferee of an encumbered asset, a judgement creditor or the administrator in the grantor’s insolvency). In that connection, it was pointed out that the priority of a security right as against the rights of those competing claimants was not addressed in paragraph 2. In addition, it was observed that any reference to the time a notice was received could create confusion as to the actual time of effectiveness of the registration, in particular as, in an electronic context, there would be no or little time difference between the time when a notice was received and the time it became available to searchers.

58. Moreover, it was said that paragraph 2 contributed to that confusion to the extent that it referred to an internal matter of the registry, namely the order in which paper notices were entered into the record by the registry staff. As a result, it was suggested that paragraph 1 should refer to the time when registration of a notice became effective and paragraph 2 should be deleted. That suggestion received sufficient support.

59. Another view was that article 10 should be restructured to deal first with the time of effectiveness of a registration and then with the order in which paper notices

were entered into the record by the registry staff. It was stated that the former matter was more important and the latter should be confined to situations in which several paper notices were submitted. In that connection, it was pointed out that an error by the registry staff in entering notices into the record in the order they were received could affect the priority of the relevant security rights and also result in liability for the registry.

60. In the discussion, it was suggested that in the second part of paragraph 1, reference should be made to the initial notice, as the registration number that would control all subsequent registrations would be the registration number of the initial notice (see para. 20 (g) above). It was also suggested that the words within square brackets in paragraph 2 (“or otherwise organize”) should be retained outside square brackets and revised to refer to retention of information in a way that would allow a searcher to find it. It was stated that, while indexing of information was widely used (initially in paper and then in electronic registries), it was possible to organize information so as to allow searches without an index (for example, by using free text or key words). There was sufficient support for those suggestions.

61. After discussion, the Working Group agreed that article 10 should be recast to deal in the first part with the date and time of effectiveness (implementing recommendation 70) and in the second part with the order in which paper notices should be entered into the record by the registry staff. It was also agreed that the first part of paragraph 1 should refer to the date and time registration of a notice became effective and the second part should refer to the registration number of the initial notice. Moreover, it was agreed that the substance of paragraph 3 could be retained unchanged. It was also agreed that the matters addressed in article 10, including the situation where paper notices were received by mail on the same date and time, should be further explained in the commentary.

62. Subject to the above-mentioned changes, the Working Group approved the substance of article 10 (as to the second change suggested in para. 60, see para. 74 below).

11. Article 11: Duration and extension of registration

63. At the outset, while some preference was expressed for option A only and option A together with option C, it was generally recognized that: (a) all options contained in article 11 could be retained; and (b) the commentary should clarify that an enacting State would have to choose one of them. It was also widely felt that the commentary should discuss all options and their advantages and disadvantages. It was stated that option A provided certainty but no flexibility, option B provided excessive flexibility to the extent the registrant could choose an infinite number of years and option C combined flexibility of choice by the parties with certainty to the extent that it contained a limit to the duration the registrant could choose.

64. A number of suggestions were made. One suggestion was that, as in paragraph 1 of option C, in paragraph 1 of options A and B, reference should be made to the duration of registration of the initial notice, as the duration of the renewal (amendment) notice was addressed in paragraph 2 of all three options. Another suggestion was that reference should be made to article 26 to clarify that a renewal of the duration of registration would take place by way of registration of an amendment notice. Yet another suggestion was that the term “registrant” in

paragraph 2 of options A, B and C should be replaced by the terms “secured creditor or its representative”. It was stated that the term “registrant” referred to the person that effected a registration and thus could encompass the secured creditor or its representative (that could be identified in the appropriate field in the notice), other than a courier, employee or service provider (see para. 20 (d), and para. 40 above, as well as para. 89 below). It was stated that the notice could include a field for a registrant other than a secured creditor or its representative. Yet another suggestion was that the use of the term “registrant” in all articles should be reviewed with a view to determining whether its use was appropriate in each context.

65. Yet another suggestion was that, while, under article 17, if the registrant could choose the duration of registration and failed to do so, the registry would reject the notice, the commentary could discuss the possibility of the registry being designed so as to automatically insert a duration time. Yet another suggestion was that the problem of option B not setting any limit to the duration of registration could also be discussed in the commentary. It was stated that, as grantor authorization was always a requirement for the effectiveness of registration, the problem of the unlimited duration would be addressed as the grantor would not permit a notice to remain on record for an unlimited period of time. In addition, it was observed that the problem could be addressed by way of calculating registration fees on a per year basis, thus discouraging overreaching in the choice of the duration of registration. Moreover, it was pointed out that the problem would be addressed if a State chose to enact option C. In view of the above, the suggestion was made that the matter should be discussed in the commentary. There was sufficient support for all those suggestions.

66. Subject to the above-mentioned changes, the Working Group approved the substance of article 11.

12. Article 12: Time when notice may be registered

67. At the outset, the suggestion was made that article 12 and article 13 should be deleted as they reiterated recommendations of the *Guide* that addressed matters of law. It was stated that, as a general matter, articles that dealt with matters of law and were not addressed to registry designers did not belong in the draft recommendations. It was also observed that matters for the secured transactions law could be addressed in the commentary that fulfilled a different, general educational function.

68. That suggestion was objected to. It was stated that States followed different legislative techniques and the draft Registry Guide should leave it open for States to address registration-related matters in the law, the registry regulations, the registry terms and conditions of use, the contract between the supervising authority and the registry operator, or another text. In addition, it was observed that there was nothing inherently wrong with repeating in the draft recommendations of the draft Registry Guide (that were addressed to the legislator of registry regulations) recommendations of the *Guide* (that were addressed to the legislator of the relevant secured transactions law). Moreover, it was pointed out that the draft Registry Guide should be drafted in a reader-friendly way, not only for registry designers and registry staff that might not be lawyers, but also for legislators, judges and lawyers that would welcome some guidance on matters of law. It was also mentioned that the introduction to the draft Registry Guide could include a pedagogical part as to

the function of the draft recommendations and how they could be enacted in law, regulations, contracts or other texts. It was also suggested that the introduction could also explain the background (including legal matters) and clarify that the registry regulations (to which the draft recommendations referred) could not modify the relevant secured transactions law of the enacting State (including the recommendations of the *Guide*).

69. The view was also expressed that dealing in the draft recommendations with matters of law raised a fundamental question as to the nature and the purpose of the instrument being prepared. It was stated that, if the text were to take the form of a guide with commentary and recommendations, there was no need to deal in the recommendations with matters of law. It was also observed that, if the text under preparation were to take the form of registry regulations, it could deal with matters of law as it would need to be comprehensive. In that connection, the Working Group recalled its decision that the text being prepared would take the form of a guide with commentary and recommendations, and possibly examples of model regulations on certain issues on which the draft recommendations would include options (see para. 18 above). It was noted that the form of the text under preparation did not preclude the inclusion of recommendations that would deal with matters of law and provided comprehensive guidance to the intended readers of the guide.

70. After discussion, the Working Group agreed that article 12 should be retained. As to the formulation of article 12, a number of suggestions were made. One suggestion was that it should include language along the following lines: "Where the law does not already provide, the regulations should provide that ...". It was stated that such an approach would inform the reader that the matter addressed in article 12 was a matter of law and that it did not need to be addressed in the regulations if it had already been addressed in the law. That suggestion was objected to. It was stated that such an approach would inadvertently result in the conclusion that a State need not address a matter both in the law and in the regulations or other text. It was also observed that such an approach could have another unintended result, namely that a State might not need to implement the registration-related recommendations of the *Guide*, a result that could undermine the *Guide*.

71. Another suggestion was that articles 12 and 13 should be merged. That suggestion was also objected to. It was widely felt that articles 12 and 13 could not be merged as they dealt with different matters. Yet another suggestion was that article 12 should avoid referring to the "conclusion" of the security agreement as that term might be misinterpreted as meaning that the agreement had come to an end and the security right was extinguished. In that connection, the Working Group noted that the relevant recommendation 67 referred to "the conclusion of the security agreement".

72. Recalling its decision that the last two sentences of article 12 should be moved to article 8 (see para. 47 above), the Working Group approved the substance of article 12.

13. Article 13: Sufficiency of a single notice

73. The Working Group approved the substance of article 13 unchanged.

14. Article 14: Indexing of notices

74. There was general support in the Working Group for the substance of article 14. Recalling its decision with respect to article 10, paragraph 2 (see paras. 60 and 62 above), the Working Group agreed that the words within square brackets in paragraph 1 (referring to the organization of information so as to become searchable) should be retained outside square brackets and that paragraph 3 should be aligned with paragraph 1. It was reiterated that, while registry designers could create an index, modern software came with search functions that did not require an index.

75. In addition, in line with its decision with respect to serial number assets (see para. 20 (i) above, as well as paras. 86 and 89 below), the Working Group agreed that paragraph 2 should be deleted and the matters addressed therein should be discussed in the commentary. Moreover, the Working Group agreed that the possibility of indexing notices so as to make them retrievable according to the secured creditor identifier for the internal use by the registry (for the purpose of making global amendments; see article 27), should be discussed in the commentary.

76. Subject to the above-mentioned changes, the Working Group approved the substance of article 14.

15. Article 15: Change, addition, deletion, removal or correction of information

77. A number of concerns were expressed with respect to article 15. One concern was that paragraph 1 appeared as dealing with a matter that was different from the matters addressed in paragraphs 2 to 5 and, therefore, the opening words “subject to paragraphs 2 to 5” were inappropriate and should be deleted or replaced with words, such as “except as provided in”. Another concern was that, while paragraph 1 referred to the collective registry record, paragraphs 2 to 5 referred to information in a specific notice and that, therefore, paragraph 1 should be aligned in that respect with paragraphs 2 to 5. Yet another concern was that paragraph 3 was inconsistent with recommendation 74, and should be aligned with recommendation 74, which required not just the information in the notice but also the fact of expiration, cancellation or amendment to be archived. Yet another concern was that paragraph 3 appeared unnecessarily preventing registries from retaining information in their archives for more than twenty years, and should, therefore, be revised to provide that information could be retained for twenty years at a minimum. Yet another concern was that paragraph 4 was inconsistent with recommendation 74 in that it provided that information could be removed from the public record only upon its expiry and not also upon its cancellation, and, should, therefore, be aligned more closely with recommendation 74. With respect to paragraph 5, the concern was expressed that it dealt with corrections on the part of the registry that could affect the priority of the rights of competing claimants in the absence of recommendations of the *Guide* that would address that priority matter. The concern was also expressed that reference to a paper form might create a doubt as to whether paragraph 5 was meant to apply to notices transmitted, for example, by fax. It was, therefore, suggested that paragraph 5 should be deleted from the draft recommendations and the matter should be discussed in the commentary. There was support for those suggestions.

78. After discussion, it was agreed that that paragraph 1 should be formulated as a separate draft recommendation stating the general rule that the registry might not change the registry record except as provided in the regulations. It was also agreed that paragraphs 2 to 4, properly revised as mentioned above, should be reformulated as separate draft recommendations setting out the exceptions to the above-mentioned general rule. With respect to paragraph 5, it was agreed that the matter should be discussed in the commentary, indicating that States would need to provide rules on the legal consequences of correction of errors made by the registry in entering information in the registry record (generally, without referring to paper forms). Further to the above-mentioned changes, the Working Group agreed that the headings of article 15 would need to be revised to fit its contents. Subject to those changes, the Working Group approved the substance of article 15.

16. Article 16: Responsibility with respect to the information in a notice

79. A number of concerns were expressed with respect to article 16. One concern was that paragraph 1 unnecessarily created an obligation for the registrant. Another concern was that paragraph 2 might overlap with articles 7 and 8. As a result, it was widely felt that article 16 should be confined to usefully stating the principle that the registry was not responsible to ensure that the information in the notice registered was accurate and complete. Subject to that change, the Working Group approved the substance of article 16.

17. Article 17: Information required in a notice

80. There was support in the Working Group for the substance of article 17. It was widely felt that article 17 dealt with an important matter and should be retained in the draft recommendations. However, a number of suggestions were made as to the formulation of article 17. One suggestion was that, in the chapeau to paragraph 1, reference should be made to the initial notice, as article 26 dealt with amendment notices and article 28 dealt with cancellation notices. Another suggestion was that, in subparagraphs 1 (a) and (b), reference should be made to the physical (street address, post office box or equivalent) and the electronic address of the grantor and the secured creditor or its representative. Yet another suggestion was that subparagraph 1 (d), should be placed within square brackets and the relevant footnote should be expanded to clarify that the subparagraph would apply only if the enacting State chose in article 11 option B or C, permitting the registrant to select the duration of registration.

81. Yet another suggestion was that the registrant's identifier and address should be added to the information to be provided in the notice. It was stated that such an approach would facilitate the registration process where the registration was effected by a third party other than the secured creditor or its representative (such as a law firm or other service provider). That suggestion was objected to. It was widely felt that, while the registry could request the identity and address of a third-party registrant, that information should not be part of the information required for the registration of the notice to be effective. It was also stated that such an approach did not appear to be consistent with recommendation 57 that set out all the information required for a notice to be effective ("the following information *only* is required").

82. With respect to paragraph 2, it was suggested that reference should be made to: (a) "a language" (rather than "the language"), so as to take into account the

possibility that the law might specify more than one language; and (b) the use of a character set specified and made known to the public by the registry. Yet another suggestion was that paragraphs 3 and 4 should be confined to stating the principle that, in the case of more than one grantor or secured creditor, the required information ought to be provided in the notice separately for each grantor or secured creditor. Yet another suggestion was that the second sentence of paragraph 4 should be reflected in a separate paragraph, as it dealt with a different issue than the issue of the identification of more than one secured creditor, which was addressed in paragraph 4. There was support for all those suggestions.

83. Yet another suggestion was that paragraph 5 should be deleted. It was stated that objective of paragraph 5 was different from the other paragraphs of article 17 in that it dealt with the legal consequences of a change in the identifier of the grantor or the secured creditor, a matter that was addressed in recommendation 61. While there was some doubt as to the correctness of that interpretation and whether recommendation 61 actually applied to such a change in the grantor's identifier (and it did not address a change in the secured creditor's identifier), the Working Group decided to delete paragraph 5.

84. Subject to the above-mentioned changes, the Working Group approved the substance of article 17.

18. Article 22: Description of encumbered assets

85. While there was support for the substance of article 22, it was suggested that the reference to proceeds should be deleted. It was stated that such a reference might inadvertently give the impression that the security right in an encumbered asset did not automatically continue in its proceeds, which would run counter to recommendation 19. While there was support for that suggestion, a note of caution was struck. It was explained that, under recommendation 40, with respect to some types of proceeds, for the security right in proceeds to continue being effective against third parties, reference to those proceeds should be included in the notice. Subject to that change, the Working Group approved the substance of article 22.

19. Article 23: Description of encumbered serial number assets

86. In line with the decision of the Working Group that matters relating to serial number assets should be discussed only in the commentary (see paras. 20 (i) and 75 above, as well as para. 89 below), the Working Group decided that article 23 should be deleted from the draft recommendations and discussed in the commentary.

20. Article 24: Description of encumbered attachments to immovable property

87. It was widely felt that article 24 was unnecessary and should be deleted. It was stated that its heading referred to the description of encumbered attachments to immovable property and its contents to the question where a notice of a security right in an attachment might be registered. In addition, it was observed that the former topic was already addressed in article 22, while the latter was a matter of secured transactions or immovable property law. Moreover, it was pointed out that those matters could usefully be discussed in the commentary. After discussion, the Working Group decided that article 24 should be deleted and the matters addressed therein should be discussed in the commentary.

21. Article 25: Incorrect or insufficient information

88. While there was support for the substance of article 25, a number of suggestions were made as to its formulation. One suggestion was that the formulation of paragraph 1 should be aligned with the formulation of the recommendations of the *Guide* that referred to the effectiveness of notice rather than of a registration. It was noted that the recommendations of the *Guide* referred to “the effectiveness of the registration of a notice” (see, for example, recommendation 70).

89. Another suggestion was that, in line with the decision of the Working Group that matters relating to serial number assets should be discussed only in the commentary (see paras. 20 (i), 75 and 86 above), paragraph 2 should be deleted and the matters addressed therein should be discussed in the commentary. Yet another suggestion was that paragraph 3 should be aligned more closely with recommendation 64, which dealt with the identifier of the secured creditor or its representative only and provided for the possibility that an error in the identifier would seriously mislead a searcher (but not that a searcher was actually misled). There was support for those suggestions. Subject to those changes, the Working Group approved the substance of article 25.

22. Article 26: Amendment of registered notice

90. With respect to article 26, the Working Group agreed that:

(a) The article should clarify that only the secured creditor or its representative (if shown in the secured creditor field in the notice; see recommendation 73) was entitled to amend the notice, leaving the matter of third-party service providers to the relevant agency law;

(b) In subparagraph 1 (a), reference should be made to the registration number of the initial notice (see paras. 20 (g), 60, 61, 65 and 80 above);

(c) Subparagraph 1 (b) should be deleted as the exact purpose or nature of the amendment would be evident from the amendment notice and need not be repeated;

(d) In subparagraph 1 (c), reference to the deletion of information should be deleted because, if information was deleted, there would be no new information added;

(e) Subparagraph 1 (e) should be deleted since, as a practical matter only an authorized person could have access to the initial notice and the registry could not verify online the authorization of the person amending an existing notice;

(f) Paragraph 2 should be retained and further explained in the commentary (see recommendation 62 and relevant commentary);

(g) Paragraph 3 should be retained and the commentary should explain that registration of an amendment notice to disclose a subordination agreement should not be required;

(h) Paragraph 4 should be retained and the commentary should explain that, in line with recommendation 75, an amendment notice may be registered to disclose

the name of the new secured creditor, but absence of an amendment notice would not render the existing notice ineffective;

(i) Paragraph 5 should be deleted as if all information were deleted and was not replaced with other information, the notice would be incomplete under article 9 and thus be rejected by the registry;

(j) In paragraph 6, the use of the words “subject to” should be reconsidered and the second sentence should be deleted, as no notice other than a renewal notice could extend the duration of effectiveness of a registration; and

(k) Paragraph 7 should be retained.

91. Subject to the above-mentioned changes, the Working Group approved the substance of article 26.

V. Future work

92. The Working Group agreed that, while the draft Registry Guide was an important text that was urgently needed by States, it was premature at the current session to decide to submit it, in whole or in part, to the Commission for approval at its 2012 session. It was widely felt that the Working Group should be able to consider its future work at its next session, when it expected to have a more complete overview of all the material in the draft Registry Guide.

**B. Note by the Secretariat on a Draft Security Rights Registry Guide,
submitted to the Working Group on Security Interests at its
twentieth session**

(A/CN.9/WG.VI/WP.48 and Add.1-3)

[Original: English]

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Preface

At its forty-second session (Vienna, 29 June-17 July 2009), the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.¹ In accordance with that decision,² the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The colloquium was attended by experts from governments, international organizations and the private sector.³

At its forty-third session (New York, 21 June-9 July 2010), the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources.

¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 313-320.

² *Ibid.*

³ For the colloquium papers, see www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html.

However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.⁴

In that connection, it was widely felt that a text on registration of security rights in movable assets would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries. It was stated that secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry. It was also emphasized that the *UNCITRAL Legislative Guide on Secured Transactions* (the "Guide") did not address in sufficient detail the various legal, administrative, infrastructural and operational questions that needed to be resolved to ensure the successful implementation of a registry.⁵

The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *Guide*, texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Guide*. After discussion, the Commission decided that the Working Group should be entrusted with the preparation of a text on registration of security rights in movable assets.⁶

At its eighteenth session (Vienna, 5-10 November 2010), the Working Group considered a note by the Secretariat entitled "Registration of security rights in movable assets" (A/CN.9/WG.VI/WP.44 and Add.1 and 2). At the outset, the Working Group expressed its broad support for a text on the registration of security rights in movable assets, noting that empirical evidence clearly demonstrated that the efficacy of a secured transactions law depended on an effective registration system (A/CN.9/714, para. 12). As to the specific form and structure of the text to be prepared, the Working Group adopted the working assumption that the text would be a guide on the implementation and operation of a registry of security rights in movable assets that could include principles, guidelines, commentary and possibly model regulations. The Working Group also agreed that the text of the proposed registry guide should be consistent with the type of secured transactions legal regime contemplated by the *Guide*, while also taking into account the diverse approaches taken by modern national and international registry regimes. It was also observed that, in line with the *Guide* (see recommendation 54, subpara. (j)), the proposed registry guide should take into account the need to accommodate a hybrid electronic/paper system in which parties would have the option of submitting registration and search inquiries either electronically or in paper form (A/CN.9/714, para. 13). The Secretariat was asked to prepare a draft of the proposed registry guide based on the discussions and conclusions of the Working Group (A/CN.9/714, para. 11).

At its nineteenth session (New York, 11-15 April 2011), the Working Group considered notes by the Secretariat entitled "Draft Security Rights Registry Guide" (A/CN.9/WG.VI/WP.46 and Add.1 and 2) and "Draft Model Regulations"

⁴ Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 264 and 273.

⁵ Ibid., para. 265.

⁶ Ibid., paras. 266-267.

(A/CN.9/WG.VI/WP.46/Add.3). At the outset, the Working Group considered the form and content of the text to be prepared. One view was that a stand-alone guide should be prepared that would include an educational part introducing the secured transactions law recommended in the *Guide* and a practical part that would consist of model registration regulations and commentary thereon (see A/CN.9/719, para. 13). Another view was that emphasis should be placed on model registration regulations and a commentary thereon, which would provide States that had enacted the secured transactions law recommended in the *Guide* with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry (see A/CN.9/719, para. 14). At that session, differing views were also expressed as to whether the regulations should be formulated as model regulations or as recommendations (A/CN.9/719, para. 46). The Working Group requested the Secretariat to prepare a revised version reflecting the deliberations and decisions of the Working Group (A/CN.9/714, para. 12).

At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission considered the reports of the eighteenth and nineteenth sessions of the Working Group (A/CN.9/714 and A/CN.9/719, respectively). At that session, the significance of the work undertaken by Working Group VI was emphasized in particular in view of efforts currently undertaken by several States with a view to establishing a general security rights registry and the significant beneficial impact the operation of such a registry had on the availability and the cost of credit. With respect to the form and content of the text to be prepared, it was stated that, following the approach followed with respect to the *Guide*, the text should be formulated in the form of a guide with commentary and recommendations, rather than as a text with model regulations and commentary thereon. In that connection, it was noted that the next version of the text before the Working Group would be formulated in a way that would leave the matter open until the Working Group had made a decision. After discussion, the Commission agreed that the mandate of the Working Group, leaving the decision on the form and content of the text to be prepared to the Working Group, did not need to be modified, and that, in any case, a final decision would be made by the Commission once the Working Group had completed its work and submitted the text to the Commission.⁷

Noting the significant progress made by the Working Group in its work and the guidance urgently needed by a number of States, the Commission requested the Working Group to proceed with its work expeditiously and to try to complete its work, hopefully, in time for the text under preparation to be submitted to the Commission for final approval and adoption at its forty-fifth session, in 2012.⁸ The text that follows constitutes the second draft.

[Note to the Working Group: In view of the decision made by the Working Group at its eighteenth session that the background secured transactions law for the text will be the law recommended in the Guide (see A/CN.9/714, para. 13), it would seem that the text would undoubtedly supplement the Guide. In that context, the Working Group may wish to first consider whether the text would be in the form of a guide with commentary and recommendations, or a text with model regulations and commentary thereon. The Working Group may wish to consider that either form of

⁷ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 233.

⁸ Ibid., para. 234.

presentation of the material could be consistent with the Guide, as long as the text is formulated in a sufficiently flexible way to accommodate the different ways in which the Guide may be implemented and the different needs and capacity to implement a registry of the various States implementing the Guide. As to the title of the text, while calling the text “Supplement II” would be accurate in highlighting its relationship with the Guide and the Supplement on Security Rights in Intellectual Property, calling the text “guide”, rather than a supplement, may highlight its importance, raise its profile, and be also justified on the ground that the proposed registry text will not only elaborate on issues already addressed in the Guide but also address new issues (always in line with the law recommended in the Guide). If the Working Group decides to call the text a “guide” rather than a “supplement”, it may wish to consider its title (for example, Security Rights Registry Guide, Guide on the implementation of a Security Rights Registry, etc.). The adoption of a working assumption at this stage would facilitate the drafting of the final version to be considered by the Commission hopefully, at its forty-fifth session in 2012.]

I. Introduction

A. General

1. The *UNCITRAL Legislative Guide on Secured Transactions* (the “*Guide*”) reflects the global recognition of the economic importance of a modern legal framework to support financing against the security of movable assets. The establishment of a publicly accessible registry in which information about the potential existence of security rights in movable assets may be registered is an essential feature of the law recommended in the *Guide* and of reform initiatives in this area generally.
2. Chapter IV of the *Guide* contains commentary and recommendations on many aspects of a security rights registry. However, in order to understand the requirements and legal effects of registration, as well as the scope of the registry, a reader needs to have a rather thorough understanding of the *Guide* as a whole. Thus, chapter II of the draft Security Rights Registry Guide (the “draft Registry Guide”) offers a concise summary of the legal function of a security rights registry for States that have adopted or wish to adopt the law recommended in the *Guide*. Chapter II is intended to assist not only non-legal experts involved in the registry implementation process, who will need to have a basic understanding of the legal context of the registry in order to carry out their work knowledgeably, but also the registry clientele and others (see para. 10 below).
3. A general security rights registry differs fundamentally from the kinds of registry for recording title and encumbrances on title in immovable property and high-value equipment, such as ships, with which many States are most familiar. Thus, chapter III of the draft Registry Guide explains the key characteristics of a general security rights registry, notably notice registration for the purpose of establishing third-party effectiveness and grantor-based indexing, characteristics that differentiate it from other types of registry and contribute to its efficient operation.
4. The legislative framework governing secured transactions typically leaves the detailed rules applicable to the registration and search process to be dealt with in subordinate regulations, ministerial guidelines and the like. Although chapter IV of the *Guide* provides recommendations on the general policy issues, chapter IV of the draft Registry Guide (A/CN.9/WG.VI/WP.48/Add.1 and 2) provides concrete guidelines for submitting notices for registration and conducting searches. These guidelines are further supplemented by draft model regulations (see A/CN.9/WG.VI/WP.48/Add.3).
5. Chapter IV of the *Guide* does not address, or does not address in every detail, the myriad of technological, administrative, and operational issues involved in developing and operating an effective and efficient security rights registry. Thus, chapter V of the draft Registry Guide (see A/CN.9/WG.VI/WP.48/Add.2) seeks to complement the *Guide* by addressing these practical issues in a more specific and expanded fashion.

B. Sources

6. The experience of States that have instituted the kind of general security rights registry contemplated by the *Guide* demonstrates how advances in information technology can vastly improve the efficiency of its operation. Thus, particularly in relation to the technical aspects of registry design and operation, the draft Registry Guide draws on these national precedents to provide guidance to States.

7. In addition, the draft Registry Guide has benefitted from other international sources, including the following:

(a) The European Bank for Reconstruction and Development (EBRD) Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry (2004);

(b) EBRD Publicity of Security Rights: Setting Standards (2005);

(c) The Asian Development Bank (ADB) Guide to Movable Registries (2002);

(d) The Principles, Definitions and Model Rules of a European Private Law, Draft Common Frame of Reference (DCFR), volume 6, book IX (Proprietary security in movable assets), chapter 3 (Effectiveness as Against Third Parties), section 3 (Registration), (2010), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group);

(e) The Organization of American States (OAS) Model Registry Regulations under the Model Inter-American Law on Secured Transactions (October 2009);

(f) The International Finance Corporation (World Bank Group) Secured Transactions Systems and Collateral Registries (January 2010);

(g) The Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA) Treaty: recent developments in relation to the establishment of a regional security rights registry; and

(h) The Convention on International Interests in Mobile Equipment (Cape Town, 2001) and its Protocols, establishing international registries (which, although they are asset based and cover other transactions in addition to secured transactions, are notice based, with registration resulting in third-party effectiveness and priority).

8. The national, regional and international sources referred to above do not always accord with the recommendations in chapter IV of the *Guide* on registration-related issues. Consequently, the draft Registry Guide explains the policy rationale for approach recommended in the *Guide* relative to other possible approaches.

C. Guiding principles

9. The draft Registry Guide is governed by the following overarching principles:

(a) Legal efficiency: the legal and operational guidelines for all registry services, including but not limited to registration and searching, should be simple, clear and certain;

(b) Operational efficiency: all registry services, including the registration and search process, should be designed to be as fast and inexpensive as possible to ensure the security and retrievability of the information entered in the registry record; and

(c) A balanced approach to the interests of all registry constituents: potential grantors, potential secured and unsecured creditors, as well as potential competing claimants, all may have an interest in the extent and scope of information that is entered in a security rights registry and in the availability of that information; thus, the legal and operational framework of the registry should be designed to fairly balance the interests of all its constituents.

D. Intended readership

10. The potential readership of the draft Registry Guide comprises all those who are interested or actively involved in the design and implementation of a security rights registry as well as those who may be affected by its establishment, including:

(a) Registry system designers, including technical staff charged with the preparation of design specifications and fulfilling of the hardware and software requirements for the registry;

(b) Registry administrators and staff;

(c) Registry clientele, credit providers, credit reporting agencies and insolvency representatives, as well as all members of the public whose legal rights may be implicated by transactions involving movable assets potentially subject to a security right;

(d) The general legal community (including judges, arbitrators and practicing lawyers); and

(e) All involved in secured transactions law reform and the provision of technical assistance (such as the World Bank Group, the EBRD, the ADB and the Inter-American Development Bank).

11. Not all of these potential readers will be versed in the intricacies of secured transactions law or even have legal training. Accordingly, the draft Registry Guide is formulated in “plain language” style employing “reader-friendly” aids.

12. Like the *Guide*, the draft Registry Guide has been formulated in a fashion that enables it to be used in States with diverse legal traditions. Consequently, it uses neutral generic terminology that is consistent with the terminology used in the *Guide* and can be adapted readily to each State’s domestic legal tradition and drafting style, as well as to local legislative conventions regarding which types of

rule must be incorporated in principal legislation and which may be left to subordinate regulations or ministerial or administrative guidelines.

II. Secured transactions and security rights registry

A. Purpose of a security rights registry

13. A general security rights registry contemplated in the *Guide* permits the registration of information contained in notices with respect to potential present and future security rights for the purpose of: (a) making the security rights effective against third parties; (b) providing an efficient point of reference for priority rules based on the time of registration; and (c) functioning as an objective source of information for third parties dealing with a grantor's assets (see purpose section of chap. IV of the *Guide*). Thus, generally the purpose of a security rights registry is to receive, store and make available to the public, information relating to security rights in movable assets.

[*Note to the Working Group: The relevant article in the draft model regulations is article 2.*]

14. A general security rights registry does not exist in a vacuum. It is an integral component of the overall legal and economic context of the secured financing regime in a particular State. Yet those who are involved in the design and implementation of a security rights registry, as well as the potential registry clientele, may not be familiar with the intricacies of secured transactions. Accordingly, this chapter provides an overview of secured transactions and the legal consequences of registration in line with the law recommended in the *Guide*.

B. Function of a security right

15. Although the legal terminology may vary (for example, "pledge", "charge", "security interest" or "hypothec"), the basic idea of a security right is much the same everywhere. A security right is a property right (right *in rem*, distinct from ownership and personal rights) in a movable asset that is created by agreement and secures payment or other performance obligation (see the term "security right" and "grantor" in the introduction to the *Guide*, sect. B). A security right mitigates the risk of loss resulting from a default in payment by entitling the secured creditor to claim the value of the assets encumbered by the security right as a back-up source of repayment. For example, if a business that borrows funds on the security of its equipment fails to repay the loan, its secured creditor will be entitled to obtain possession of the equipment, have it disposed and apply the proceeds to the outstanding balance. The central feature of a security right is that it generally enables a creditor to claim the value of encumbered assets by preference over other competing claimants. As the risk of loss from default is mitigated, the grantor's access to credit is expanded, quite often on more favourable terms.

16. Enterprises, in particular small and medium-sized enterprises, typically require some form of financing to support their start-up and expansion costs and to acquire or produce the equipment, inventory and services from which they hope to generate profits. Consequently, credit performs an important role in financing productive

business development. Consumers as well may require access to credit to be able to acquire assets such as household appliances or motor vehicles. As already mentioned, a creditor that is forced to rely solely on a borrower's promise to repay is likely to extend only a small amount of credit for a short period of time, at a high interest rate and then only to a borrower that has an established credit record. As mentioned above, a security right enhances grantor's access to credit at lower cost and for a longer duration because of the additional protection it offers creditors against the risk of default in payment. Indeed, many consumers and small and medium-sized businesses are unable to access credit at all unless they have assets to offer as security (see introduction to the *Guide*, paras. 1-11).

C. A registry as a way of addressing the risks of non-possessory security rights

17. Legal systems have long recognized security rights in the form of the classic possessory pledge in which the grantor delivers physical possession of the encumbered asset to the secured creditor (see the *Guide*, chap. I, paras. 51-59). The requirement for delivery of physical possession means that the secured creditor can be confident that the grantor has not already encumbered the asset in favour of another creditor and enables the secured creditor to guard against damage to or deterioration in the value of the asset. Dispossession of the grantor also alerts potential buyers and other competing claimants that the grantor may no longer have unencumbered title to the asset.

18. However, possessory pledges are possible only if the asset is capable of physical possession. This excludes many types of movable asset, including future assets (that is, assets acquired by the grantor or produced after the creation of a security right; see the *Guide*, chap. I, para. 8), as well as intangible assets, such as receivables or intellectual property rights. Giving up possession may defeat the purpose of the financing. An enterprise needs to retain possession of its equipment, inventory and other business assets in order to generate income to satisfy the secured obligation. Similarly, postponement of delivery of tangible assets purchased on secured credit terms would deprive consumers as well as businesses of the present benefit of use and enjoyment of the assets. Even when delivery of possession is feasible, the secured creditor normally may not be in a position or wish to store, maintain and insure bulky assets (for a discussion of the advantages and disadvantages of possessory pledges, see the *Guide*, chap. I, paras. 51-59).

19. In view of the limitations of possessory security rights, modern secured transactions laws generally permit security to be granted without the need for a delivery of physical possession of the encumbered asset to the secured creditor. A legal regime that recognizes non-possessory security rights increases access to credit by expanding the range of assets that a grantor can offer as security. An enterprise can encumber its intangible assets in addition to its tangible assets, and its future assets (most significantly, its receivables and its inventory) in addition to its present assets. This is the approach recommended in the *Guide* (see recommendations 2 and 17; for security rights in all assets of a grantor, see the *Guide*, chap. II, paras. 61-70). Non-possessory security rights also enhance consumer access to credit since it enables the consumer to take immediate possession of assets purchased on credit.

20. However, the recognition of non-possessory security rights poses information challenges for third parties. It is important for potential buyers and secured creditors to be able to determine whether assets in a person's possession are encumbered. It is equally important for unsecured creditors and the grantor's insolvency representative to be able to determine which of the grantor's assets are already encumbered and therefore potentially not available to satisfy their claims. In the face of these information challenges, legal systems may be reluctant to permit the holder of a non-possessory security right to enforce its security right against competing claimants that acquire a right in the encumbered asset without an opportunity to become aware of the existence of the security right. On the other hand, the value of a security right to a creditor is diminished or eliminated to the extent that rules protecting third parties enable them to take their rights in the encumbered assets free of any pre-existing security right.

21. A security rights registry resolves the aforementioned "information" problem in a manner that protects the rights of both secured creditors and third parties (by giving some information about the security right and allowing third parties to obtain more information from the secured creditor with the consent of the grantor). To achieve this solution to this "information" problem, the law recommended in the *Guide* incorporates the three basic rules. First, registration is a generally available mechanism to achieve the effectiveness of a non-possessory security right against third parties (see recommendations 29 and 32). Second, in the event of the grantor's default, the holder of a security right that became effective against third parties must be entitled as against competing claimants to enforce its security right and apply the value of the encumbered asset to the outstanding part of the secured obligation (see the term "priority" in the introduction to the *Guide*, sect. B, and recommendations 142 and 152). Third, priority among security rights in the same asset that became effective against third parties by registration must be generally determined by the order of registration (see recommendation 76, subpara. (a)). Although these recommendations provide the baseline rules, a modern secured transactions law along the lines recommended in the *Guide* will invariably recognize some exceptions in the interest of facilitating other business practices and policy objectives. The next section offers some typical examples.

D. Exceptions to registration-based third-party effectiveness and priority rules

1. Possessory security rights

22. Although most secured transactions involve non-possessory security rights, the possessory pledge is still commonly used for certain types of asset, such as negotiable instruments and negotiable documents. Even States that have implemented a registry system almost invariably permit taking actual possession as an alternative to registration for achieving third-party effectiveness of a security right in assets capable of physical possession (not non-actual possession described by terms such as constructive, fictive, deemed or symbolic possession; see the term "possession" in the introduction to the *Guide*, sect. B). This is the approach recommended in the *Guide* (see recommendation 37). The dispossession of the grantor is considered to be sufficient practical notice to third parties that the grantor's rights in the assets are likely to be encumbered. However, the mere fact

that the assets are in possession of the secured creditor does not prevent the grantor from creating additional security rights in the same asset that may be made effective against third parties by registration. In the event a possessory security right comes into competition with a non-possessory security right made effective against third parties by registration, priority is generally determined by the respective order of registration or delivery of possession (see recommendation 76, subpara. (c)). However, with respect to certain types of asset, such as negotiable instruments or negotiable documents, a security right made effective against third parties by possession has priority even over a previously registered security right (see recommendations 101 and 109).

2. Acquisition financing

23. A security right may also be granted for the purposes of extending credit to finance the acquisition of tangible assets by the grantor. For example, a seller may reserve ownership in assets sold on credit in order to secure payment of the purchase price (for acquisition financing, see the *Guide*, chap. IX; see also paras. 34 and 35 below). Modern secured transactions laws typically give priority to a security right over another security right a notice of which was registered later (see recommendation 76). A first-to-register priority rule means that a security right in the assets of an enterprise (including future assets, that is, assets that are acquired or come into existence after the security right is created), which is made effective against third parties by registration, will have priority over security rights in the same assets (that is, assets that fall within the description of the encumbered assets in the first registered notice) that are made effective against third parties by later registration. This is reasonable, as a general rule, since the subsequent secured creditor could and should have protected itself by searching the registry before extending credit.

24. However, modern secured transactions laws often recognize that there should be an exception to this priority rule where the subsequent secured creditor is financing the grantor's acquisition of tangible assets (for example, consumer goods, equipment or inventory) or intellectual property. As the grantor would not have been able to acquire these new assets but for the new financing, it is considered fair that the acquisition financier (the later-registered secured creditor financing the acquisition) should have priority with respect to the value of those assets over of the earlier-registered creditor. Giving priority to acquisition security rights (including retention-of-title rights and financial lease rights, in the context of the unitary approach to acquisition financing; see the term "acquisition security right" in the introduction to the *Guide*, sect. B) also benefits the grantor by giving it access to diversified sources of secured credit to finance new acquisitions (see the *Guide*, chap. IX). Acquisition security rights also benefit secured creditors whose security right automatically extends to the newly acquired asset. Although, the non-acquisition security right in such assets would be junior to the acquisition security right, the former right would extend to the new assets without the non-acquisition secured creditor having to provide new value. To preserve its special priority status, the acquisition secured creditor is generally required to register a notice in a timely fashion following delivery of the asset to the grantor and may also be required to notify the earlier-registered secured creditor where the assets constitute inventory in the hands of the grantor; acquisition security rights in consumer goods, however, may be excepted from the requirement for registration.

This is the approach recommended in the *Guide* (see recommendation 180). The same approach is also recommended by the *Guide* for systems that treat acquisition financing in the form retention-of-title rights and financial lease rights as distinct from security rights (see paras. 34 and 35 below).

3. Ordinary-course-of-business transactions

25. In States that lack a general security rights registry, the law often provides that a third party that acquires an encumbered asset without actual or imputed knowledge that the asset is subject to a security right takes the asset free of that security right. Under this approach, a potential buyer is not only under no obligation to search the registry to determine whether the asset in which it is interested is subject to a security right, but also has a positive incentive not to search. This level of protection is incompatible with the goal of a comprehensive registry system aimed at facilitating publicity of security rights and establishing clear and objective rules for resolving contests between competing claimants. Consequently, secured transactions regimes that have established a general security rights registry typically enable a secured creditor that has registered a notice of its security right to follow the asset into the hands of a buyer from the grantor regardless of whether the buyer has actual knowledge of the registered security right. This is the approach recommended in the *Guide* (see recommendation 79). Therefore, actual or imputed knowledge of the existence of a security right by a third party is not a substitute for registration and the acquisition of an encumbered asset with knowledge of the existence of an unregistered security right does not constitute bad faith. This approach enables third parties to place full confidence in the registry system to determine whether or not they are bound by any security rights the grantor may have given in its assets. It is not unfair to secured creditors since they could have protected themselves by timely registration.

26. However, the secured creditor's general right to enforce its security right against an encumbered asset in the hands of a buyer is subject to an important qualification, that a buyer that purchases a tangible asset in the ordinary course of the grantor's business acquires the asset free of any security right, whether a notice about it is registered or not. This is also the approach recommended in the *Guide* (see recommendation 81(a)). The ordinary-course-of-business exception typically protects a buyer even when the buyer has actual knowledge of the existence of a security right that has become effective against third parties. It is only if the buyer additionally knows that the sale violates the rights of the secured creditor under the security agreement that the buyer's title will be subject to the security right.

27. This approach is consistent with the reasonable commercial expectations of the parties involved, the grantor, the secured creditor as well as the buyer. It is not realistic to expect buyers dealing with a commercial enterprise which routinely sells the type of asset in which the buyer is interested, for example, computer equipment, to check the registry before entering into the transaction. Moreover, a secured creditor that takes a security right in a grantor's inventory will normally have done so on the understanding that the grantor may dispose of the inventory free of the security right in the ordinary course of the grantor's business. After all, for the grantor to be able to generate the revenue necessary to pay back the secured loan, its customers need to be assured that they will acquire unencumbered title in any inventory sold to them in the grantor's ordinary course of business.

4. Money, negotiable instruments and negotiable documents

28. Secured transactions laws typically extend similar protection to transferees and competing secured creditors to whom money is paid or in whose favour negotiable documents (such as a bill of lading) or negotiable instruments (such as a cheque) are negotiated. This is the approach recommended in the *Guide* (see recommendations 101, 102, 108 and 109). Here, the policy of preserving the free negotiability of these types of asset in the market place is considered to outweigh the risk to the priority position of the registered security right.

5. Bank accounts and securities

29. In the interest of facilitating transactions by large financial institutions in the securities lending, repurchase and derivatives markets, legal systems sometimes create exceptions to registration-based priority rules for security rights in bank accounts and in, at least, certain types of securities (although it should be noted that securities and payment rights arising under or from financial contracts and foreign exchange contracts are excluded from the scope of the *Guide*; see recommendation 4, subparas. (c)-(e)). In these systems, secured creditors typically have the option of taking “control” of the bank account or securities in lieu of registration; and secured creditors with “control” have priority even over earlier-registered security rights. This is the approach recommended in the *Guide* (with respect to bank accounts, see the term “control” in the introduction to the *Guide*, sect. B, and recommendation 103).

6. Assets subject to specialized registration

30. Other exceptions to the first-to-register priority rule may be based on a State’s decision to retain existing well-functioning alternatives to registration in the general security rights registry. Some States, for example, have adopted a system for noting security rights on the title certificates for motor vehicles. A State may give priority to a security right noted on a title certificate as against a security right registered in the general security rights registry and may also require a notation on the title certificate for the secured creditor to prevail against a subsequent transferee. This is the approach recommended in the *Guide* (see recommendations 77 and 78).

31. In addition, some States already have in place specialized legal regimes and registries for recording rights, including security rights, in specific types of movable asset, notably, ships, aircraft and intellectual property. The law recommended in the *Guide* may apply to some of these assets or not (see recommendation 4, subparagraphs (a) and (b)). These registries may serve broader goals than simply publicizing security rights in the relevant assets (for example, also recording ownership or transfers of ownership). To the extent the law recommended in the *Guide* would apply to security rights in these assets, a State may decide to give priority to security rights registered in a specialized registry as against a security right registered in the general registry; a State may also require registration in the specialized registry for the secured creditor to prevail against a subsequent transferee. This is the approach recommended in the *Guide* (see recommendations 77 and 78).

32. Finally, States that are parties to international treaties, such as the Convention on International Interests in Mobile Equipment and its Protocols, require

registration in the international registry for security and other rights in the types of asset to which these treaties apply (for example, aircraft frames and engines, railway rolling stock and space assets). Such registration has the result of making the security right effective against third parties.

7. Other exceptions

33. The extent to which other exceptions are recognized depends on the particular social and economic context of each State. Some States, for example, protect buyers of relatively low-value consumer assets, whether or not purchased in the ordinary course of the seller's business. In those States, the theory is that it is unrealistic to expect them to undertake a registry search in advance of the transaction. However, it is important that these exceptions be narrow and clearly specified in the law (see recommendation 7).

E. Transactional scope of the registry

1. General approach: substance over form

34. An efficient and effective secured transactions regime should be comprehensive in scope, covering all transactions that in substance operate as security regardless of the form of the transaction, the type of encumbered asset, the nature of the secured obligation or the status of the parties. This is the approach recommended in the *Guide* (see recommendation 2). So, for example, if a person transfers title of an asset to a creditor under a "sale", but retains possession on the understanding that title may be redeemed on payment of the outstanding obligation, the sale should, in principle, be regulated by the same rules that apply to nominal security rights, including the rules on registration. This approach is necessary to avoid undermining the benefits of risk reduction and efficient priority ordering resulting from the establishment of a general security rights registry.

2. Acquisition financing — title retention security devices

35. The unitary and the non-unitary approaches to acquisition financing recommended in the *Guide* are based on the "substance over form" approach (see chap. IX of the *Guide*). In some States, transactions in which a creditor retains title to an asset for the purpose of securing payment of its acquisition price by the buyer are treated in the same way as secured transactions for the purposes of secured transactions law. Thus, retention-of-title rights or financial lease rights are subsumed under the concept of "security right" and brought within the scope of the general security rights registry. This is the unitary approach to acquisition financing recommended in the *Guide* (see recommendation 178). In other States, retention-of-title devices are treated as conceptually distinct from security rights granted in assets already owned by the grantor. However, even in these States, it is generally recognized that retention-of-title devices raise the same publicity concerns as traditional security rights. In the absence of a registration requirement, a third party would have no means of objectively verifying whether assets in a person's possession may in fact be subject to the ownership rights of a seller or lessor. Consequently, these States often also bring retention-of-title devices within the scope of the general security rights registry, while retaining

different terminology. This is the non-unitary approach recommended in the *Guide* (see recommendation 187).

3. Outright assignments of receivables

36. An outright assignment of a receivable creates the same problem of information inadequacy for third parties as a non-possessory security right. A potential secured creditor or assignee has no efficient means of verifying whether the receivables owed to a business have already been assigned. While inquiries could be made of the debtors of the receivables, this is not practically feasible where the debtors of the receivables are not notified of the assignment or the transaction covers present and future receivables generally. To address this concern, secured transactions laws often extend the registration requirements applicable to non-possessory security rights to outright assignments of receivables, with priority among successive assignees or secured creditors of the same receivables determined by the order of registration. Other outright transfers, such as ordinary sales, are not made subject to registration, since, unlike outright assignments of receivables, they do not perform a financing function.

37. Bringing outright assignments of receivables within the scope of the registry does not mean that these transactions are recharacterized as secured transactions. It merely ensures that an outright assignee of receivables is subject to the same rules relating to creation, third-party effectiveness, and priority (but generally not enforcement) as the holder of a security right in receivables. It also means that the outright assignee has the same rights and obligations vis-à-vis the debtor of the receivable as a secured creditor. This is the approach recommended in the *Guide* (see chap. I, paras. 25-31, and recommendations 3 and 167).

4. True leases and consignment sales

38. True long-term leases and consignment sales of movable assets do not operate to secure the acquisition price of assets. However, they create analogous publicity problems for third parties since they necessarily involve a separation of a property right (the ownership of the lessor or consignor) from actual possession (which is with the lessee or consignee). To address this concern, some States expand the scope of the registration and priority regime applicable to acquisition security rights and retention-of-title devices, to these types of transaction. This approach also allows the lessor or consignor to register so as to protect themselves against the risk that a court may find that a transaction that appeared to be a true lease or a true consignment was actually a secured transaction and thus ineffective if a notice with respect to it was not registered (this is also possible in States that do not require registration for true leases and consignment sales to be effective against third parties). The *Guide*, however, does not recommend this approach.

5. Preferential claims

39. A registry of security rights in movable assets is designed primarily to accommodate the registration of a security right created by agreement of the parties. However, in some States, a right that may amount to a security right or give equivalent protection created by operation of law may also be registered. Such preferential claims include, for example, rights of a State in the assets of a taxpayer for unpaid taxes (see the *Guide*, chap. V, paras. 90-109). In those States, the same

registration and priority rules that apply to security rights apply to rights created by operation of law. However, the *Guide* does not recommend this approach. It treats statutory claims as preferential claims that should be limited both in type and amount (see recommendation 83). As a result, a creditor holding such a right does not need to register, the first-to-register priority rule does not apply and third parties should be aware of this risk and investigate accordingly.

6. Rights of judgement creditors

40. Unlike preferential claims, the rights of judgment creditors do not automatically have a special priority status. However, in some States, creditors that have obtained a judgment and taken the steps necessary to acquire rights in an encumbered asset (including registration of a notice or seizure of the asset) are treated as secured creditors. Under this approach, judgment creditors are subject to the same registration and priority rules as secured creditors. The *Guide* recommends this approach (see recommendation 84).

F. Territorial scope of the registry

41. Registry users would need clear guidance on where (or in the registry of which States) a security right must be registered and where (or in the registry of which States) searches should be conducted. Guidance is typically required in situations where the transaction involves parties and assets located in different States. Typically, guidance is to be found in a State's conflict-of-laws rules for determining the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right. Similarly, while the law recommended in the *Guide* does not specify the territorial scope of the registry, that scope may be determined by the conflict-of-laws rules recommended in the *Guide*.

42. Under the approach recommended in the *Guide*, the applicable law depends on the nature of the assets. For security rights in tangible assets, the law of the State in which the encumbered asset is located applies (see recommendation 203). This means that a notice of the security right would need to be registered in the registry of the State where the encumbered asset is located. Where the encumbered assets are located in multiple States, the law of each such State applies. If these States have registries, multiple registrations will be necessary. For security rights in intangible assets, as well as mobile goods of a kind that are commonly used in multiple States, the law of the State in which the grantor is located applies (see recommendations 204 and 208), which means that a notice of the security right would need to be registered in the registry of the State where the grantor is located.

43. However, different conflict-of-laws rules apply to security rights in certain types of asset, such as receivables arising from a transaction relating to immovable property, rights to payment of funds credited to bank accounts, rights to receive the proceeds under an independent undertaking, intellectual property rights and proceeds (see recommendations 209-215 and 248). For example, where the encumbered asset is intellectual property the applicable law is primarily the law of the State in which the intellectual property is protected, although a security right may also be created and made effective against the grantor's insolvency representative and judgement creditors, and may be enforced only, under the law of

the State in which the grantor is located (see *Supplement on Security Rights in Intellectual Property*, recommendation 248).

G. Registration and its legal consequences

1. Registration not an element of the creation of a security right

44. Under the law recommended in the *Guide*, registration is not an element of the creation of a security right (see recommendation 33). Rather the security right takes effect and becomes enforceable between the grantor and the secured creditor as soon as a security agreement is concluded (see recommendations 13-15). Registration is purely a precondition to the third-party effectiveness of the security right. In addition, as explained in detail below, what is registered is not the security agreement itself but rather only basic information provided in a notice with respect to a potential security right (see recommendation 32 and paras. 63-67 below). The registration does not constitute evidence that the security right to which it refers actually exists. It is the off-record security agreement that evidences the security right. Registration merely alerts third-party searchers of the possible existence of a security right in the described assets.

2. Enforcement

45. Some legal regimes require secured creditors to register a notice of the initiation of enforcement action. Under the law recommended in the *Guide*, a secured creditor does not have an obligation to register such a notice. Instead, the enforcing secured creditor is required to search the registry and to notify interested third parties (including competing claimants) of the particular enforcement remedy that it seeks to exercise (see recommendation 151).

3. Failure to register and third-party effectiveness

46. The *Guide* does not require a secured creditor to register a notice of its security right and thus does not recommend the imposition of monetary penalties or other administrative or other sanctions on secured creditors for failing to do so. The only adverse consequence of a failure of a secured creditor to register a notice of its security right is that the security right will not be effective against certain third parties as described in the *Guide*.

4. Insolvency

47. Modern secured transactions and insolvency laws generally make registration a precondition to the effectiveness of a security right against the grantor's unsecured judgement creditors and insolvency representative. This is the approach recommended in the *Guide* (see recommendations 238 and 239) in line with the UNCITRAL Legislative Guide on Insolvency Law. Failure to register a notice or otherwise make a security right effective against third parties, at all or in time, means that the secured creditor is effectively demoted to the status of an unsecured creditor as against competing claimants, including the grantor's judgement creditors and insolvency representative.

48. This rule:

- (a) Encourages timely registration by secured creditors;
- (b) Enables the grantor's insolvency representative to determine efficiently which of the grantor's assets may have been encumbered;
- (c) Enables judgement creditors to determine at any given time the extent to which the grantor's assets may have been encumbered, thereby enabling them to determine whether it is worthwhile to commence judgement enforcement proceedings; and
- (d) Enables potential creditors to contact secured creditors on record with the consent of their potential debtor and determine the possible extent of secured indebtedness of their potential debtor (knowledge that may contribute to their overall assessment of creditworthiness of a potential debtor).

49. Timely registration does not, however, protect a secured creditor from challenges on the basis of general insolvency law policies, such as rules avoiding preferential or fraudulent transfers and rules giving priority to certain protected classes of creditors (see the *Guide*, chap. XII, and recommendation 239; see also recommendations 88 and 188 of the UNCITRAL Legislative Guide on Insolvency Law).

50. In addition, modern secured transactions and insolvency laws generally allow the secured creditor to take an action to extend the effectiveness of the security right against third parties even after the commencement of insolvency proceedings (see recommendation 238). Accordingly, the secured creditor should be able to extend the effectiveness of the registration that would otherwise expire during the insolvency proceedings by registering the relevant notice of amendment. Registration of other types of amendments would be ineffective and constitute a violation of the automatic stay.

51. Moreover, modern insolvency laws generally authorize the insolvent grantor to create a security right to obtain post-commencement finance (see recommendation 65 of the UNCITRAL Legislative Guide on Insolvency Law). Such post-commencement finance does not have priority over existing secured creditor(s) unless agreed to by the existing secured creditor(s) or authorized by the court with the appropriate protections for the secured creditor. When post-commencement finance is provided, the notice of registration must identify the grantor appropriately depending on the type of insolvent person (see A/CN.9/WG.VI/WP.48/Add.1, para. 23).

H. Coordination of the general security rights registry and specialized movable property registries

52. Where specialized registries exist and permit the registration of security rights in movable assets with third-party effects (as is the case with the international registries under the Convention on International Interests in Mobile Equipment and its Protocols), modern secured transactions regimes deal with matters related to the coordination of registrations in the two types of registry. The *Guide* and the *Supplement on Security Rights in Intellectual Property* discuss coordination of

registries in detail (see the *Guide*, chap. III, paras. 75-82, chap. IV, para. 117; and the Supplement, paras. 135-140).

53. For example, the *Guide* provides that a security right in an asset subject to specialized registration may be made effective against third parties by registration in the general security rights registry or in the specialized registry and addresses the issue of coordination between the two types of registry through appropriate priority rules, giving priority to a security right, a notice of which is registered in the relevant specialized registry, over a security right in the same asset, a notice of which is registered in the general security rights registry, irrespective of the time of registration (see recommendations 43 and 77, subpara. (a)).

54. The *Guide* also discusses other ways of coordinating registries, including the automatic forwarding of information registered in one registry to another registry and the implementation of common gateways to the various relevant registries. This approach raises complexities with respect to the design of the general security rights registry where the specialized registry organizes registrations by reference to the asset as opposed to the grantor-based indexing system used in the general security rights registry (see the *Guide*, chap. III, paras. 77-81; see also paras. 65-67 below).

I. Coordination of the security rights registry and immovable property registries

55. Immovable property registries exist in most, if not in all, States. Typically, the general security rights registry is separate from the immovable property registry owing to differences in the requirements for the description of the encumbered asset and indexing structures (see further, paras. 65-67 below) as well as to the legal effects of registration as against third parties.

56. A State implementing a general security rights registry will need to provide guidance on where notices relating to security rights in attachments to immovable property should be registered. The law recommended in the *Guide* provides that such registrations may be made either in the general security rights registry or in the immovable property registry (see recommendation 43). The choice between the two types of registration has priority consequences. The *Guide* recommends that an encumbrance registered in the immovable property registry has priority as against a security right a notice of which is registered only in the security rights registry (see recommendation 87). The *Guide* also recommends that the security right in an attachment to immovable property will be ineffective against a buyer (or other third party) that acquires a right in the immovable property unless a notice with respect to the security right is registered in the immovable property registry in advance of the sale (see recommendation 88).

57. It should also be noted that the asset description requirements as to notices relating to security rights in an attachment to immovable property may differ depending on whether the notice is to be registered in the security rights registry or in the immovable property registry. The law recommended in the *Guide* provides that an attachment to immovable property, just like any other encumbered asset, should be described in a manner that reasonably allows its identification when registering a notice in the security rights registry (see recommendation 57, subpara. (b)). Thus, a description of the tangible asset that is or will be attached

without a description of the immovable property is sufficient for the purposes of registering such a notice in the security rights registry. In contrast, registering such a notice in the immovable property registry will generally require that the immovable property to which the tangible asset is or will be attached be described sufficiently under the law of immovable property. Such description must be sufficient to allow the indexing of the notice in the immovable property registry.

[Note to the Working Group: The relevant article in the draft model regulations where reference is made to an attachment to immovable property is article 24.]

III. Key characteristics of an effective security rights registry

A. Introduction

58. Most States have established registries for recording title and encumbrances on title with respect to transactions involving immovable property as well as a limited number of high-value movable assets, such as ships and aircraft. It is essential to the successful implementation of an effective security rights registry that its very different characteristics be well understood by those responsible for its design and operation, as well as by its potential clientele. Accordingly, this chapter explains the key characteristics of an efficient and effective security rights registry (the detailed legal rules and design considerations necessary to implement these key characteristics are addressed in subsequent chapters).

B. Record of potentially existing security rights

59. A title registry, such as the typical land, aircraft or ship registry, operates to disclose both the current owner of a particular asset and any encumbrances on the owner's title. However, it would not be practical or cost effective to attempt to establish a reliable ownership record for the great bulk of tangible and intangible movable assets that are commonly made the subject of security rights. Consequently, a general security rights registry for movable assets contemplated by the *Guide* does not purport to record the existence or transfer of title to the encumbered asset described in the notice or to guarantee that the person named as grantor in the notice is the true owner. It simply provides a record of potentially existing security rights on whatever property right the grantor has or may acquire in the assets described in the notice as a result of off-record transactions or events (see the *Guide*, chap. IV, paras. 10-14).

60. In certain types of transaction mentioned in paragraphs 35-38 above (retention of title under sale or financial lease agreement, outright assignment of receivables, and true leases and consignment sales), the registration refers not to a security right but to the ownership right of the assignee, retention-of-title seller, lessor or consignor. However, even in these cases, registration does not establish or evidence ownership; it merely provides notice that the assignee, retention-of-title seller, lessor or consignor may hold title to the assets described in the notice. Whether these parties hold title or not depends on off-record evidence of the transactions or events under which title is claimed (see the *Guide*, chap. IX, paras. 96-107).

C. Notice registration

61. Registry systems for recording title and any encumbrances on title to specific parcels of land or some high-value movable assets, such as aircrafts or ships, typically require registrants to file or tender for scrutiny the underlying documentation. This is because document registration generally is considered to constitute evidence or at least presumptive evidence of title and any property rights affecting title.

62. While, security rights registries in some States still require submission of the underlying security documentation, the *Guide* recommends notice registration (see recommendations 54, subpara. (b), and 57). A notice registration system does not require the actual security documentation to be registered or even tendered for scrutiny by registry staff. All that need be registered is a notice that provides the basic information necessary to alert a searcher that a security right may exist in the assets described in the notice. It follows that registration does not mean that the security right to which the notice refers necessarily exists; only that one may exist at the time of registration or later. Registration of a notice also does not create a security right; it simply makes a security right effective against third parties if it exists at the time of registration or, in the case of advance registration, comes into existence later (see recommendations 32, 33 and 67).

63. The *Guide* recommends notice registration rather than document registration because notice registration:

- (a) Reduces transaction costs for both registrants (as they would not need to register all the security documentation) and third-party searchers (they would not need to peruse voluminous documentation that might be on record or hire special service providers to produce an assessment of the grantor's assets as reflected on public record);

- (b) Reduces the administrative and archival burden on registry system operators;

- (c) Reduces the risk of registration error (since the less information that must be submitted, the lower the risk of error); and

- (d) Enhances privacy and confidentiality for secured creditors and grantors (the less information that must be submitted, the less the confidential information available to searchers).

64. The *Guide* uses the term “notice” in the sense of a communication so as to cover not only a form (or screen) used to transmit information to the registry (see the term notice in the introduction to the *Guide*, sect. B, recommendations 54, subpara. (b), and 57) but also other communications, such as those made in the context of enforcement (see recommendations 149-151). Chapter IV of the *Guide* supplements the meaning of the term “notice” in a registration context by referring to: (a) “information contained in a notice” or “the content of the notice” (see recommendations 54, subpara. (d), and 57); and (b) the “registry record” in the sense of information contained in all notices that have been accepted by the registry and entered into the database of the registry that is available to the public (see recommendation 70). The draft Registry Guide uses these terms in the same

sense, emphasizing more the information contained in the paper or electronic communication rather than the medium of communication.

D. Grantor-based indexing

65. Immovable property generally has a sufficiently unique geographical identifier to enable registrations to be indexed and searched by reference to the asset. Certain types of high-value movable asset with unique serial numbers may also be indexed and searched by reference to that serial number. By contrast, most types of movable asset lack a sufficiently specific or unique objective identifier to support asset-based indexing. Moreover, a modern secured transactions regime must accommodate the creation of an effective security right in pools of present and future assets such as the grantor's equipment, inventory and receivables. Thus, requiring an item-by-item specific description for these types of asset would make the registration process cumbersome, more expensive and prone to errors in descriptions.

66. For these reasons, notices are indexed by reference to the identifier of the grantor (the grantor's name or other identifier) as opposed to the asset (see the *Guide*, chap. IV, paras. 31-33). Grantor-based indexing greatly simplifies the process of registration and searching. Secured creditors can register a security right in a grantor's present and future movable assets generally, or in generic categories, through a single one-time registration. This is the approach recommended in the *Guide* (see recommendation 57, subpara. (a))

67. Some secured transactions regimes provide for supplementary asset-based indexing in respect of narrowly defined types of high-value asset, which are not held as inventory and for which reliable alpha-numerical identifiers are available and for which there is a significant resale market (for example, motor vehicles, trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat motors). Although the *Guide* does not recommend this approach, it is discussed (see the *Guide*, chap. IV, paras. 34-36) and further elaborated in chapter IV. E below (see A/CN.9/WG.VI/WP.48/Add.1).

(A/CN.9/WG.VI/WP.48/Add.1) (Original: English)

**Note by the Secretariat on a Draft Security Rights Registry Guide,
submitted to the Working Group on Security Interests at its
twentieth session**

ADDENDUM

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IV. Rules applicable to the registration and search process

A. Introduction

1. In the interest of legal certainty, a State establishing a security rights registry will need to adopt a set of rules to regulate the registration and search process. The goal of this chapter is to identify the issues that must be addressed in these rules and provide guidelines for their treatment in line with the *Guide* (in particular, chapter IV).

2. As already noted (see A/CN.9/WG.VI/WP.48, para. 21), under the law recommended in the *Guide*, registration of a notice in the general security rights registry is the general method for making the security right effective against third parties (see recommendation 32); and priority among security rights made effective against third parties by such a registration is determined on the basis of the time of registration (see recommendation 76). This means that registration or failure to effect a registration has consequences for the third-party effectiveness and priority of a security right (see A/CN.9/WG.VI/WP.48, para. 46).

B. Grantor authorization for registration

3. Under the law recommended in the *Guide*:

(a) Registration of a notice (whether the initial, amendment or cancellation notice) with respect to a security right is ineffective unless authorized by the grantor in writing, which may be in the form of an electronic communication (see recommendations 11, 12 and 71);

(b) Authorization is not necessary at the time of registration as long as it is given subsequently (see recommendation 71) and thus registration may take place even before the creation of a security right or the conclusion of a security agreement (recommendation 67); and

(c) A written security agreement is sufficient to constitute authorization (see recommendation 71).

4. As a result, if a security agreement is concluded in writing after registration took place without prior authorization, the security agreement constitutes authorization and makes the registration effective as of the time of registration. If, however, a security agreement is not concluded in writing (and there is no other written authorization by the grantor), there is no security right and the registration is ineffective. Accordingly, if a subsequent notice was registered (with authorization by the grantor), the formerly registered security right would have priority only if authorization was obtained or if a security agreement was concluded after its registration. Otherwise, there will be no priority conflict as the formerly registered security right would be ineffective against third parties. Authorization may be necessary not only for the initial notice but also for any subsequent amendment notice. Generally, additional authorization is required for two types of amendment, those that add encumbered assets and those that add grantors.

5. In contrast, some registry systems require the grantor's authorization to be evidenced on the registry record itself at the time of registration. This requirement adds cost and time to the registration process since it requires reliable verification that the person giving authorization is in fact the grantor named in the notice and that the person has actually given authorization. Such a requirement could add complexity to the registration process in particular where information is entered into the registry record via electronic means of communication.

6. Such registry systems may be influenced by an inappropriate analogy with title registries. In a title registry, such a requirement makes sense insofar as the rights of the true owner may be lost if an unauthorized transfer is entered into the record and the person named as the new owner then proceeds to dispose of the asset. However, in a security rights registry system of the kind contemplated by the *Guide*, registration does not create a security right or evidence that it actually exists; it merely provides notice of the possible existence of a security right in the described assets (see recommendations 32 and 33, see also A/CN.9/WG.VI/WP.48, paras. 44 and 59). This is prejudicial to the person identified in the registration as the grantor only insofar as it may impede that person's ability to deal freely with the assets described in the registration until the registration is cancelled or amended (in some States, unauthorized registrations are added by credit reporting agencies to credit reports of individuals and may thus affect the creditworthiness of a person).

7. Under the law recommended in the *Guide*, the risk of such unauthorized registration can be efficiently dealt with by enabling the grantor to quickly and inexpensively seek cancellation (where there is no authorization at all) or amendment (where there is partial authorization) of the unauthorized registration from the secured creditor and, if the secured creditor does not correct the record within a short period of time specified in the law after receipt of a written request of the grantor, through a summary administrative or judicial procedure (see recommendations 72, subpara. (b), and A/CN.9/WG.VI/WP.48/Add.2, chap. IV, sect. H). To facilitate the exercise of this right of the person identified in the notice as the grantor, the registrant is required to send a copy of the initial registration or any subsequent amendment notice to the person identified in the notice as the grantor (see recommendation 55, subpara. (c)); in an electronic system, the registry may be designed so that a copy of the registration is automatically sent (see A/CN.9/WG.VI/WP.48/Add.2, paras. 34-38).

8. Further protection against unauthorized registrations may be achieved by requiring registrants to provide some form of identification as a precondition to submitting a notice for registration. The main reason for this approach is to ensure legitimate use of the registry (which may be a concern in some States). The disadvantage is that it is likely to increase the time and cost of registration. This requirement though need not pose an excessive administrative burden if the identification procedure is built into the payment process. In addition, since most registrants are likely to be repeat customers, a permanent secure access code can be assigned when the account with the registry is opened, eliminating the need to repeat the identification procedures for subsequent registrations. Moreover, the efficiency of the registration process is not undermined if the registry requires and maintains but does not verify the identity of the registrant (see recommendations 54, subpara. (d), and 55, subpara. (b); see also the *Guide*, chap. IV, para. 48).

9. Additional sanctions aimed at protecting grantors against unauthorized registrations depend on the determination made by each State as to the extent of the risk of unauthorized and fraudulent registrations relative to the cost of administering prescriptions of this nature (see the *Guide*, chap. IV, para. 20). One possible way is to subject a person that effects an unauthorized registration to liability for any damages caused to the person identified in the registration as the grantor and to criminal or monetary penalties if it is established that the registrant acted in bad faith or with the intent to harm the interests of the grantor.

[*Note to the Working Group: The relevant article in the draft model regulations is article 12.*]

C. Advance registration

10. Advance registration refers to registration of a notice before the creation of the security right or the conclusion of a security agreement. In the notice registration system contemplated by the *Guide* (see A/CN.9/WG.VI/WP.48, paras. 61-67), the registrant is not required to register the actual security documentation. All that is registered is the basic information contained in a notice that is sufficient to alert a third-party searcher that a security right may exist in the described assets (see recommendation 57). This approach enables advance registration and the *Guide*

recommends that such advance registration be expressly permitted by law (see recommendation 67). Thus, advance registration may not be challenged as being ineffective simply because it took place before the creation of the security right or the conclusion of the security agreement. However, as mentioned in section B above, advance registration would require authorization from the grantor at some point of time after the registration in order to be effective.

11. Advance registration by itself does not, however, ensure that the secured creditor will necessarily have priority over other classes of competing claimants. As explained in chapter II (see A/CN.9/WG.VI/WP.48, para. 44), registration does not create and is not necessary for the creation of a security right (see also recommendation 33). Consequently, until the security agreement is actually entered into and the other requirements for the creation of a security right are satisfied, the secured creditor may be defeated by a competing claimant, such as a buyer that acquires rights in the encumbered assets in the intervening period between advance registration and the creation of the security right.

12. If the negotiations are aborted after the registration is effected and no security agreement is ever entered into between the parties, the creditworthiness of the person named as grantor in the registration may be adversely affected unless the registration is cancelled. This risk, like the risk of unauthorized registrations generally, can be controlled by: (a) requiring the secured creditor (or, in the case of an electronic registry, the registry system) to notify the person identified in the notice as the grantor in a timely manner about the registration of the notice (see recommendation 55, subpara. (c)); (b) making it an obligation for the secured creditor to cancel a notice in certain cases (see recommendation 72, subpara. (a)); and (c) providing a summary judicial or administrative procedure to enable the person identified in the notice as the grantor to compel the cancellation of the notice. If a security agreement is entered into after the registration but its terms do not correspond to the content of the registered notice, the person identified in the notice as the grantor may seek the amendment of the notice (see recommendations 54, subpara. (d), and 72, subparas. (b) and (c), as well as A/CN.9/WG.VI/WP.48/Add.2, paras. 15-21).

[Note to the Working Group: The relevant article in the draft model regulations is article 12.]

D. Sufficiency of a single notice

13. Under the law recommended in the *Guide*, the registration of a single notice is sufficient to achieve third-party effectiveness of one or more than one security right, whether they exist at the time of registration or are created later and whether they arise from one or more than one security agreements between the same parties (see recommendation 68). The registration continues to be effective, however, only to the extent that the description of the assets in the notice corresponds to their description in any new or amended security agreement. For example, if a new security agreement covers new assets or categories of assets that were not described in the initial registration, a new registration or an amendment would be needed. The priority of a security right with in such assets not previously described in a

registered notice would date only from the registration of a new notice or amendment.

14. In a notice registration system of the kind contemplated by the *Guide* where the security agreement is not required content of a notice (see recommendation 57), there is no reason why a single notice should not be sufficient to give third-party effectiveness to, present or future, security rights arising under multiple security agreements between the same parties. Requiring a one-to-one relationship between each notice and each security agreement would generate unnecessary costs and undermine the ability of the secured creditor to flexibly respond to the grantor's evolving financing needs without having to fear a loss of the priority position it holds under the initial registration.

[Note to the Working Group: The relevant article in the draft model regulations is article 13.]

E. Information required in a notice

15. Under the law recommended in the *Guide*, only the following information needs to be provided in a notice: (a) the identifier and address of the grantor; (b) the identifier and address of the secured creditor or its representative; (c) a description of the asset; (d) the duration of the registration, if the law allows parties to select it; and (e) the maximum monetary amount for which the secured creditor may enforce the security right, if the law allows it (see recommendation 57). The following paragraphs discuss each of the elements of the required content of a notice.

[Note to the Working Group: The relevant article in the draft model regulations is article 17.]

1. Grantor information

(a) General

16. As already explained (see A/CN.9/WP.48, paras. 65-67), information contained in notices is indexed by reference to the grantor's identifier and not according to the encumbered asset or other information required in a notice. In order to ensure that a search of the registry discloses all security rights that may have been granted by a person, the rules applicable to registration should make it clear that the grantor's identifier is a required component of a notice.

17. In line with law recommended in the *Guide* (see recommendation 58), any rules applicable to registration should provide explicit guidance on what constitutes the correct identifier of the grantor. The purpose of these rules should be to ensure that a secured creditor can be confident that its registration will be legally effective and searchers can confidently rely on a search result.

18. It is not uncommon for a person to create a security right in its assets to secure an obligation owed by a third-party debtor. Since the function of registration is to disclose the possible existence of a security right in the assets described in the notice, the rules applicable to the registration process should make it clear that the information required is the identifier and address of the grantor that owns, or has

rights in, the encumbered assets, and not the debtor of the secured obligation (or a mere guarantor of the obligation owed by the debtor).

(b) Natural persons versus legal persons

19. The general security rights registry contemplated by the *Guide* envisages that information contained in the notices will be stored in a centralized and consolidated registry record (see A/CN.9/WG.VI/WP.46/Add.2, paras. 48 and 49). Thus, while the *Guide* provides separate rules with respect to the identifier of the grantor depending on whether the grantor is a natural or a legal person (see recommendations 59-60), regardless of whether the grantor is a natural or a legal person, all notices will be stored in a single registry (see the *Guide*, chap. IV, paras. 21-24).

20. This also has implications for the registration and search process. In registry systems that distinguish grantors that are natural persons from grantors that are legal persons (and thus permit separate searches), the registrant would have to indicate whether the grantor is a natural person or legal person in the category of the grantor during the registration process. In such cases, it is also critical for the registry searchers understand the registry system, since a search of the registry record against the identifier of a natural person will not disclose a security right registered against a grantor that is a legal person with the same identifier.

(c) Grantor identifier for natural persons

21. The *Guide* recommends that, if the grantor is a natural person, the identifier of the grantor for the purposes of an effective registration should be the name of the grantor as it appears in a specified official document (see recommendation 59). It further recommends that, where necessary (for example, where the grantor's name is common), additional information such as the birth date or identity card number, should be required to uniquely identify the grantor. In line with the law recommended in the *Guide*, the rules applicable to the registration process should make it clear that it is the responsibility of the registrant (and not the registry) to enter the correct identifier of the grantor in accordance with these rules.

22. A rule implementing this approach may determine, as the following table illustrates, examples in order to accommodate the particular circumstances of different categories of grantors (the responsibility for entering the correct identifier of the grantor in the appropriate order and in the appropriate field in accordance with these rules lies with the registrant).

Grantor status	Grantor identifier
Born in enacting State	[(1)] Name on birth certificate or equivalent official document [(2)] Personal identification number]
Born in enacting State but birth not registered in enacting State	(1) Name on current passport (2) If no passport, name on equivalent official document (e.g. driver's licence) (3) If no passport or equivalent official document, name on current foreign passport from jurisdiction of habitual residence

Born in enacting State but birth name subsequently changed pursuant to change of name	Name on a birth certificate or equivalent official document (such as a marriage certificate)
Not born in enacting State but naturalized citizen of enacting State	Name on citizenship certificate or equivalent official document
Not born in enacting State and not a citizen of enacting State	(1) Name on current passport issued by the State of which the grantor is a citizen (2) If no current foreign passport, name on birth certificate or equivalent official document issued at grantor's birth place
None of the above	Name on any two official documents issued by the enacting State, if those names are the same (for example, a current motor vehicle operator's licence and a current government medical insurance identification card)

23. It is equally important to have clear rules specifying what components, as well as in what order those components, of the name in the official document are required (for example, family name, followed by the first given name, followed by the second given name). In addition, the name parts should be treated as individual parts and thus each name part should have its own field and not concatenated into one single element. It should, however, be noted that not all official documents specify the components of the name. Guidance should also be provided for exceptional situations (for example, where the grantor's name consists of a single word).

24. In many States, many persons may have the same name, with the result being that a search under that name may disclose multiple grantors with the same name. As already mentioned (see para. 21 above), the *Guide* recommends that, where necessary, additional information, such as the birth date or an identity card number, should be required to uniquely identify the grantor (if the registry system is so designed, additional information may be included in a notice in other cases at the discretion of the registrant). Whether an identification number (alphanumeric or other code) should be indicated in a notice depends on three principal considerations. First, whether the system under which the identification numbers are issued is sufficiently universal and reliable to ensure that each natural person is assigned a unique number (that is also permanent; otherwise, rules would be required to address any changes). Second, whether the public policy of the enacting State permits the public disclosure of the identification number assigned to its citizens and/or residents. Third, whether there is a documentary or other source by which third-party searchers can objectively verify whether a particular identification number relates to the particular grantor. If searchers must instead rely solely on the grantor's representations as to the grantor's identification number, this may not be reliable. If the above-mentioned conditions are met, the use of identification numbers would be an ideal way to uniquely identify grantors. However, as mentioned above, the approach recommended in the *Guide* is that additional information, such as an identification number, may be used only where necessary to uniquely identify a grantor (see recommendation 59).

25. Even if an identification number is used to uniquely identify a grantor, it will still be necessary to include supplementary rules to accommodate cases where the grantor is not a citizen or resident of the enacting State, or, for any other reason, has not been issued an identification number (unless a State accepts the number of the foreign passport as sufficient to identify foreign nationals).

[Note to the Working Group: The relevant article in the draft model regulations is article 18.]

(d) Grantor identifier for legal persons

26. For grantors that are legal persons, the *Guide* recommends that the correct identifier for the purposes of effective registration is the name that appears in the document constituting the legal person (see recommendation 60). Virtually all States maintain a public commercial or corporate register for recording information about legal persons constituted under the law of that State including their names. Accordingly, the required identifier for registration and search purposes should be the name as it appears on the public record constituting the legal person. The rules governing registration should provide whether an abbreviation which is indicative of the type of body or entity should be considered part of the identifier. It should also be noted that, in many States, upon registration in that record, a unique and reliable registration number is assigned to each legal person, which may additionally be used to identify the grantor.

[Note to the Working Group: The Working Group may wish to consider the following addition to the commentary and the draft model regulations: "If the document constituting a legal person includes a number of variations of the name (such as "The ABC inc." or "ABC Inc." or "ABC"), the rules should indicate that the grantor's identifier is the grantor's name that is designated as the "name of the grantor" in the document".]

27. Supplementary rules would need to be developed to accommodate cases where the legal person was constituted in a foreign State, in particular, whether the name or registration number that appears on the public record of a foreign State may be used as the identifier of the legal person in the enacting State.

[Note to the Working Group: The relevant article in the draft model regulations is article 19.]

(e) Other types of grantor

28. The rules governing registration will also need to set out additional guidelines on the required grantor identifier where the grantor does not precisely fit into either the natural person or the legal person categories. The following table illustrates the types of situations that will need to be addressed, together with examples of possible identifiers.

Grantor status	Grantor identifier
Estate of a deceased natural person or an administrator acting on behalf of the estate	Identifier of the deceased person, in accordance with the rules applicable for grantors who are natural persons, with the specification in a separate field that the grantor is an estate or an administrator acting on behalf of the estate

Estate of an insolvent natural person acting through an insolvency representative	Identifier of the insolvent natural person, in accordance with the rules applicable for grantors who are natural persons, with the specification in a separate field that the grantor is insolvent
Estate of an insolvent legal person acting through an insolvency representative	Identifier of the insolvent legal person in accordance with the rules applicable for grantors who are legal persons, with the specification in a separate field that the grantor is insolvent
Trade union that is not a legal person	Name of the trade union as set out in the document constituting the trade union[, and, where required, additional information, such as the name(s) of each person representing the trade union in the transaction in accordance with the rules applicable for grantors who are natural persons]
Trust or a trustee acting on behalf of the trust and the document constituting the trust designates the name of the trust	Name of the trust as set out in the document constituting the trust, with the specification in a separate field that the grantor is a “trust” or a “trustee”
Trust or a trustee acting on behalf of the trust and the document constituting the trust does not designate the name of the trust	Name of the trustee, in accordance with the rules applicable for grantors who are natural persons or legal persons as the case may be, with the specification in a separate field that the grantor is a “trust” or a “trustee”
Participant in a legal person that is a syndicate or joint venture	Name of the syndicate or joint venture as set out in the document constituting it[, and, where required, additional information, such as the name of each participant in accordance with the rules applicable for grantors who are natural persons or legal persons as the case may be]
Participant in a legal person other than a syndicate or joint venture	Name of the legal person as set out in the document constituting it[, and, where required, additional information, such as the name of each natural person representing the legal person in the transaction to which the registration relates, determined in accordance with the rules applicable for grantors who are natural persons]
Any other entity that is not a natural or legal person already referred to above	Name of the entity as stated in the documents creating the entity[, and, where necessary, additional information, such as the name of each natural person representing the organization in the transaction to which the registration relates, in accordance with the rules applicable for grantors who are natural persons]

29. In the case of sole proprietorships, even though the business may be operated under a different business name and style than that of the proprietor, registration rules typically provide that the grantor’s identifier is the name of the proprietor in accordance with the rules applicable for grantors who are natural persons. The name of the sole proprietorship is unreliable and may be changed at will by the proprietor.

However, the name of the sole proprietorship may be entered as an additional grantor in the notice.

30. As noted above, systems for electronic registration of notices should be designed to allow registrants to select from a category field with the appropriate designation (for example, estate, insolvent, trust, trustee and etc.) instead of entering the designation in the name field of the grantor. Alternatively, the notice may include a field or item in which the registrant must enter the appropriate designation.

[Note to the Working Group: The relevant article in the draft model regulations is article 20. The Working Group may wish to consider whether the rules in article 20 should be presented as examples or whether it is sufficient to indicate that in the commentary (see paras. 22 and 28 above).]

(f) Address of the grantor

31. While, under the law recommended in the *Guide*, the grantor's address is not part of the grantor's identifier (recommendation 59), where necessary (for example, where the grantor's name is common; see recommendation 59), it should also be required in the notice to uniquely identify the grantor. The address of the grantor is part of the required content of the notice (see recommendation 57, subpara. (a)) also: (a) to enable the registrant (or, in the case of an electronic registry, the registry system) to forward copies of registered notices to the grantor (see recommendation 55, subparas. (c) and (d)); and (b) to enable searchers that are not already dealing with the grantor to contact the grantor for further information.

32. Some States do not require the grantor's address because personal security concerns necessitate that an individual's address details not be disclosed in a publicly accessible record (although using a post office box or similar non-residential mailing address may alleviate this concern). In those States, interested parties are required to contact the secured creditor (whose address must be mentioned in the notice) and obtain further information about the grantor, if they are not already in contact with the grantor.

33. It should be noted that, the grantor's address plays less of a role in systems in which the required grantor identifier is unique (for example, a government-issued identification number) as compared to systems in which the identifier is the grantor's name and in which a search may disclose multiple security rights granted by different grantors that share the same name (see paras. 24-25 above).

[Note to the Working Group: The Working Group may wish to consider whether a discussion of the various types of addresses, set out in the definition of the term "address" (see A/CN.9/WG.VI/WP.48/Add.3) should be included in the commentary, and, if so, provide guidance in that respect to the Secretariat.]

(g) Grantor information and impact of error

34. The law recommended in the *Guide* provides that registration of a notice is effective only if it provides the grantor's correct identifier or, in the case of an incorrect statement, if the notice would be retrieved by a search of the registry record under the correct identifier (see recommendation 58). Therefore, an error in the grantor's identifier submitted by the registrant could render a registration

ineffective, with the result being that third-party effectiveness of the security right would not be achieved. The relevant rule makes it clear that the test should not be based on whether the error appears to be minor or trivial in the abstract, but whether it would cause the information in the registry record not to be retrieved by a search of the registry record under the grantor's correct identifier. This is because the grantor's identifier is the search criterion for retrieving information submitted in a notice and entered in the registry record. The test is an objective one, since: (a) even if a searcher knew that a security existed and had been registered, the search would still be ineffective if the relevant notice could not be retrieved by a search of the registry record under the correct grantor identifier; and (b) the registration is ineffective regardless of whether a person challenging the effectiveness of the registration suffered any actual prejudice as a result of the error.

35. The law recommended in the *Guide* does not prescribe the impact of an error in additional grantor information that does not constitute the grantor's identifier, for example, an error in the address of the grantor or in the grantor's birth date. Guidance on this issue should be included in the rules applicable to registration and searching. By analogy to the general test recommended in the *Guide* for errors in the entry of secured creditor information, the rules should specify that an error in the additional grantor information that does not constitute an identifier does not render a registered notice ineffective unless it would seriously mislead a reasonable searcher (see recommendation 64). For example, if the search result discloses numerous grantors all bearing the same name and yet the error in the additional grantor information is so acute as to make the reasonable searcher firmly believe that the relevant grantor was not included in the list, a notice indicating that grantor may be found to be ineffective.

[Note to the Working Group: The Working Group may wish to consider whether in situations in which the additional grantor information is required to uniquely identify the grantor and is thus part of the required grantor identifier (for example, where the grantor's name is very common)), the rules applicable to an error in grantor identifier (that is, recommendation 58) should apply to an error in additional grantor information.]

36. In registry systems that store information provided in notices in an electronic database, the search logic may be programmed so as to return close matches to the grantor identifier entered by the searcher. In such a system, a registration may be considered effective even though the registrant had made a minor error in entering the correct grantor identifier. This is because a searcher entering the correct grantor identifier would still be able to retrieve the registration (with the error) and consider it likely that the grantor whose identifier appears on the search result as an inexact but close match is nonetheless the relevant grantor. Whether this is the case depends on such factors as whether: (a) a reasonable searcher would be able to readily identify the grantor by referring to additional information, such as address, birth date or identification number; (b) the list of inexact matches is so lengthy as to prevent the searcher from efficiently determining whether the grantor which it is interested in is included in the list; and (c) the rules for determining "close" matches are objective and transparent so that a searcher will be able to rely on the search result.

37. In some of these registry systems, the indexing and search logic for grantor identifiers is programmed so as to ignore all punctuation, special characters and

case differences and to ignore selected words or abbreviations that do not make an identifier unique (such as articles of speech and indicia of the type of enterprise such as “company”, “partnership” “LLC” and “SA”). Where this is the case, an error in the entry of this type of information will not render the registration ineffective since the registration will still be retrieved despite the error.

[Note to the Working Group: The relevant article in the draft model regulations is article 25.]

2. Secured creditor information and impact of error

38. The law recommended in the *Guide* requires that the identifier of the secured creditor or the secured creditor’s representative, along with its address, be included in the notice submitted to the registry (see recommendation 57, subpara. (a)).

39. The identifier rules that apply to the grantor should apply also to the secured creditor or its representative. However, since the identifier of the secured creditor or its representative is not a search criterion, strict accuracy is not as essential to the effectiveness of the registration. Thus, an error in the identifier of the secured creditor should be treated differently from an error in the identifier of the grantor.

[Note to the Working Group: The Working Group may wish to consider whether in a registry system where grantors are identified by personal identification numbers (alphanumeric or other code), the secured creditor should still be identified by its name.]

40. Consequently, under the approach recommended in the *Guide*, an error by the registrant in the identifier or address of the secured creditor or its representative renders the registration ineffective only if it would seriously mislead a reasonable searcher (see recommendation 64). For example, if the secured creditor is identified in the notice as bank AAA, and the search of the registry returns a result that does not include bank AAA, the registered notice may not be ineffective (bank AAA may have changed its name, merged with another bank or sold). Still, substantial accuracy is always important, since searchers rely on the identifier and address information of the secured creditor or its representative in the registry record for the purposes of sending notices under the secured transactions law (such as a notice of an extrajudicial disposition of an encumbered asset; see recommendations 149-151). Moreover, the grantor may need such information to submit a written request to the secured creditor for the cancellation or the amendment of a certain notice (recommendation 72, subpara. (a)).

[Note to the Working Group: The relevant article in the draft model regulations is article 21.]

3. Description of encumbered assets

(a) General

41. Under the law recommended in the *Guide*, a description of the assets to which the registration relates is a required component of an effective notice (see recommendation 57, subpara. (b)). In this way, the notice provides objective information to third parties dealing with the grantor’s assets (such as prospective secured creditors, buyers, judgement creditors and the insolvency representative of the grantor).

42. In addition, under the law recommended in the *Guide*, a description of the encumbered assets is generally considered sufficient, for the purposes of both an effective security agreement and effective registration, as long as it reasonably allows identification of the encumbered assets (see recommendations 14, subpara. (d), and 63). For example, if the encumbered assets are specific artwork at a gallery, it would be sufficient to indicate the title of the painting, the name of the painter and the year the painting was created. On the other hand, if the encumbered assets are generic categories of asset, it may be sufficient to describe them as “all oil paintings” or “all sculptures”. Thus, the rules on registration should explicitly state that the description of encumbered assets in a notice may be specific or generic as long as it reasonably allows their identification (for example, “all of the grantor’s movable assets” or “all of the grantor’s inventory and receivables”). The rules might also state that a description that refers to all assets within a generic category or to all assets of a grantor is assumed to cover future assets within the specified category to which the grantor acquires rights during the duration of effectiveness of the notice.

[Note to the Working Group: The relevant article in the draft model regulations is article 22.]

(b) Description requirements for “serial number” assets

43. There is a limited number of movable asset for which there is a significant resale market (for example, motor vehicles, trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat engines). These types of asset are typically referred to as “serial number assets” (see definition of the term in article 1 of the draft model regulations contained in document A/CN.9/WG.VI/WP.48/Add.3). Under the law recommended in the *Guide*, the registrant may include serial number and type of asset in the description of the encumbered assets in the notice as long as it reasonably allows their identification (see recommendations 14, subpara. (d), 57, subpara. (b), and 63). If such a description were necessary though, the ability of a secured creditor to make a security right effective against third parties in the grantor’s future serial number assets through a single registration (in which the relevant assets would be described simply in generic terms) would be limited. The secured creditor would have to effect a new registration or amend the description of encumbered assets in its existing registration to record the serial number of each new asset as it is acquired by the grantor.

44. For this reason, a serial number description is generally not required where the serial number assets are held by the grantor as inventory. A generic description of encumbered assets simply as inventory is sufficient to enable searchers to reasonably identify the encumbered assets. In addition, the difficulty a secured creditor of a transferee of an encumbered asset may have in finding out about security rights created by the transferor (the so called “A-B-C-D problem”) does not arise in the case of inventory, since buyers that acquire inventory from the original grantor in the ordinary course of the grantor’s business take the inventory free of the security right in any event (see recommendation 81, subpara. (a)).

45. Where serial number and type of asset are a required component of a notice, the consequences of failure to use them (in particular, the effectiveness of the security right against third parties when the serial number or type of asset is not included in the notice or when there is an error) would need to be addressed. In

addition, the registry would need to be designed so that serial number and type of asset could be entered in the notices (and then used for indexing).

46. In some States, a generic description in a notice would still be sufficient to make a security right effective against third parties. Serial number registration would generally be required only to preserve the secured creditor's right to follow the asset into the hands of a buyer or lessee from the original grantor. In other words, there would be no need to include the serial number for the purposes of achieving third-party effectiveness against other classes of competing claimants, including the grantor's secured and unsecured creditors and insolvency representative. In some States, in addition to a generic description, serial number registration is required for a secured creditor to retain its priority status based on the time of registration against a subsequent secured creditor that takes security in a serial number asset within the generic class covered by the generic description through a serial number registration. However, even in these States, a generic description remains sufficient to achieve third-party effectiveness against the grantor's unsecured creditors and insolvency representative and to preserve priority against a subsequent secured creditor that has not included a serial number description in its notice.

[Note to the Working Group: The relevant articles in the draft model regulations are article 23 and 25, paragraph 2. The Working Group may wish to retain article 23 outside square brackets as there is nothing inconsistent with the Guide in requiring description of encumbered assets by serial number and type, if this is necessary to reasonably allow their identification (see recommendation 63). The Working Group may wish to consider though that article 25, paragraph 2, may be retained only if serial number is retained as an indexing criterion. If serial number is simply a part of the possible description of an encumbered asset, article 25, paragraph 2, may be deleted as paragraphs 3 and 4 would be sufficient to deal with an error in the serial number and type of asset as part of the description of the encumbered assets.]

(c) Description of proceeds

47. In the event that the encumbered assets are disposed of by the grantor, the law recommended in the *Guide* allows the secured creditor to claim an automatic security right in whatever identifiable asset is received in respect of the encumbered assets, unless otherwise agreed by the parties to the security agreement (see recommendation 19 and the term "proceeds" in the introduction to the *Guide*, sect. B). In this case, the question arises as to whether the third-party effectiveness of the security right in the original encumbered assets automatically extends to the security right in the proceeds or whether the secured creditor needs to take additional steps to ensure that its security right in the proceeds is effective against third parties.

48. When the proceeds consist of cash proceeds (for example, money or a right to payment), the *Guide* recommends the automatic continuation of the third-party effectiveness of a prior registered security right in the original encumbered assets into the proceeds. The same is true where the proceeds are of a type that is already covered by the description of the original encumbered assets in the registered notice (for example, the description covers "all tangible assets" and the grantor trades in one item of equipment for another; see recommendation 39).

49. However, where the proceeds are not cash proceeds and are not otherwise encompassed by the description in the existing notice, under the law recommended in the *Guide*, the secured creditor must amend its registration to add a description of the proceeds within a short period of time after the proceeds arise in order to preserve the third-party effectiveness and priority of its security right in the proceeds from the date of the initial registration (see recommendation 40). An amendment is necessary because a third party otherwise would not be able to identify which categories of asset in the grantor's possession might constitute the relevant proceeds. Accordingly, the registry should be designed in such a way that allows the secured creditor to register an amendment notice to cover the type of asset represented by the proceeds.

(d) Description of encumbered attachments to immovable property

50. Like any other type of asset, a tangible asset that is or will be an attachment to immovable property would need to be described in a manner that reasonably allows its identification (see recommendations 14, subpara. (d), 57, subpara. (b), and 63)). While a generic description of the asset will not affect the indexing of the notice in the general security rights registry (which functions with grantor indexing), it may affect indexing in the immovable property registry (which operates with asset indexing). Thus, if the notice is to be registered in the immovable property registry, the description of the asset must be sufficient to allow the indexing of the notice in the immovable property registry. In addition, if the grantor of the security right in the asset is not the owner of the immovable property, the notice must also identify the owner of the asset if such identification is necessary for the indexing of the notice in the immovable property registry.

[Note to the Working Group: The relevant article in the draft model regulations is article 24.]

(e) Asset description and impact of error

(i) General

51. Under the law recommended in the *Guide*, a registrant's failure to include an asset or certain type of asset in a notice means that the third-party effectiveness of the security right in any omitted asset or type of asset may not be achieved. However, as notices in a general security rights registry are generally indexed and searched by reference to the grantor's identifier, the law recommended in the *Guide* provides that a minor error in the description of the encumbered asset does not render the registered notice ineffective unless it would seriously mislead a reasonable searcher (see recommendation 64). In addition, under the law recommended in the *Guide*, a registrant's failure to meet the "seriously misleading" test means that the registration is ineffective only to the extent of those assets whereas the security right continues to be effective against third parties with respect to other assets that were sufficiently described (see recommendation 65).

52. In addition, to the extent that it reasonably allows the identification of encumbered assets, under the law recommended in the *Guide*, an all-encompassing or over-inclusive description is permitted (see recommendations 14, subpara. (d) and 63). Similar to advance registration (see paras. 10-12), this approach facilitates the ability of the parties to enter into new security agreements encumbering

additional, future or revolving categories of asset as the grantor's financing needs evolve without the need for a new registration since the secured creditor can rely on the existing registration for both third-party effectiveness and priority purposes. In such a case, a question may arise as to the appropriate description of the encumbered assets when the notice refers to a generic category of asset even though the security agreement concluded or contemplated by the parties covers only certain items within that category. For example, the notice may describe the encumbered assets as "all tangible assets" whereas the relevant security agreement may cover only specified items of equipment. In any case, the over-inclusive description in the notice has to be authorized by the grantor (see recommendation 71). Otherwise, the grantor would generally be entitled to request the secured creditor or, if the secured creditor failed to act on the grantor's request in a timely fashion, an administrative or judicial authority through a summary administrative or judicial procedure to cancel or amend the notice so as to accurately reflect the actual range of encumbered assets covered by the security agreement existing between the parties (see recommendations 72 and A/CN.9/WG.VI/WP.48/Add.2, paras. 17-21).

(ii) *Description and error in the description of serial number assets*

53. As already mentioned, serial number assets may need to be described in a notice by reference to the serial number and the type of asset, if this is necessary to allow their reasonable identification (see recommendations 14, subpara. (d), 57, subpara. (d), and 63). If that is the case, an error in the serial number and type of asset should be treated in the same way as any other error in the description of the asset. This generally means that a minor error in the serial number does not render the registered notice ineffective unless it would seriously mislead a reasonable searcher (see recommendation 64). If the serial number is treated as an indexing and search criterion, an analogy could be made to the recommendation of the *Guide* applicable to incorrect or insufficient grantor identifier in the notice. Accordingly, a notice with the incorrect serial number would only be effective if it could be retrieved by a search of the registry record under the correct serial number (see recommendation 58 and paras. 38-40 above).

54. If both the grantor identifier and the serial number of the encumbered asset were to be treated as indexing and search criteria, both would need to be entered correctly in the notice for the registration of that notice to be effective (unless serial numbers were treated only as additional information necessary to describe the encumbered assets in certain cases only; see recommendation 59). As a result, should there be an error in either the grantor identifier or the serial number resulting in the notice not being retrievable by a search using the correct grantor identifier or the correct serial number, the registration of that notice would be ineffective or result in lower priority for the relevant security right as against certain competing claimants (e.g. transferees or lessee of the encumbered assets from the original grantor).

[*Note to the Working Group: The relevant article in the draft model regulations is article 25, paragraph 2.*]

4. Duration and extension of registration

(a) General

55. The *Guide* provides that an enacting State may select one of two approaches to the duration of a registration (see recommendation 69). Under the first approach, the law would specify that all registrations are subject to a standard statutory duration. In such a case, the secured creditor must ensure that the registration is renewed before its expiry. Such an approach may provide certainty as to the duration of registration, but limits the freedom of the parties to agree upon a longer duration of the registration beyond the statutory duration. Under the second approach, the law would permit the registrant to self-select the desired duration of the registration. In such a case, the indication of the duration in the notice would be a required component of the notice and without it a notice would be rejected. In legal systems that adopt the second approach, it may be desirable to base registration fees on a sliding tariff related to the duration selected by the registrant in order to discourage the selection of excessive terms that do not correspond to the duration of the underlying security agreements.

56. Although not all of them are contemplated in the *Guide* (see the *Guide*, chap. IV, paras. 87-88), there are other options as well. One option would be to not set a limited duration for the registration of a notice so that the registration would continue to be effective until it is cancelled. Another option would be a self-selection approach, yet with a fallback rule to the statutory duration, in cases where the duration had not been self-selected by the registrant. A third option, also based on the self-selection approach, would allow the selection of the duration by the registrant yet only up to a maximum temporal limit, so as to discourage the selection of excessive terms (for the last option, see the *Guide*, chap. IV, para. 88).

57. In legal systems that adopt the self-selection approach, it would also be desirable to design the registry in a way that permits the secured creditor to easily select and indicate in the notice the desired duration without the risk of inadvertent error, for example, by limiting the choice to whole years from the date of registration.

58. Regardless of the approach a State may take to the issue of the duration of registration, under the law recommended in the *Guide*, third-party effectiveness of a security right continues past the lapse of the duration of the registration, if it was made effective against third parties prior to the lapse by some other method (see recommendation 46). This would be the case, for example, if a secured creditor registered an amendment notice extending the duration of the registration or took possession of the encumbered assets before the lapse of the duration of registration. However, in the case where there was a lapse of the duration, whereby the security right would no longer be effective against third parties, the third-party effectiveness of that security right could then only be re-established, taking effect from the time of re-establishment (see recommendations 47 and 96). A re-establishment would require the registration of a new initial notice with its own date and time of registration.

(b) Duration of registration and impact of error

59. States must also address the impact on the effectiveness of registration of an incorrect statement in the notice by the registrant as to the duration of the

registration. The *Guide* recommends that the error should not render the registration ineffective (see recommendation 66). However, this recommendation is subject to the important caveat that protection should be given to third parties that relied on such a statement (for the protection of the grantor against unauthorized registration, including an unauthorized statement of the duration of registration in the notice, see paras. 3-9 above).

60. Accordingly, where the registrant enters a longer duration than intended, the protection of third parties is not as relevant as they would not be prejudiced by relying on the incorrect statement. The registered notice will still alert them to the possibility that a security right may exist and that they can take steps to protect themselves against that risk. As there would be nothing on the registry record to indicate that the secured creditor intended to enter a shorter term, third-party searchers would not in any way be misled by the secured creditor's error in entering a longer term. Consequently, the error in the duration in the registered notice should not render the registration ineffective. However, in cases where the security right referred to in the notice has, in fact, been extinguished (for example, by payment of the secured obligation and termination of any credit commitment), the grantor would be able to request the secured creditor to amend or cancel the notice to reflect the correct duration. If the secured creditor failed to do so within a number of days specified in the law after receipt of the grantor's written request, the grantor could seek the amendment or cancellation of the notice through a summary judicial or administrative procedure (see recommendation 72, subparas. (a) and (b)).

61. However, where the statutory duration or the duration that the registrant entered is shorter than the actually intended duration, the registration will lapse at the end of the specified duration and the security right will no longer be effective against third parties, unless it was made effective prior to the lapse by some other method (see recommendation 46). As mentioned, while the secured creditor can re-establish third-party effectiveness, it will take effect against third parties only from the time of re-establishment (see recommendations 47 and 96).

[Note to the Working Group: The relevant article in the draft model regulations is article 11.]

5. Maximum amount for which the security right may be enforced

(a) General

62. The *Guide* anticipates that, to facilitate subordinate lending, some States may require an indication in the notice of the maximum monetary amount for which the security right may be enforced (see recommendation 57, subpara. (d); for a corresponding indication of that amount in the security agreement, see recommendation 14, subpara. (d)). In those States, the maximum amount must be entered in a specific field of the notice. The amount may be entered either in numbers, letters or both. Some States also allow the registrant to indicate or select from a menu the relevant currency in which the loan has been made.

63. At the same time, the *Guide* recognizes that an equally valid approach is to avoid stating in the notice such a maximum amount so as to facilitate the extension of credit by the initial secured creditor (see the *Guide*, chap. IV, paras. 92-97). Thus, the *Guide* acknowledges that both approaches have merit and recommends that States adopt the policy that is most consistent with efficient financing practices in

each State and, in particular, with the credit market practices that underlie each approach (see recommendation 57, subpara. (d)).

64. In secured transactions regimes that require a statement of the maximum amount for which the security right may be enforced to be included in the notice, the legal consequences of a difference in the maximum amount specified in the notice and the amount actually owed need to be addressed. If the maximum amount specified in the notice is higher than the amount actually owed at the time of enforcement, the secured creditor is entitled to enforce its security right only up to the amount actually owed. In the contrary case where the maximum amount specified in the notice is lower than the amount actually owed, the secured creditor can enforce its security right only up to the maximum amount specified in the notice (and has the remedies of an unsecured creditor for the outstanding balance). However, if there is no other competing claimant, the secured creditor would be able to enforce its security right up to the amount actually owed. In either case, if the amount actually owed or the maximum amount specified in the notice is higher than the amount specified in the security agreement, the secured creditor would only be able to enforce its security right up to the amount specified in the security agreement.

65. The aim of this approach is illustrated by the following example. An enterprise has an asset with an estimated market value of \$100,000. The enterprise applies for a revolving line of credit facility to a maximum amount of up to \$50,000 (including capital, interest and costs). The creditor is willing to extend the loan on the condition that it obtains a security right in the asset. The grantor is agreeable but since the maximum loan amount specified in the security agreement and in the notice is only \$50,000 and the asset has a value of \$100,000, the grantor may wish to reserve the ability to obtain another secured loan from another creditor later by giving a security right in the same asset relying on the residual value of the asset. Ordinarily, the first-to-register priority rule would deter this subsequent creditor from giving a loan for fear that the first lender could later extend loans beyond the initial \$50,000 for which it would have priority under the general first-to-register rule. By imposing a requirement to specify the maximum value for which the security right may be enforced, the subsequent creditor in this example can be assured that the first-registered secured creditor cannot enforce its security right for an amount greater than \$50,000 (including capital, interest and costs), leaving the residual value available to satisfy its own claim should the grantor default.

66. Other secured transactions regimes do not require that the maximum amount for which the security right may be enforced should be specified in the notice. This approach is based on the assumptions that: (a) the first-registered secured creditor is either the optimal long-term financing source or will be more likely to extend financing, especially to small, start-up businesses, if it knows that it will retain its priority with respect to any financing to be provided to the grantor in the future; (b) the grantor will not have sufficient bargaining power to require the first-registered secured creditor to enter a realistic maximum amount in the notice (instead the secured creditor will insist that an inflated amount be included to cover all possible future extensions of credit and the grantor will not usually be in a position to refuse); and (c) a subsequent creditor to whom the grantor applies for financing may be able to negotiate a subordination agreement with the first-registered security creditor for credit extended on the basis of the current

amount of residual value in the encumbered asset. The concern with this latter approach is that it may limit the grantor's access to credit from sources other than the first-registered secured creditor even when its assets have a significant residual value in excess of any credit granted or intended to be granted by the first-registered secured creditor.

(b) Maximum monetary amount and impact of error

67. In line with the approach taken in States that already have this requirement, the *Guide* recommends that an incorrect statement in a registered notice of the maximum amount for which a security right may be enforced should not render the notice ineffective (see recommendation 66). Again, this is subject to the caveat that third parties that relied on the incorrect statement of the maximum monetary amount in the registered notice should be protected. Thus, where the maximum amount indicated in the notice is greater than the maximum amount agreed in the security agreement or the amount actually owed, there is no need to protect a third party since its decision to advance funds normally will be based on the amount indicated in the notice. It should be noted that the grantor would also be protected in this situation since it could request the secured creditor or, if the secured creditor failed to act in a timely manner, a judicial or administrative body through a summary proceeding, to amend the notice to correct the amount so that the grantor could obtain financing against the residual value of the encumbered asset (see recommendation 72).

68. However, where the maximum amount indicated in the notice is less than the maximum amount agreed to in the security agreement or the amount actually owed, a third party that relied on the maximum amount specified in the notice (in advancing secured credit on the assumption that it could enforce its security right against any residual value in the asset in excess of the amount indicated in the notice) should be protected. Similarly, a judgement creditor, who took enforcement action in the belief that the excess value of the asset above that stated in the notice would be available to satisfy its judgement claim, should also be protected. The way to protect the interests of third parties is to limit the right of the secured creditor to enforce its security right as against the third party up to the maximum amount erroneously stated by the secured creditor in the registered notice (as to the rights of the creditor to claim the amount actually owed, see para. 63 above).

[Note to the Working Group: The only relevant article in the draft model regulations is article 25 but it might be necessary to formulate separate rules for errors made with respect to the duration of registration and the maximum amount along the lines of recommendation 66 of the Guide.]

(A/CN.9/WG.VI/WP.48/Add.2) (Original: English)

**Note by the Secretariat on a Draft Security Rights Registry Guide,
submitted to the Working Group on Security Interests at its
twentieth session**

ADDENDUM

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IV. Rules applicable to the registration and search process (*continued*)

F. Effective time of registration

1. Owing to the role that the effective time of registration plays in determining the priority of a security right, it is essential that a date and time of registration be assigned to each notice of a security right. However, if the registry system permits the submission of notices in paper form, it will take time for the information set forth in the notice to be transposed by registry staff into the registry record. This raises the question of whether the effective date and time of registration should be assigned as soon as the notice in paper form is physically received by the registry or only after the information set forth in the notice is entered by registry staff into the registry record so as to be available to searchers of the registry record.

2. If the former approach is followed, there will be a time lag between the effective time of registration and the time when the information will become available to searchers of the registry record. This time lag would create a priority risk for searchers as their rights would be subordinate to security rights, notice of

which was registered even though it was yet not available to searchers (assuming that the registry will always process the notices in the order they were received). In some legal systems, to deal with this risk, search results are assigned a “currency date” indicating that the search result is designed to disclose the state of registrations in the registry record only as of the currency date and time (for example, a day before the search) and not as of the real time of the search. Under this approach, a prospective secured creditor, after registering its security right, would then have to conduct a second search to make sure no intervening security rights have been registered before being confident in advancing funds. Prospective buyers and other third parties would similarly need to conduct a subsequent search before parting with value or otherwise acting in reliance on the registry record.

3. Accordingly, the better approach is for the registry system to assign the effective time of registration as of the time when the registration information has been successfully entered into the registry record so as to be available to searchers of the registry record. This is the approach recommended in the *Guide* (see recommendation 70). In States in which information in notices is entered into a computerized registry record (whether directly by the registrant or by the registry staff entering information submitted by the registrant in paper form), the registry software should be programmed to ensure this result. Although highly unlikely, notices may be submitted by competing secured creditors against the same grantor at the same date and time. To address the resulting problem of date and time of third-party effectiveness and priority, the registry system may be designed to assign sequential numbers to each notice that may be part of the registration number or be assigned in addition to the registration number.

4. The approach mentioned in the preceding paragraph does not eliminate the time lag problem but simply shifts responsibility to the registrant that must verify that the information on the notice in paper form has been entered into the registry record and is searchable. Accordingly, the registry system should be designed to enable registrants to themselves enter the information into the publicly available registry record using any computer facilities, whether their own, those of a service provider or those located at a branch of the registry (see further the discussion on access to the registry record in chapter V below). Even in such cases, there could be a nominal time lag between the time the information was entered into the registry record and the time such information become available to searchers. Nonetheless, this approach would give secured creditors some control over the timing and efficiency with which their registrations would become effective since technological advances should virtually eliminate any time lag between the time of submission of a notice and the point time at which information entered into the registry record become available to searchers.

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 10.]

G. Amendment of registration

1. General

5. Information entered in the registry record may need to be changed to reflect a change in the relationship between the secured creditor and the grantor. This is

typically done by way of an amendment that indicates the changes to the information contained in the registry record (with the exception of errors made by the registry in entering the information in the registry record, once a notice is registered there is no means to edit a notice and all changes must be in the form of a subsequent amendment notice; see recommendation 72). An amendment may be necessary, for example, in order to add, change or delete information in the registry record or to renew the duration of the effectiveness of a notice.

6. Normally, an amendment is not effected by deleting the currently registered information and replacing it with the new information. Instead, an amendment is added to the initial registration information so that the searcher is able to find and examine both the originally registered information as well as the information subsequently registered. Neither registrants nor registrars are able to replace any information from the registry record, and registry systems should be designed accordingly.

7. To effect an amendment a registrant must provide in the appropriate field in the amendment notice certain information (for example, the registration number of the notice to which the amendment relates, the purpose of the amendment, the new information and the identifier of the secured creditor authorizing the amendment). Same as with the information in the initial notice, the information in an amendment notice submitted by the registrant is not subject to verification or substantive change by those administering the registry, as the registry merely serves as a repository of information received by it (and the legal effect of that information is determined by the substantive rules of the secured transactions regime).

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 26.]

2. Change in grantor identifier

8. A change in the identifier of the grantor indicated in the registered notice (for example, as a result of a subsequent name change) may undermine the publicity function of registration from the perspective of third parties that deal with the grantor after the identifier has changed, as a search of the registry under the new identifier may not reveal the initially registered notice. After all, the grantor's identifier is the principal indexing and search criterion and, at least in the case of a new registration after the name change, a search using the grantor's new name will not disclose a security right registered against the old name. It should be noted that in a registry system that uses identification numbers as the grantor identifier in lieu of the name, it is less likely that similar issues will arise because the identification number is typically permanent and not subject to change.

9. Accordingly, the rules on registration should enable the secured creditor to enter the new grantor identifier with an amendment notice. While failure to submit an amendment should not make the security right generally or retroactively ineffective against third parties, third parties that deal with the grantor after the change in its identifier and before the amendment notice is registered should be protected. Accordingly, the applicable rules should provide that, if the secured creditor does not register the amendment notice within a short "grace period" (for example, 15 days) after the identifier has changed, its security right would be ineffective against buyers, lessees, licensees and other secured creditors that deal

with the encumbered asset after the change in the grantor identifier and before the amendment is registered. This is the approach recommended in the *Guide* (see recommendation 61). The rules should specify when the grace period begins to run, whether it is the date of change or when the secured creditor acquired actual knowledge of the change. Guidance should also be provided on what constitutes a change of identifier in the context, in particular, of corporate amalgamations and the effect of not making an amendment in these circumstances.

[Note to the Working Group: The Working Group may wish to consider whether text should be added to article 26 of the draft model regulations to address an amendment for the purpose of indicating a change in the grantor's identifier.]

3. Transfer of an encumbered asset

10. When the grantor transfers, leases or licences an encumbered asset, the security right will generally follow the asset into the hands of the transferee (see recommendation 79). In such a case, a search of the registry according to the transferee's, lessee's or licensee's identifier will not disclose a security right registered against the identifier of the grantor (the transferor, lessor or licensor). Accordingly, to protect third parties that deal with the encumbered asset in the hands of the transferee, the registry system should enable the secured creditor to submit an amendment notice (or a new notice) to record the identifier and address of the transferee, lessee or licensee as the new grantor.

11. The *Guide* recommends that the secured transactions law should address the impact of a transfer of an encumbered asset on the effectiveness of registration (see recommendation 62). Thus, the secured transactions law should address whether and to what extent such an amendment is required to preserve the effectiveness of the security right against intervening claimants. Some States adopt a rule equivalent to that applicable to a change in the identifier of the grantor (see recommendation 61, and paras. 8 and 9 above). Under this approach, failure to amend the registration to disclose the identifier of the transferee does not make the security right ineffective against third parties generally. However, if the secured creditor does not register the amendment within a short "grace period" (for example, 15 days) after the transfer, its security right is ineffective against buyers, lessees, licensees and other secured creditors that deal with the encumbered asset after the transfer and before the amendment is registered. Other States adopt a similar approach subject to the important caveat that the grace period given to the secured creditor to register the amendment begins to run only after the secured creditor acquires actual knowledge of the transfer. In still other States, such an amendment is purely optional and failure to amend does not affect the third-party effectiveness or priority of the security right (see the *Guide*, chap. IV, paras. 78-80).

4. Subordination of priority

12. Under the law recommended in the *Guide*, a competing claimant with priority may at any time subordinate its priority unilaterally or by agreement in favour of any other existing or future competing claimant (see recommendation 94). There is no requirement that the subordinating secured creditor or the beneficiary of the subordination amend the registered notice to reflect this subordination. However, in some cases, a subordinating secured creditor or the beneficiary of the subordination may wish to amend the registry record to reflect the order of priority between them

(and, if subordination refers only to certain assets, the relevant assets). In such case, either the subordinating secured creditor or the beneficiary of the subordination with the consent of the subordinating secured creditor could register an amendment notice provided that the security right of the subordinating secured creditor had been made effective against third parties by registration. Accordingly, the registry should be designed so as to accommodate an amendment of the notice to reflect such subordination. In any case, registration of subordination is not necessary, as it affects only the rights of the subordinating secured creditor and the beneficiary of the subordination and it could increase the cost of the registry system to the extent the relevant functions need to be built into the system and amendment forms designed.

5. Assignment of the secured obligation and transfer of the security right

13. A secured creditor may assign the secured obligation. As in most legal systems, the *Guide* recommends that, as an accessory right, the security right follows the secured obligation, with the result that the assignee of the obligation in effect will be the new secured creditor (see recommendations 25 and 48). In the event of an assignment, the original secured creditor will usually not wish to have to continue to deal with requests for information from searchers and the new secured creditor will wish to ensure that it receives any notifications or other communications relating to its security right.

14. Consequently, the original secured creditor (assignor) or the new secured creditor (assignee) with the consent of the original secured creditor should be permitted to update or amend the secured creditor information in the registry record to reflect the identifier and address of the new secured creditor. However, under the approach recommended in the *Guide*, an amendment should not be required in the sense of it being necessary to preserve the effectiveness of the registration (see recommendation 75). As the identifier of the secured creditor is not an indexing and search criterion, searchers will not be materially misled by the change in the identity of the secured creditor. Nonetheless, if the new secured creditor fails to register the amendment, the original secured creditor will retain the power to alter the record by submitting an effective amendment notice (see the *Guide*, chap. IV, para. 111) In any case, the registry system should be designed so as a search result will show the information of both the original and the new secured creditor, if any.

15. Another issue relevant to the assignment of the secured obligation is the duty of the secured creditor to disclose the identity of the assignee on request. If a notice about the assignment of the secured obligation is registered, under the law recommended in the *Guide*, the registrant is obligated to forward a copy of that notice to the grantor (see recommendation 55, subpara. (c)). However, whether such a notice is registered or not, the secured obligation has an obligation to disclose the assignment and the identity of the assignee to the grantor upon request.

6. Addition of newly encumbered assets

16. After the conclusion of the original security agreement, the grantor may agree to grant a security right in additional assets not already described in the registered notice. In such circumstances, secured transactions law and the registration rules should enable the secured creditor to either amend the initially registered notice so as to add the description of the newly encumbered assets or to register a new notice

with respect to the new assets (the only difference between the two options would be that the effectiveness of the amendment notice would expire with the original notice, while in the second case the two notices would have different expiration dates). In either case, the amendment notice or the new notice becomes effective as of the time of registration of the amendment notice or the new notice (see recommendation 70). The reason for this approach is that a search of the registry record by third parties prior to registration of the amendment notice or the new notice would not disclose that a security right has been granted in the newly encumbered assets.

[Note to the Working Group: The Working Group may wish to consider whether text should be added to the commentary to discuss amendments that purport to delete encumbered assets or grantors (see article 26, para. 6, of the draft model regulations).]

7. Extension of the duration of a registration

17. After a registration is made and before its duration expires, a registrant may need to extend its duration. The rules applicable to registration should confirm that the duration of an existing registration may be extended by way of amendment at any point in time before the expiry of the term of the registration (see recommendation 69). If a new registration were instead required, this requirement would undermine the secured creditor's original priority status and the continuity of the effectiveness of its security right against third parties.

18. As already discussed (see A/CN.9/WG.VI/WP.48/Add.1, paras. 55-58), there are several approaches that States can take with respect to the duration of a registration (recommendation 69). In States where the duration of the registration is established by law, the extension should be an additional period equal to the statutory duration. In States that permit the registrant to self-select the duration of the registration, the registrant should also be permitted to select the duration of the extension period, possibly subject to any applicable maximum limit. Under this approach, a registrant who, for example, selected a five year term for the initial registration should be allowed to select three years for the duration of the extension. In States that do not set any limit to the duration of the registration, there would be no need for an extension and a registration would continue to be effective until it was cancelled.

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 11.]

8. Correction of erroneous lapse or cancellation

19. In the event that a secured creditor fails to extend the duration of a registration in a timely fashion or inadvertently registers a cancellation, the secured creditor may register a new notice of its security right, re-establishing third-party effectiveness. However, under the law recommended in the *Guide*, the third-party effectiveness and priority status of the security right dates only from the time of the new registration (see recommendation 47). The secured creditor will suffer a loss of priority as against all competing claimants, including those whom it had priority, under the first-to-register rule, prior to the lapse or cancellation (see recommendation 96).

20. Some States adopt a more lenient approach. The secured creditor is given a short grace period after the lapse or cancellation to revive its registration so as to restore the third-party effectiveness and priority status of its security rights as of the date of the initial registration. However, even in States that adopt this approach, the security right is ineffective against or subordinate to competing claimants that acquired rights in the encumbered assets or advanced funds to the grantor after the lapse or cancellation and before the new registration.

9. Global amendment of secured creditor information in multiple notices

21. The registry system may be designed so as to permit the retrieval of information by the registry staff according to the identifier of the secured creditor. This feature of the registry system would enable registry staff to efficiently amend the information of the secured creditor in all or multiple notices associated with that secured creditor, at the request of the person identified in the registration as the secured creditor, through a single global amendment. A single global amendment would be particularly useful in certain case such as a merger or a change of the name of the secured creditor. Such a search could be made only by registry staff, that is, not by searchers, as the name of the secured creditor would not be a search criterion (see paras. 34-37 below).

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 27.]

H. Cancellation and amendment of notice

1. Mandatory cancellation or amendment

22. A notice may not reflect, or may no longer reflect, an existing or contemplated financing relationship between the secured creditor and the grantor identified in the registration. This may happen because, after the registration, the negotiations between the parties broke down or because the financing relationship represented by the registration came to an end. In such a case, the continued presence of the information on the records of the registry will limit the ability of the person identified as grantor to sell or create a new security right in the assets described in the registration. This is due to the fact that a prospective buyer or secured creditor will be reluctant to enter into any dealings with the person identified as the grantor unless and until the existing notice is cancelled.

23. Ordinarily, the person identified as the secured creditor in a registration will be willing to register a cancellation notice at the request of the person identified as the grantor if it does not have or does not reasonably expect to acquire a security right in the grantor's assets (see recommendation 72, subpara. (a)). However, in the event that cooperation is not forthcoming, a speedy and inexpensive judicial or administrative procedure should be established to enable the grantor to seek cancellation of the notice. This is the approach recommended in the *Guide* (see recommendation 72, subpara. (b)).

24. Similar issues arise when a registration contains inaccurate information that may be prejudicial to the ability of the person identified as the grantor to deal with its assets in favour of other secured creditors or buyers; for example, the description

of the encumbered assets in the registration may include items that are not in fact covered, or are no longer covered, by any existing or contemplated security agreement and the grantor has not otherwise authorized such broad description. To address this situation, the procedure should also entitle the person identified as the grantor to seek an amendment of the notice so as to accurately reflect the actual status of the relationship between the parties (see recommendation 72, subpara. (b)). In a situation where the grantor satisfied a portion of the secured obligation that entitles the grantor to seek a release of some encumbered assets from the security right, the secured creditor should register an amendment deleting the affected encumbered assets from the registered notice. If the secured creditor fails to do so, the grantor should be entitled to have access to procedures compelling the amendment (see recommendation 72, subpara. (b)), but not a cancellation. The grantor would be entitled to seek cancellation only in the situations described above (see para. 22).

25. Accordingly, the rules on registration should entitle a person identified as the grantor in a notice (or indeed any person with a right in the assets described in a registration) to send a written notice to the person identified as the secured creditor to cancel or amend the notice, as appropriate, in any of the following circumstances: (a) a security agreement has not been concluded or was not contemplated; (b) the security right has been extinguished by full payment or otherwise; or (c) the grantor did not authorize the registration.

26. The person identified as the secured creditor should be obligated to comply with the request within a specified number of days after the secured creditor's receipt of a written request from the person identified as the grantor, failing which the person identified as the grantor should be entitled to request a court or other administrative authority to order the cancellation or appropriate amendment of the notice unless it is found that the information in the registry record correctly reflects the existing financing relationship between the parties and was authorized by the person identified as the grantor. In either case, the rules applicable to registration should provide a specified procedure whereby the person identified as the grantor or the court or administrative authority could submit a notice of cancellation or amendment, subject to adequate protections of the secured creditor such as the right to be notified of such a procedure and present evidence.

2. Voluntary cancellation or amendment

27. A secured creditor should be in a position to amend or cancel a notice, to the extent appropriate, at any time. While such amendment or cancellation would require appropriate authorization by the grantor, cancellation of a notice, amendment due to assignment of the secured obligation, subordination or change of address of the secured creditor or its representative should not require authorization by the grantor. Typically, the grantor would authorize registration of an initial notice as well as any amendment in a single authorization document. This single authorization would not require the secured creditor to request individual authorizations for individual amendments (such as, for example, to extend the duration of the registration). This is the approach recommended in the *Guide* (see recommendations 71 and 73).

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 28.]

3. Consequences of expiration, cancellation or amendment

28. The registry may remove information from the registry record that is accessible to the public only upon the expiry of the duration of registration or pursuant to a judicial or administrative order. However, information in notices that were cancelled may be retained in the registry record with the cancellation notice. Such notices may be removed from the registry record and archived only upon the expiry of the duration of the registration. Information removed from the record available to the public must be archived for a period of time that is long enough for that information to be retrieved when necessary, for example, to determine the order of priority among certain competing claimants at a certain point of time in the past (see recommendation 74).

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 15.]

I. Copy of registration, amendment or cancellation notice

29. It is essential for the registrant (as well as the secured creditor) to obtain verification that information in a notice has been successfully entered into the registry record and to be informed of any changes thereafter. In this context, it should be clarified that the registrant does not necessarily have to be the secured creditor, but may be a representative of the secured creditor. A representative may be identified in the notice instead of the secured creditor or as the registrant.

30. Under the approach recommended in the *Guide*, a registrant could obtain a record of the registration as soon as the registration information is entered into the registry record and then, the registrant is obligated to forward a copy of the notice to the grantor (see recommendation 55, subparas. (e) and (c)). However, failure of the registrant to meet this obligation results only in nominal penalties and any proven damages resulting from the failure (see recommendation 55, subpara. (c)). An electronic registry could be designed so as to provide a record of the registration in the form of an acknowledgement of a notice and to send a copy of any notice to the person identified in the notice as the grantor automatically.

31. The registry is only obligated to send promptly a copy of any changes to a registered notice to the person identified as the secured creditor in the notice (see recommendation 55, subpara. (d)). This is important to enable the secured creditor to take prompt steps to protect its position in the event that the cancellation or amendment was erroneous. Again, this may be relevant only in a paper context and not very practical if postal systems are not reliable. In an electronic registry, the secured creditor should be able to run a search to identify those registrations that have received an amendment or cancellation notice. The registry system may also be programmed to inform the person identified in the notice as the secured creditor of such changes automatically, most likely using electronic means of communication.

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 29.]

J. Searches

1. Entitlement to search

32. Under the approach recommended in the *Guide*, to achieve its publicity objectives, the general security rights registry must be publicly accessible and a searcher should not be required to give any of the reasons for the search (see recommendation 54, subparas. (f) and (g)).

33. In the name of privacy, some States require searchers to demonstrate that they have a justifiable reason for searching the registry record. The *Guide* does not recommend this approach because the purpose of the general security rights registry is to enable third parties that are contemplating the acquisition of a right in a particular asset (by way, for example, of sale, security or judgment enforcement proceedings) or parties that otherwise require information about potential security rights in a person's assets (such as the grantor's insolvency representative) to expeditiously determine the extent to which a person's assets may already be encumbered. Requiring potential searchers to first indicate the reasons for the search and registry staff to make a decision thereon would gravely undermine the efficiency and functionality of the search process since it would interpose a complex and cumbersome adjudicative process into the search process. Transaction costs would also be increased to an unsustainable extent owing to the need to hire expert staff to administer and adjudicate search applications.

34. Privacy concerns are more effectively dealt with by requiring, for example, grantor authorization of a registration and the establishment of a procedure to enable grantors to cancel or amend unauthorized or erroneous notices quickly and inexpensively (see A/CN.9/WG.VI/WP.48/Add.1, paras. 3-9, and paras. 22-28 above).

35. However, whether the registry may request and maintain the identity of the searcher is a different matter. In some States, the registry may not disclose personal (private) information unless the registry knows the identity of the searcher. The *Guide* makes such a recommendation with respect to the identity of the registrant (see recommendation 55, subpara. (b)), but does not include a similar recommendation with respect to the identity of the searcher. In general, there should be no need for the registry to request or maintain the identity of the searcher except for the purposes of collecting search fees, if any.

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 7.]

2. Search criteria

36. As already explained (A/CN.9/WG.VI/WP.48, paras. 65-67), under the approach recommended in the *Guide*, information in the registry record is indexed by reference to the identifier of the grantor and as such, the identifier of the grantor is the principal criterion by which such information may be searched and retrieved by searchers. However, a searcher should be entitled to rely on the accuracy of a search result only if the searcher used the correct grantor identifier in searching.

37. The approach of the *Guide* with respect to grantor-based indexing is based on two considerations. First, unlike immovable property, most categories of movable

asset do not have a sufficiently unique identifier to support asset-based indexing and searching. Second, taking security in future assets and circulating pools of assets such as inventory and receivables would be administratively impractical and prohibitively expensive if the secured creditor had to continuously update its notice to add a description of each new asset acquired by the grantor. A grantor-based indexing and searching system resolves these problems by enabling the secured creditor to make its security right effective against third parties by a single one-time registration covering security rights, 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 (see recommendation 68).

38. As compared to asset-based indexing and searching, grantor-based indexing and searching has a drawback. Under the law recommended in the *Guide*, if the grantor sells or disposes of an encumbered asset outside the ordinary course of business, the security right will generally follow the asset into the hands of the transferee (see recommendations 79 and 81). Yet the security right will not be disclosed on a search of the registry record against the identifier of the transferee, potentially prejudicing third parties that deal with the asset in the hands of the transferee and that may not be aware of the historical chain of title. Suppose, for example, that grantor B, after granting a security right in its automobile in favour of secured creditor A, sells the automobile to third party C, who in turn proposes to sell or grant security in it to fourth party D. Assuming D is unaware that C acquired the asset from the original grantor B, he or she will search the registry using only C's identifier. That search will not disclose the security right granted in favour of A because it was registered against the name of the original grantor B. This is generally referred to as the "A-B-C-D" problem (on the question whether a secured creditor should be obligated to amend its registration to add the transferee as a new grantor, see paras. 10 and 11 above).

39. In response to the "A-B-C-D" problem, some secured transactions laws provide for supplementary asset-based indexing and searching to preserve the secured creditor's rights to follow that asset into the hands of a transferee, lessee or licensee from the original grantor. Such rules apply to specific categories of high value and durable movable assets with significant resale market and for which unique and reliable serial numbers or equivalent alphanumerical identifiers are available (for example, road vehicles, trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat motors, hereinafter generally referred to as "serial number assets"). The motor vehicle market is a good example. Motor vehicles are of quite high value with a relatively significant resale market. Moreover, the automotive industry assigns a unique alphanumerical identifier, commonly referred to as a vehicle identification number, to identify individual motor vehicles according to a system based on standards issued by the International Organization for Standardization (ISO). In such a case, the vehicle identification number may be used for indexing and searching so as to be retrievable by searchers rather than the name of the grantor. This approach solves the "A-B-C-D" problem since a search based on the vehicle identification number will disclose all security rights granted in the particular motor vehicle by any owner in the chain of title.

40. The *Guide* discusses but does not recommend the possibility of using the serial number of an asset as a search criterion (see the *Guide*, chap. IV, paras. 34-36). If a State chooses to do so, rules similar to those mentioned above with respect to the

use of correct identifier of the grantor would also apply to the use of serial numbers. However, if serial number registration is only mandatory for the purposes of third-party effectiveness and priority as against certain classes of competing claimants (for example, transferees of the encumbered assets), rules applicable to the search process should make it clear that a searcher is entitled to rely on a serial number search only to the extent that the particular searcher falls within the category of competing claimants for which entry of the specific serial number in the registration is required.

41. The registry system could also be designed to allow that notices may be searched and retrieved by reference to a registration number assigned by the registry either to each initial, amendment or cancellation notice or to a single registration number that covers the initial and any subsequent notice. While not generally useful to third parties as a search criterion (as third parties will not have the information), registration numbers would give secured creditors an alternative search criterion to quickly and efficiently retrieve a registration for the purposes of entering an amendment or cancellation (see paras. 22-28 above). Registration numbers could be particularly useful in circumstances where a notice could not be retrieved through the use of the identifier of the grantor due to indexing errors or changes in search logic.

42. Finally, the registry system could be designed so that information could be retrieved by the registry staff according to the identifier of the secured creditor. As already mentioned (see para. 21 above), this would enable registry staff, at the request of the person identified in the registration as the secured creditor, to efficiently amend the identifier or address information of the secured creditor in all or multiple registrations associated with that secured creditor through a single global amendment.

43. However, the identifier of the secured creditor should not be a search criterion for searching by the public generally. The identifier of the secured creditor has limited relevance to the legal objectives of the registry system (see recommendation 64). Moreover, to allow public searching may violate the reasonable expectations of secured creditors; for example, because of the risk that a credit provider may undertake a search based on the secured creditor identifier to obtain the client lists of its competitors (see the *Guide*, chap. IV, para. 81).

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 31.]

3. Search results

44. A search result should either indicate that no registrations were retrieved against the specified search criterion or list all registrations that match the specified search criterion along with the full details of the information as it appears in the registry record. Whether the result will reflect information that matches the search criterion exactly or only closely is a matter of the design of the registry system. The registry should issue a search certificate upon request by a searcher and payment of the relevant fee, if any. A search certificate should in principle be admissible as evidence in court that a notice as registered, or not, at a certain date and time. All these issues should be addressed in the registration rules.

[*Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 32.*]

K. Language of registration and searching

45. The rules applicable to registration should clarify the language to be used to enter information in the registry. This language could be the official language or languages of the State under whose authority the registry is maintained or any other language specified by that State. In any case, search results should be displayed in the language in which the information was entered in the registry record (see the *Guide*, chap. IV, paras. 44-46). In addition, where the grantor's name is the relevant identifier and the correct name is in a language other than that used by the registry, the rules should clarify how the characters and any symbols that form the name are to be adjusted or translated to conform to the language of the registry.

46. The law under which a grantor that is a legal person is constituted may entitle the grantor to have and use alternative linguistic versions of its name. To accommodate that possibility, the rules applicable to registration should confirm that all linguistic versions of the name may be entered as separate grantor identifiers since third-party searchers may be dealing or have dealt with the grantor under any of the alternative versions of its name.

47. A way to mitigate the various problems that might arise from the use of multiples languages in the registry in the registration and search process would be to use personal identification numbers as identifier of the grantor in lieu of the name of grantor.

L. Grantor's entitlement to additional information

48. As already discussed (see A/CN.9/WP.48/Add.1 paras. 15-68), a notice registered in the registry record contains minimum information about a security right that may not even exist at the time of registration. Thus, in certain circumstances, the grantor (in particular if the grantor is not the debtor but a third party) may need to request additional information about the security right. While the *Guide* does not take a position on this issue, in some States secured transaction law provides that the grantor is entitled to request the person identified in the notice as the secured creditor to provide to the grantor additional information about the security right, such as: (a) a list of the assets in which the person identified as the secured creditor is claiming a security right; and (b) the current amount of the obligation secured by the security right to which the registration relates, including the amount needed to pay off the secured obligation. The ability of a third party to obtain information from the secured creditor takes account of the fact that registration does not create or evidence the creation of a security right but merely signals that a security right may exist in a particular asset. Whether the security right has been created, and the scope of the assets which it covers, depends on off-record evidence. Consequently, prospective buyers and secured creditors and other third parties with whom the grantor is dealing may wish to have independent verification directly from the person identified in the notice as the secured creditor

as to whether it is in fact currently claiming a security right in an asset in which they are interested under an existing security agreement with the named grantor.

49. In some States, the grantor is entitled to one request free of charge every few months. For additional requests for information, the secured creditor may charge a fee. This approach protects the secured creditor from having to respond to frequent requests of the grantor that may not be justified or be intended to harass.

[Note to the Working Group: The Working Group may wish to note that the grantor's entitlement to additional information is not dealt with in the law.]

V. Registry design, administration and operation

A. Introduction

50. Technical design, administrative and operational issues are crucial components of an effective and efficient registry system. This chapter canvasses the principal issues that must be addressed at this level.

B. Electronic versus paper registry record

51. Registry records traditionally were maintained in paper form and this is still the case in some States. An electronic registry database offers enormous efficiency advantages over a traditional paper-based record (see the *Guide*, chap. IV, paras. 38-43). These advantages include:

- (a) A greatly reduced archival and administrative burden;
- (b) A reduced vulnerability to physical damage, theft and sabotage;
- (c) The ability to consolidate information in all notices in a single database regardless of the geographical entry point of the information in notices; and
- (d) The facilitation of speedy low-cost registration and search processes (see the discussion on modes of access to the registry in paras. 56-59 below).

52. Accordingly, every effort should be made by enacting States to provide for the storage of information contained in a notice in an electronic as opposed to a paper record. This is the approach recommended in the *Guide* (see recommendation 54, subpara. (j)).

53. The *Guide* includes in recommendations 11 and 12 the basic rules to accommodate electronic communications taken from article 9, paragraphs 2 and 3, of the United Nations Convention on the Use of Electronic Communications in International Contracts on written form and signature requirements. The rules applicable to electronic registries should be consistent with these recommendations and the principles of non-discrimination, technological neutrality and functional equivalence on which recommendations 11 and 12 are based (see the *Guide*, chap. I, paras. 119-122, as well as Explanatory Note to the Convention, paras. 133-165).

C. Centralized and consolidated registry record

54. Under the approach recommended in the *Guide*, registrants and searchers will be able to access the registry through multiple modes and access points because registry records will likely be centralized and consolidated (see recommendation 54, subparas. (e) and (k)). This means that all information will be stored in a consolidated database. Otherwise, the transaction costs faced by registrants in having to register and searchers in having to conduct searches in multiple decentralized registry records may deter utilization of the registry system and undermine the success of the secured transactions law. A centralized registry record would especially be effective for multi-unit States (see recommendations 224-227).

55. As noted above, centralization of the registry record can be achieved far more efficiently if information contained in notices is stored in electronic form in a centralized computer database than if the registry record is maintained in paper form. An electronic record enables information submitted to branch offices of the registry to be entered at the branch office and transferred electronically to the centralized registry database. In paper systems, the information flows in a similar way except that the physical document has to be first manually transferred from the branch to the central office where the centralized paper record is maintained (see the *Guide*, chap. IV, paras. 21-22).

D. User access to the registry services

56. An electronic registry record enables users to submit notices and conduct searches directly without the need for the assistance or intervention of registry personnel. If possible, the system should be designed to support the electronic submission of notices and search requests over the Internet or via direct networking systems as an alternative to the submission of paper registration notices and search requests (see the *Guide*, chap. IV, paras. 23-26 and 43).

57. As already discussed (see paras. 1-4 above), when information is submitted to the registry in paper form, registrants must wait until the registry staff has entered the information into the registry record and the information is searchable by third parties before the registration becomes legally effective. Search requests transmitted by paper, fax or telephone also give rise to delays since the searcher must wait until the registry staff member carries out the search on their behalf and transmits the results. In addition to eliminating these delays, a system in which registrants have the option to electronically enter the information directly into the registry record offers the following other advantages:

- (a) A very significant reduction in the staffing and other day-to-day costs of operating the registry;
- (b) A reduction in the risk of error and reduced opportunity for fraudulent or corrupt conduct on the part of registry personnel;
- (c) A corresponding reduction in the potential liability of the registry to users who otherwise might suffer loss as a result of the failure of registry staff to enter registration information or search criteria at all, or to enter it accurately; and

(d) User access to the registration and searching services outside of normal business hours.

58. If this approach is implemented, the registry should be designed to permit registry users to enter information and conduct searches from any computer facilities, whether private or public available at branch offices of the registry or other locations. In addition, owing to the reduced costs of direct electronic access, the registry should be designed to permit third-party private sector service providers to provide registry services to interested parties.

59. To preserve the security and integrity of the registry record, users may be issued, for example, unique access codes and passwords (other methods of access and identification may also be used). As a measure of protection against the risk of unauthorized registrations, potential registrants may additionally be required to supply some form of identification (for example, an identification card, driver's licence or passport) as a precondition to submitting a registration (see recommendation 55, subpara. (b)), while the registry is not required to verify the identity of the registrant (see recommendation 54, subpara. (d)). To facilitate access for frequent users (such as financial institutions, automobile dealers, lawyers and other intermediaries acting for registrants and searchers), all users should have the option of setting up a user account with the registry that permits automatic charging of fees to the users' credit account with the registry and institutional control of the user's access rights. It might also be necessary to provide certain frequent users (for example, a bank) with special access codes whereby its multiple constituents (for example, the branch offices or its staff) could access the registry record.

E. Specific design and operational considerations

1. General

60. This section is intended to provide guidance to States, in line with the *Guide*, as to the specific design of a registry system by discussing examples of possible approaches. It is not intended to prescribe the exact way in which a registry is to be designed.

2. Establishment of an implementation team

61. It is critical that the technical staff responsible for the design and implementation of the registry are fully apprised of the objectives that it is designed to fulfil, as well as of the practical needs of the registry personnel and of potential registry users. Consequently, it is necessary at the very outset of the design and implementation process to establish a team that reflects technological, legal and administrative expertise, as well as user perspectives.

3. Design and operational responsibility

62. It will be necessary at an early stage in the registry design and implementation process to determine whether the registry is to be operated in-house by a governmental agency or in partnership with a private sector firm with demonstrated technical experience and financial accountability. Under the *Guide*, while the

day-to-day operation of the registry may be delegated to a private entity, the enacting State retains the responsibility to ensure that the registry is operated in accordance with the applicable legal framework (see the *Guide*, chap. IV, para. 47, and recommendation 55, subpara. (a)). Accordingly, for the purposes of establishing public trust in the registry and preventing commercialization and fraudulent use of information in the registry record, the enacting State should retain ownership of the registry record and, when necessary, the registry infrastructure.

4. Storage capacity

63. The implementation team will need to plan the storage capacity of the registry record. This assessment will depend in part on whether the registry is intended to cover consumer as well as business secured financing transactions. In this case, a much greater volume of registrations can be anticipated and thus the storage capacity should be increased. Capacity planning will need to take into account the potential for additional applications and features to be added to the system. For example, it will need to take into account the need to expand the registry database at a later point to accommodate the registration of judgments or non-consensual security rights or the addition of linkages to other governmental records such as the State's corporate registry or other movable or immovable registries. Capacity planning will depend as well on whether registered information is stored in a computer database or a paper record. Ensuring sufficient storage capacity is less of an issue if the record is in electronic form since recent technological developments have greatly decreased storage costs.

5. Programming

64. If the registry record is computerized, the programming specifications will depend on whether grantor-based registration, indexing and searching will be supplemented by serial number registration, indexing and searching. In any event, the hardware and software specifications should be robust and secure employing features that minimize the risk of data corruption, technical error and security breach. In addition to database control programs, software will also need to be developed to manage user communications, user accounts, payment of fees and financial accounting, electronic links between registries, computer-to-computer communication and the gathering of statistical data.

65. The necessary hardware and software needs will need to be evaluated and a decision made as to whether it is appropriate to develop the software in-house by the registry implementation team or purchase it from private suppliers in which event the team will need to investigate whether an off-the-shelf product is available that can easily be adapted to the needs of the implementing State. It is important that the developer/provider of the software is aware of the specifications for the hardware to be supplied by a third-party vendor, and vice versa.

66. Consideration should also be given to whether the registry should be designed to function as an electronic interface to other governmental databases. For example, in some States, registrants can search the company or commercial registry in the course of effecting a registration to verify and automatically input grantor or secured creditor identifier information.

67. Another issue that should be considered is whether the registry system would allow one or more than one type of search. In some States, there is only one type of search that is based on the official search logic (the program applied by a registry system to the search criteria provided by the searcher to retrieve information from the registry record). In those States, all that the searcher has to do is enter the correct grantor identifier and the registry system will automatically apply the official search logic and produce an official search result.

68. In other States, there is also an unofficial search. This type of search allows users to expand their search and for this purpose uses non-standard characters. For example, if the official search logic is strict returning only exact matches and a registrant registered a notice against “John Macmillan” misspelling the name as “John Macmallan”, an official search using the correct grantor identifier “John Macmillan” may not retrieve the notice and thus the registration may be ineffective. However, an unofficial search against the name “John Macm*” will most likely retrieve the notice with the misspelled name. However, this does not change the fact that the registration is ineffective because only an official search would allow a searcher to retrieve the relevant notice. A searcher cannot rely on the result retrieved using this type of search. In any case, a searcher must know which search logic is official, that is, in the case of an electronic registry, which button to select or in which field to enter the correct identifier and then the registry system will apply the search logic automatically.

6. Reducing the risk of error

69. The registry can be designed to ensure a basic level of information quality, while also preventing registrants from committing errors by, for example, incorporating mandatory fields, edit checks, drop-down menus and online help resources. The registry may also be designed to enable a registrant to conduct a review of the information it has entered as a final step in the registration process.

7. Loss of data, unauthorized access and duplication of registry records

70. An electronic registry record may be inherently less vulnerable to physical damage than a paper registry record but more vulnerable in other respects such as loss of data, unauthorized access and duplication. In that context, measures to prevent loss of data, unauthorized access to and duplication of registry records need to be considered and implemented. Ways to ensure uninterrupted service of the registry system and to recover quickly from natural and artificial disasters need to be developed as well.

8. Role of registry staff and liability

71. The role of registry staff should essentially be limited to managing and facilitating access by users, processing fees and overseeing the operation and maintenance of the registry system. It should be made clear to staff and to registry users that registry staff are not allowed to give legal advice on the legal requirements for effective registration and searching or on the legal effects of registrations and searches.

72. Registry staff should also be responsible for ongoing monitoring of the way the registry is working (or not working) in practice, including gathering statistical

data on the quantity and types of registrations and searches that are being made, in order to be in a position to suggest any necessary adjustments to the registration and search processes and the relevant regulations.

73. The potential for registry staff corruption should be minimized by designing the registry system to: (a) make it impossible for registry staff to alter the time and date of registration or any other information entered by a registrant; (b) eliminate any discretion on the part of registry staff to reject access to the registry services; (c) institute financial controls that strictly limit staff access to cash payments of fees (for example, by making it possible for payments of fees to be made to and confirmed by a bank or other financial institution); and (d) maintaining the archived copy of the original data submitted as previously outlined.

9. Liability for loss or damage suffered by secured creditors or third-party searchers

74. As already noted, the registry should be designed, if possible, to enable registrants and searchers to submit information for registration and conduct a search directly and electronically as an alternative to having registry staff do this on their behalf (see recommendation 54, subpara. (j)). If this approach is adopted, the registration rules should make it clear that users bear sole responsibility for any errors or omissions they make in the registration or search process and carry the burden of making the necessary corrections or amendments.

75. This point aside, the enacting State will need to assess how responsibility for loss or damage due to any of the following causes is to be allocated: (a) incorrect or misleading advice or information or unjustified denial of registry services by the registry staff; and (b) delay or erroneous or incomplete registrations or search results caused by a system malfunction or failure. While in cases where the registry permits direct registration and searching by registry users the law recommended in the *Guide* limits the responsibility of the registry to system malfunction, it generally leaves this matter to enacting States (see recommendation 56). In some States, part of the registration and search fees is put into a fund to cover possible liability of the registry for loss or damage suffered by secured creditors or third-party searchers. In other States, there are other insurance schemes aimed at covering such liability of the registry.

10. Registration and search fees

76. Under the law recommended in the *Guide*, registration and search fees, if any, should be set at a cost-recovery level as opposed to being used to extract tax revenue (see recommendation 54, subpara. (i)). In some States, in which the registry is established and managed by the government, no fee is charged for registration or searching. In any case, excessive fees and transaction taxes will significantly deter utilization of the registry, thereby undermining the overall success of the enacting State's secured transactions law. However, in assessing the level of revenue needed to achieve cost-recovery, account should be taken of the need to fund the operation of the registry, including: (a) salaries of registry staff; (b) replacement of hardware; (c) upgrading of software; (d) ongoing staff training; and (e) promotional activities and training on the registry operations for the users.

77. Consideration should be given to whether registration fees should be set on a per transaction basis or based on a sliding tariff related to the duration of the registration (in systems that permit registrants to self-select the registration term). The latter approach has the advantage of discouraging registrants from selecting an inflated term out of an excess of caution. Whatever approach is adopted, fees should not be related to the maximum amount specified for which the security right can be enforced (in systems that require this information to be included) since this would discourage registration, depress credit overall and undermine the benefits of an otherwise modern and efficient secured transactions law.

78. Consideration should also be given to whether searches and cancellations should be free of charge (at least in the case of an electronic registry) so as to encourage searching by the public and the prompt registration of cancellations by secured creditors.

[Note to the Working Group: The Working Group may wish to note that the relevant article in the draft model regulations is article 33.]

11. Financing initial acquisition, development and operational costs

79. The implementation of a modern electronic registry requires an initial capital investment to cover the cost of implementation of the registry, including hardware and software acquisition and development costs. However, the comparatively low cost of operation of an electronic security rights registry means that this investment should be recoverable out of service fees within a relatively short period after start-up through registration and search fees. The cost can be kept low, especially if the registry record is computerized and direct electronic registrations and searches are permitted.

80. If a State decides to develop and operate the registry in partnership with a private entity, it may be possible for the private entity to make the initial capital investment in the registry infrastructure on the understanding that it will be entitled to recoup its investment by taking a percentage of the fees charged to registry users once the registry is up and running.

12. Education and training

81. To ensure a smooth implementation of the registry system and its active take up by potential users, the implementation team will need to develop education and awareness programmes, disseminate promotional and explanatory material, and conduct training sessions. The implementation team should also develop instructions on entering information into paper registration forms and electronic screens.

F. Transition

82. The law recommended in the *Guide* may well constitute a significant departure from old law. In view of this fact, the law recommended in the *Guide* contains a set of fair and efficient rules governing the transition from the prior law to the new law. In particular, the law recommended in the *Guide* addresses two important transition issues, the date as of which the new law will come into force (the “effective date”)

and the extent to which the new law will apply to transactions or security rights that existed before the effective date.

83. Specifically with respect to the third-party effectiveness of a security right, the law recommended in the *Guide* provides that a security right that was effective against third parties under prior law remains effective until the earlier of: (a) the time it would cease to be effective against third parties under prior law; and (b) the expiration of a period of time specified in the law after the effective date (the “transition period”) (see recommendation 231).

84. If the enacting State does not have a registry for security rights in movable assets, the establishment of a new registry would give all existing secured creditors a quick, easy and inexpensive way of maintaining their priority status. The new registry would also allow grantors to use more easily than under prior law the full value of their assets as security for credit as they would be able to create security rights in the same assets in favour of more than one secured creditor as long as the priority status of each secured creditor is clear.

85. If the enacting State already has in place a registry for security rights in movable assets, additional transitional considerations will need to be addressed. For example, if the new registry is intended to cover security rights previously within the scope of an existing registry, the following approaches may be considered. First, the enacting State or the private entity responsible for implementing the registry may assume responsibility for migrating the information in the existing records into the new registry record. Alternatively, the burden of migration can be placed on secured creditors that would be given a transitional period (for example, one year) to themselves re-enter the information in the new registry record. This latter approach has been used with considerable success in a number of States (especially, when such “re-registration” is free of charge). If this option is chosen, a space or field on the registration form should be provided for entering a note that the registration is a continuation of a registration made prior to the coming into operation of the new registry (for transition issues with respect to matters addressed in the secured transactions law, see chap. XI of the *Guide*).

G. Dispute resolution

86. A dispute resolution mechanism may be considered to settle controversies between the parties involved in registrations relating to security rights. The mechanism should include summary judicial or administrative procedures of the type discussed with regard to the cancellation or amendment of registration (see paras. 22-26 above).

(A/CN.9/WG.VI/WP.48/Add.3) (Original: English)

**Note by the Secretariat on a Draft Security Rights Registry Guide,
submitted to the Working Group on Security Interests at its
twentieth session**

ADDENDUM

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[Draft model regulations] [Draft recommendations]

[Note to the Working Group: The Working Group may wish to recall that, at its nineteenth session, differing views were expressed as to whether the text should take the form of model regulations or recommendations for regulations (see A/CN.9/719). In favour of the formulation of the registration rules in the form of model regulations, it is mainly argued that they are meant to be addressed to States that have enacted the law recommended in the Guide. In favour of the formulation of these rules in the form of recommendations, it is argued that they are part of a guide and, as was done with the Guide, the registration rules should take the form and have the flexibility of recommendations. Pending final decision of the Working Group on this matter, the text remains in the form of model regulations. If the Working Group decides that the text should take the form of recommendations, the definitions may need to be placed in the commentary and each article preceded by the words “The regulations should provide that ...” with appropriate adjustments in the text to refer to recommendations rather than to regulations.]

I. General

Article 1: Definitions

The definitions contained in the law apply also with respect to these regulations subject to the following additions or modifications:

(a) “Address” means: (i) a physical address, including a street address and number, city, postal code and State; (ii) a post office box number, city, postal code and State; or (iii) a mailing address that is equivalent to (i) or (ii);

(b) “Amendment” means the addition of new information that indicates changes to the information contained in the registry record and includes: (a) the extension of the duration of effectiveness of a registration (renewal of a registration); (b) where two or more secured creditors or grantors are identified in the registered notice, the deletion of a secured creditor or grantor identifier; (c) where one secured creditor or grantor is identified in the registered notice, the deletion of the secured creditor or grantor identifier and the addition of a new secured creditor or grantor identifier; (f) the addition or deletion of encumbered assets, including assets identified by serial number; (g) the modification of the identifier of the grantor; (h) the modification of the identifier of the secured creditor; (i) the assignment of the secured obligation by the secured creditor; (j) the subordination by the secured creditor; (k) the subrogation of a secured creditor’s right; (l) the modification of the address of a grantor or secured creditor; and (m) the modification in the maximum monetary amount for which the security right may be enforced (if applicable);

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that, in line with the draft model regulations: (a) “amendment” means the change and the result of the change of the information in a notice entered in the registry record; and (b) the communication by which an amendment is made is expressed with the term “amendment notice”. The Working Group may also wish to consider adding to or referring in the commentary to the rules of interpretation discussed in paragraphs 17 and 19 of section B, Terminology and interpretation of the Introduction to the Guide (with respect to the meaning of the words “or”, “including”, that the singular includes the plural and vice versa, etc.)]

(c) “Law” means the law governing security rights in movable assets;

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that the law meant here is the law based on the recommendations of the Guide.]

(d) “Notice” means a communication in writing (paper or electronic) that includes information related to a potentially existing security right that is submitted to the registry or entered in the registry record, in order to effect a registration, or amend or cancel information in the registry record;¹

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that the Guide uses: (a) the term “notice” in the sense of a

¹ See term “notice” in the introduction, section B, terminology and interpretation of the *Guide*.

communication (for example, a form or screen) used to transmit information to the registry; (b) the term “information contained in a notice” or “the content of the notice” (see rec. 54 (d) and 57); (c) the term “registry record” in the sense of information in a notice once this information has been accepted by the registry and entered into the database of the registry that is available to the public (see rec. 70); and (d) the term amendment or cancellation notice to reflect a communication intended to amend or cancel information in a notice once entered in the registry record (see recs. 72-75). The draft model regulations use these terms in the same sense.]

(e) “Registrant” means the person that enters information in a notice to be registered;

[Note to the Working Group: The Working Group may wish to note that this definition has been revised to ensure that a courier or other person that merely transmits a notice filled out by someone else is not treated as a registrant. The definition is intended to cover any person that fills out a notice, whether the initial, an amendment or a cancellation notice. The Working Group may wish to note that the registrant may be the secured creditor or a person acting on behalf of the secured creditor.]

(f) “Registrar” means the natural or legal person appointed pursuant to the law and these regulations to supervise and administer the operation of the registry;

(g) “Registration” means the entry of information in a notice into the registry record [and includes the amendment and the cancellation of information in the registry record];

[Note to the Working Group: The Working Group may wish to consider whether the text within square brackets is necessary, in particular as the term “notice” includes an amendment or cancellation notice.]

(h) “Registration number” means a unique number allocated to each registered notice by the registry that is permanently associated with such notice;

(i) “Registry record” means the information in all registered notices that is stored electronically in the registry database [or manually in paper files of the registry];

[Note to the Working Group: Noting that, in line with recommendation 70, article 26, paragraph 8, refers to “registry records”, the Working Group may wish to consider whether the commentary should clarify that: (a) the term “registry record” refers to the information relating to an initial notice and any subsequent amendment, while the term “registry records” refers to information relating to all notices registered; or (b) the term “notice” should be defined to include any associated amendment, while the term “registry record” or “registry records” should refer to the information relating to all registered notices.]

(j) “Serial number” means:

(i) In the case of a motor vehicle, the vehicle identification number marked or attached to the body frame by the manufacturer;

(ii) In the case of an aircraft frame and an aircraft engine, [the current and, if different, intended aircraft nationality and registration marks assigned pursuant

to the Convention on International Civil Aviation, 1944, by the relevant authority, as well as] the manufacturer's serial number and model designator; and

(iii) In the case of a trailer, a mobile home, tractor, railway rolling stock, a boat or a boat motor, the serial number marked on or attached to the asset by the manufacturer [or any serial number assigned to an asset by a Government authority]; and

(k) "Serial number assets" means a motor vehicle, a trailer, a mobile home, tractor, an aircraft frame, an aircraft engine, railway rolling stock and a boat and boat motor.]

[Note to the Working Group: The Working Group may wish to consider whether: (a) all four identifiers in subparagraph (j) (ii) should be retained as constituting the serial number, as this approach would put an undue burden on the registrant to get all of them right, increase the cost of the registry system (since four different fields to enter this information would have to be designed) and complicate searches; (b) the exact meaning of the terms "motor vehicle", "aircraft frame", "aircraft engine" and the other types of serial number assets mentioned above should be left to the law of each enacting State or whether indicative definitions should be included here; and (c) the term "serial number" should be defined by reference to the serial number assigned to an asset by a manufacturer or a Government authority (but not both as this would put an undue burden on the registrant). Definitions (k) and (l) (as well as articles of the draft Model Regulations that refer to them) appear within square brackets as the law recommended in the Guide does not refer to serial number indexing (although the commentary of the Guide does, see chap. IV, paras. 31-36). As serial number indexing is used in a number of States, the Working Group may wish to consider whether it should be referred to only in the commentary of the draft Registry Guide or also in the draft model regulations. In addition, the Working Group may wish to identify other matters dealt with in the draft model regulations but not in the recommendations of the Guide and consider whether these matters should be addressed in the draft model regulations.]

II. Registry and registrar

[Note to the Working Group: The Working Group may wish to note that the draft model regulations address several different sorts of issues. Articles 2-3 address the establishment of the registry and the appointment of the registrar. Articles 4-9 address access to the registry services. Articles 3, alternative B, paragraphs 2 and 3, 7, 8, 10, paragraph 3, 12, 13, 16, 17, paragraph 1, 25 and 30 reiterate provisions of the law because of their importance as a reminder of issues that should be addressed in the law or in the draft model regulations; and (d) the rest of the articles of the draft model regulations address procedural registration matters. The Working Group may wish to consider whether regulations that summarize or paraphrase the secured transactions law should be retained as regulations or placed in commentary and, if they are retained as regulations, whether they should explicitly indicate that they are reiterating provisions of the secured transactions law that are relevant to the operation of the registry rather

than creating new rights or obligations. The Working Group may wish to consider identifying criteria that could assist in this effort as it works through each particular case.]

Article 2: The registry

The registry is established for the purposes of receiving, storing and making available to the public information relating to security rights in movable assets pursuant to the law and these regulations.

Article 3: Appointment [and duties] of registrar

Alternative A

[The entity or person authorized by the law] designates the natural or legal person to supervise and administer the operation of the registry, and [regulates] that person's powers and duties in accordance with the law and these regulations.

Alternative B

1. [The natural or legal person authorized by the law] designates the natural or legal person to supervise and administer the operation of the registry, and [regulates] that person's powers and duties in accordance with the law and these regulations.

2. The registry requests and maintains the identity of the registrant but may not require verification of its identity or the existence of authorization for registration of the notice or conduct further scrutiny of the content of the notice.

[Note to the Working Group: The Working Group may wish to note that paragraph 2 is consistent with recommendation 54, subparagraph (d). However, as in several modern systems verification of the registrant's identity (at least, as part of establishing a user account where user accounts are normal practice) is very important, the Working Group may wish to consider referring to verification of the registrant's identity, at least, in the commentary. Systems require verification of the identity of a registrant in order to address fraudulent registrations. They also require verification in the case of person seeking to amend or cancel a registration to ensure that that person is authorized. In some systems, to ensure such identity verification, a number is issued to the registrant by the registry, and amendments and cancellations can be made only with the use of that number to avoid making the registry system vulnerable to abuse. The Working Group may also wish to consider that paragraph 2 that does not require verification of the registrant's identity of a registrant is consistent with article 6, paragraph 3. There is a difference between the one-time identity verification as a condition of establishing a user account, on the one hand, and verification of the identity for the purposes of accepting every individual notice for registration. While the latter is expressly prohibited by the Guide, the former is not addressed but it is reasonable to require such one-time verification.]

[3. The registry must:

(a) Index information [or otherwise organize it so as to make it searchable] entered in the registry record according to article 14 of these regulations;

- (b) Provide a record of the registration to registrant as soon as the registration information is entered into the registry record;
- (c) Send promptly a copy of any changes to the information in a registered notice to the person identified as the secured creditor in the notice;
- (d) Remove information from the registry record that is available to the public upon the expiry of the term of registration or pursuant to a judicial or administrative order;
- (e) Retain in the registry record cancelled information with a specification that it is cancelled and remove it from the registry record only upon the expiry of the term of registration;
- (f) Archive information removed from the registry record that is accessible to the public for a period of [20] years in a manner that enables the registry to retrieve that information; and
- (g) Keep the user details confidential.]

[Note to the Working Group: The Working Group may wish to note that alternative A deals only with the appointment of the registrar, while alternative B deals also with the registrar's duties. The Working Group may also wish to note that alternative B, paragraph 3, sets forth in detail the role of the registry drawing on recommendations 54, subparagraph (d), 55, subparagraphs (b), (d) and (e), and draft Model Regulations 8, paragraph 1, 14, paragraph (1), 15, paragraph (3), and 17, paragraph (2). If alternative B is retained the articles of the draft Model Regulations may need to be revised to avoid any repetition or inconsistency. The advantage of listing the role of the registry is clarity and transparency in the regulations as to the role of the registry. The possible disadvantage is that such a list may appear but not be comprehensive or may be limiting where it should not be. An alternative approach might be to retain alternative A and explain the role of the registry in the commentary of the draft Registry Guide. In subparagraph 3 (b), reference is made to indexing in accordance with recommendation 54, subparagraph (h). Indexing is generally used and commercially available database programs come with an indexing functionality. The commentary explains that it is possible to organize information so as to allow searches without an index (for example, by using a free text or wild card searching with key words). While there may be no registry of security rights that uses this type of search logic as an official search logic, some registries that have a debtor-based index provide in addition unofficial or wild card searches with key words.]

III. Access to the registry services

Article 4: Public access to the registry services

Any person is entitled to have access to the registry services in accordance with the law and these regulations.

Article 5: Operating hours of the registry

1. Each office of the registry is open to the public [specify days and hours]. Registry office locations and opening hours are published on the registry's website and opening hours of each office are posted at that office.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that days and hours may be specified by separate administrative instructions and that the minimum registry office hours should be the usual business hours in that jurisdiction. Where the registration of paper notices is foreseen, the time for receiving paper notices may be set independently from the business hours. For example, the office may close at 17.00 but all notices must be received by 16.30 so that the registry has sufficient time to enter the information into the registry record.]

2. Electronic access to the registry services is generally available [continuously] [24 hours a day, 7 days a week, 365 or 366 days a year].

3. Notwithstanding paragraphs 1 and 2 of this article, the registry may suspend access to registry services in whole or in part for maintenance purposes or when circumstances arise that make it impossible or impractical to provide access. Notification of the suspension of access to the registry services and its expected duration is published in advance when feasible and as soon as reasonably possible on the registry's website and posted at the offices of the registry.

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that, in the case of an electronic registry, access to services may be suspended automatically (for example, when the Internet network goes down and electronic searches and registrations become unavailable or war, fire, etc. breaks out). The Working Group may also wish to note that the commentary will address the issue of liability of the registry as a matter of law. The secured transactions law may foresee liability of registry staff for loss or damage suffered by a registry user as a result of negligence, gross negligence or wilful conduct on the part of the registry staff in general or in the case of specified situations (e.g. information submitted in a paper notice was entered erroneously into the registry record by the registry staff) or that the registry staff are exonerated from any liability. Alternatively, the matter may be left to general law.]

Article 6: Access to registration services

1. A person is entitled to register a notice in accordance with the law, these regulations and the terms and conditions of use of the registry, if that person has:

- (a) Identified itself as required by the law and article 21 of these regulations;
- (b) Tendered payment for the service requested or has otherwise made arrangements to pay the registry fees prescribed in article 33[, if any];
- (c) Provided the information required by the law and these regulations.

2. A person is entitled to register a notice electronically by complying with the requirements referred to in paragraph 3 of this article or using the paper form attached to these regulations.

[Note to the Working Group: The Working Group may wish to note that, in line with recommendation 54, subparagraph (j), paragraph 2, accommodates the possibility of registration of a paper notice, although many modern registries provide for electronic access only. However, while this recommendation accommodates paper registration, the Guide recommends electronic registration if possible.]

3. A person that wishes to register a notice electronically must:

(a) Establish a user account pursuant to which the identity of the user has been established [or otherwise establish his or her identity], fill out a form electronically or follow any other method prescribed by the registry and make arrangements for the payment of any fees prescribed under these regulations[, if any]; and

[Note to the Working Group: The Working Group may wish to retain the text in square brackets, as many modern electronic registries permit registration by someone who does not have a user account but who establishes his or her identity and provides for payment by a credit card. This is in line with the principle of free access to the registry enshrined in the Guide and is also a very important feature in particular in the case of consumer transactions.]

(b) Comply with the terms and conditions of use of the registry.

[4. A natural person that wishes to register a notice using the paper form attached to these regulations must identify himself or herself as the registrant. A natural person that wishes to register a notice on behalf of a legal person using the paper form attached to these regulations must identify himself or herself as the registrant and representative of the legal person.]

[Note to the Working Group: The Working Group may wish to note that: (a) the commentary will explain that, according to recommendation 54, subparagraph (i), a State may decide to charge no fees and that, if any fees are charged, they should be set at a cost-recovery level (see also article 33 of the draft model regulations); and (b) rules relating to registration may be in the form of: (i) provisions of the secured transactions or other law; (ii) regulations; and (iii) separate administrative instructions, including the terms and conditions of use of the registry (for example, those users wishing to have access through a user account, a user account agreement must be entered into).]

Article 7: Access to searching services

Any person may conduct a search and request a search certificate in accordance with the law and these regulations[, without having to provide any reasons for the search or the search certificate,

Option A

or having to pay any fees].

Option B

provided that arrangements are made for the payment of search fees].

[Note to the Working Group: The Working Group may wish to consider whether the text within square brackets should be retained. An argument for its deletion may be that it is superfluous as is covered in recommendation 54, subparagraph (g), and reference to the law recommended in the Guide is already made in the article. An argument for its retention is that it is sufficiently important to be repeated in the draft model regulations (as is done with a number of other matters). The Working Group may also wish to note that the commentary will explain that, according to recommendation 54, subparagraph (i), a State may decide to charge no fees and that, if any fees are charged, they should be set at a cost-recovery level (see also article 33 of the draft model regulations).]

Article 8: Authorization and presumption as to the source of a notice

1. Registration has to be authorized by the grantor. However, the registry may not request such authorization. [Any person asserting rights on the basis of the existence of authorization or the lack thereof has to prove it.]
2. A notice registered by a person using the assigned user account is deemed to have been effected by the person to whom the user account has been assigned by the registry.

[Note to the Working Group: With respect to paragraph 1 of this article, which would apply irrespective of the form of submission, whether electronic or paper, the Working Group may wish to note that, under recommendations 54, subparagraph (d) and 55, subparagraph (b), the registry may request but need not verify the identity of the registrant. Accordingly, if someone submitted a notice without authorization or otherwise fraudulently and that resulted in harm to the grantor or the secured creditor, they would have to prove that the registrant had no authority to effect the notice. However, this would be done outside of the registry system. The function of the registry is to do what is set forth in the recommendations mentioned above. Whether or not the registrant had authority to submit a notice, whether the submission could be attributed to a user account holder seems to be outside the scope of the draft model regulations. As a result, the Working Group may wish to consider whether paragraph 1 of this article, and in particular the wording within square brackets, should be retained in the draft model regulations or simply discussed in the commentary. With respect to paragraph 2 of this article, the Working Group may wish to consider its formulation after agreeing on the formulation of article 3 (as there is overlap between the two articles) and note that for user account holders an additional way to identify the source from which the notice came makes sense because the notice is traceable to a user account. The Working Group may also wish to note that the obvious obligation of any user to keep user information confidential is a matter for the user agreement that a person signs when she or he opens a user account with the registry. User agreements would also specify that the user has a duty to notify the registry if she or he believes that her user details have been compromised.]

Article 9: Rejection of a notice or search request

1. A notice or search request may be rejected if:
 - (a) It is not communicated to the registry in one of the authorized media of communication (paper or electronic); or

(b) The information in the notice or the search request is incomplete with respect to required information or illegible; or

(c) Otherwise does not comply with the requirements of the law and these regulations, including where it is not accompanied by the required fee, if any.

2. A message and grounds for rejection must be provided to the registrant or searcher as soon as practicable.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) article 9 deals with the question whether the registry may reject a notice or search request; and (b) article 15 deals with the question whether the registry may remove from the record information already registered; (c) the registry may reject non-conforming requests submitted in paper form, while an electronic registry will be designed so as to reject automatically non-conforming requests; and (d) in the case of an electronic registry, the reasons for the rejection of registration or search will be immediately displayed to the user.]

IV. Registration

Article 10: Date and time of registration

1. The registry records the date and time of each registered notice, as provided under paragraphs 2 and 3 of this article, and assigns a registration number to each registered notice.

2. The registry must enter in the registry record and index [or otherwise organize] notices in the order they were received.

3. The registration of a notice is effective from the date and time when the information in the notice is entered into the registry record so as to be available to searchers of the registry record.

[Note to the Working Group: The Working Group may wish to note that the commentary explains that article 10 is intended to provide a basis for the application of a rule along the lines of recommendation 70, which is included in paragraph 3 of this article (it may be retained in the draft regulations because of its importance or simply discussed in the commentary). The date and time when information in a notice becomes available to searchers may be different from the time the notice was received (in particular where paper notices are submitted by registrants and entered into the registry record by the registry), but must follow the order in which the notice was received by the registry (that is, a notice received on 1 January at 08:00 am must become available to searchers before a notice received by the registry on the same date at 08:01 am). If as a result of negligent or wilful conduct or malfunction of the registry, a registrant loses its priority, the registry may be liable to the registrant for damages. In the case of an acquisition security right, if a notice is registered within the time period specified in the law, the acquisition security right obtains priority even over a previously registered non-acquisition security right (see recommendation 180, alternative A, subparagraph (a) (ii)). Thus, where the registry enters the information in a notice into the registry record and if the law requires that the notice specifies that it relates to an acquisition security right (the Guide does not require that), it is important that

this be done within the time period specified in the law for registration of an acquisition security right. Otherwise, as a matter of the law of the enacting State (the Guide does not address this issue), the registry may be liable for damages sustained by a registrant as a result of loss of priority.]

Article 11: Duration and extension of registration

Option A

1. A registration is effective for the period of time specified in the law.
2. The period of effectiveness of a registration may be renewed by the registrant for an additional period of time equal to the initial period specified in the law at any time before the registration expires.

Option B

1. A registration is effective for the period of time indicated by the registrant in the notice.
2. The period of effectiveness of a registration may be renewed by the registrant for an additional period of time indicated in the renewal notice at any time before the registration expires.

[Note to the Working Group: The Working Group may wish to note that the commentary explains that, whether a State enacts option A or B, the rules applying to the calculation of the periods in national law will apply to the period of effectiveness of a registration, unless the secured transactions law provides otherwise. For example, national law may provide that where the calculation is from the day of registration or from the anniversary of the day of registration, a year runs from the beginning of that day.]

Option C

1. A registration of an initial notice is effective for the period of time indicated by the registrant in the notice, not exceeding [20] years.
2. The period of effectiveness of a registration may be renewed by the registrant, at any time before the registration expires, for an additional period of time indicated in the renewal notice, not exceeding [20] years.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, where the law requires the registrant to enter the duration of a notice, the requirement is a mandatory requirement. This means that, if the duration is not entered in the notice, the notice will likely be rejected. The Working Group may wish to consider whether the registry may be designed to automatically include a certain duration, if the registrant fails to do so. If the Working Group considers this approach desirable and feasible, it may include a default rule along the following lines: “When no period of time is indicated in the notice, the registration is effective for [5] years”. The commentary will also explain that, while in option A the renewal period is specified in the law, in options B and C, the renewal period can be specified by the registrant in the renewal notice. A renewal extends the duration of the registration so that effectiveness is continuous (see article 26, para. 7). The Working Group may also wish to note that option B

may be consistent with recommendation 69 but is not realistic because unless there is a control mechanism all registrations will be effective for infinity. Arguably, it is one thing to give flexibility to registrants to choose the duration of the period of effectiveness of a registration, but it is quite another thing to permit this choice without some control. Some modern systems provide for infinity registrations but charge a very large registration fee to control abuse. In addition, in such systems, fees are calculated on a per year basis, thus discouraging overreaching in the choice of the duration of the period of effectiveness of a registration. If option B is retained, the Working Group may wish to consider including these considerations in the commentary.]

Article 12: Time when a notice may be registered

A notice with respect to a security right may be registered before or after the creation of the security right or the conclusion of the security agreement. Authorization by the grantor must be in writing but may be given before or after registration. A written security agreement is sufficient to constitute authorization.

[Note to the Working Group: The Working Group may wish to note that article 12 has been revised to be aligned more closely with recommendations 67 and 71.]

Article 13: Sufficiency of a single notice

A registration of a single notice is sufficient to achieve third-party effectiveness of one or more than one security right, 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 note that, as mentioned in the note above article 2, articles 12 and 13 deal with matters that are typically settled in the law (see recommendations 67, 68 and 71). The Working Group may wish to consider whether they should be retained in these draft model regulations in view of their importance as a reminder of issues that should be addressed in the law or the model regulations, or simply discussed only in the commentary.]

Article 14: Indexing of notices

1. Registered notices are indexed [or otherwise organized so as to become searchable] according to the grantor identifier as provided in the law and these regulations.

[2. A registered notice relating to security rights in serial number assets is [also] indexed [or otherwise organized so as to become searchable] according to the serial number of the asset in addition to the grantor identifier, as provided in the law and these regulations.]

3. All amendment and cancellation notices are [indexed] [organized and become searchable] in a manner that associates them with the initial notice.

[Note to the Working Group: The Working Group may wish to note that what matters is the result, that is, that information is organized and becomes searchable. This result may be achieved with or without an index. The Working Group may also

wish to note that articles 14, paragraph 2, 23 and 32, subparagraph (b), appear within square brackets for the consideration of the Working Group in view of the widespread use and importance of serial number indexing (in addition to grantor indexing) in greatly enhancing the reliability and ease of indexing and searching, although the recommendations of the Guide do not refer to serial number as an indexing and search criterion (although the commentary does, see the Guide, chap. IV, paras. 31-36). Another matter that was not addressed in the recommendations of the Guide and the Working Group may also wish to consider because of its importance in the efficient operation of a registry is whether notices should also be indexed in a manner that makes them retrievable according to the secured creditor identifier for the purposes of internal searches of the registry record by the registry staff and of making global amendments (see article 27).]

Article 15: Change, addition, deletion, removal or correction of information in the registry record

1. Subject to paragraphs 2-5 of this article, the registry may not change, delete or add any information in the registry record.
2. The registry may remove information from the registry record accessible to the public only:
 - (a) Upon the expiry of the duration of the registration; or
 - (b) Pursuant to a judicial or administrative order.
3. Information removed from the registry record accessible to the public must be archived for a period of [20] years in a manner that enables the information to be retrieved by the registry.
4. Information contained in a notice that has been cancelled may be retained in the registry record along with the cancellation notice and may be removed from the registry record accessible to the public only upon the expiry of the duration of the registration, as provided in subparagraph 2 (a), of this article.
5. Where information submitted to the registry in paper form is entered in the registry record by the registry, the registry may correct errors that it made in the process of entering information in the registry record.

[Note to the Working Group: The Working Group may wish to note that the commentary will make it clear that the registry may not change the specific text of a record. Subsequently, an amendment will change the substance of the registry record through another notice, but it will never change the text of the initial notice. Under recommendation 74, when the time of effectiveness of a registered notice has expired or a notice has been cancelled, the registry may remove information from the record accessible to the public and archive it so as to be capable of retrieval if necessary. The Working Group may also wish to note that, following the approach followed in many States, article 28, paragraph 2, of the draft model regulations provides that the information in expired or cancelled notices may be retained in the registry record available to the public with an indication that it has expired or cancelled. The Working Group may also wish to note that paragraph 5 of this article is intended to ensure that the registry may correct errors made in entering into the record information submitted in a paper form (correctness of the information on the form being the responsibility of the registrant), but may not scrutinize and correct

information entered by a registrant electronically, as this would run counter to recommendation 54, subparagraph (d), which is intended to limit the role of the registry and accordingly the scope of error and liability for error. The registry may effectuate the change correcting its error by registering a correction form that identifies the clerk making the corrections and the corrections made. Furthermore, the Working Group may wish to clarify what constitutes a “correction” and consider the question whether a “correction” may change the order of priority.]

V. Registration information

Article 16: Responsibility with respect to the information in a notice

1. It is the responsibility of the registrant to ensure that the information in the notice is accurate and complete.
2. The registry does not verify the identity of the registrant, the accuracy or legal sufficiency of information in the notice, determine whether a registration has been authorized or conduct further scrutiny of the notice.

Article 17: Information required in a notice

1. To enter information in the registry record, a registrant is required to provide in the appropriate field in a notice the following information:
 - (a) The identifier and address of the grantor, as required in articles 18-20;
 - (b) The identifier and address of the secured creditor or its representative, as required in article 21;
 - (c) A description of the encumbered assets, as required in articles 22-25;
 - (d) The duration for which the registration is to be effective, as required in article 11²; and
 - (e) The maximum monetary amount for which the security right may be enforced].³
2. The information in the notice must be expressed in the language specified in the law.
3. If there is more than one grantor, the required information must be provided separately for each grantor, in one notice in the case of joint owners of the same encumbered assets[, and in a separate notice for each grantor in the case of several sole owners of the encumbered assets].
4. If there is more than one secured creditor, the information must be provided separately for each secured creditor, in one notice in the case of joint creditors in one or more security agreement among the same parties[, and in a separate notice for each secured creditor in the case of more than one security agreement among different parties]. However, each secured creditor may provide the name of a

² If the Law allows it (see recommendation 69).

³ If the Law allows it (see recommendation 57 (d)).

representative and more than one secured creditor may provide the name of a common representative.

5. For the purposes of articles 18-21, the grantor and the secured creditor identifier is determined as of the time of the registration.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) if the information is entered in the inappropriate field (e.g. the grantor identifier is entered in the secured creditor field), a notice that contains otherwise correct and sufficient information may be ineffective; (b) the registry would need to be able to rely on a set of rules for the transliteration of names with foreign characters in the alphabet of the official language(s) of the enacting State; and (c) naming conventions of the enacting State would apply; and (d) the registry system should be designed so that a search of the identifier of any grantor with any ownership interest in the encumbered assets would reveal the registered notice in which all of the other grantors would be identified. The Working Group may wish to consider whether the text within square brackets in paragraph 3 is necessary, as it seems to state the obvious.]

Article 18: Grantor identifier (natural person)

1. For the purposes of article 17, if the grantor is a natural person, the grantor identifier is:

Alternative A

the name of the grantor. Where required, additional information, such as the birth date or the personal identification number issued to the grantor by the enacting State, may also be provided. Where the grantor has not been issued a personal identification number by the enacting State, the grantor identifier is the grantor's name.

Alternative B

the name of the grantor [and] [or] the personal identification number issued to the grantor by the enacting State. Where the grantor has not been issued a personal identification number by the enacting State, the grantor identifier is the grantor's name.

2. For the purposes of article 17 and paragraph 1 of this article:

(a) Where the grantor is a natural person whose name includes a family name and one or more given names, the name of the grantor consists of the grantor's family name and the grantor's first and second given names; and

(b) Where the grantor is a natural person whose name consists of only one word, the name of the grantor consists of that word.

3. For the purposes of article 17 and paragraph 1 of this article, the name of the grantor is determined as follows:

(a) If the grantor was born and the grantor's birth is registered in [the enacting State] with a government agency responsible for the registration of births, the name of the grantor is the name as stated in the grantor's birth certificate or equivalent document issued by the government agency;

(b) If the grantor was born but the grantor's birth is not registered in [the enacting State], the name of the grantor is the name as stated in a valid passport issued to the grantor [by the enacting State];

(c) If neither (a) nor (b) applies, the name of the grantor is the name stated in an official document, such as an identification card or driver's licence, issued to the grantor by [the enacting State];

(d) If neither (a), nor (b), nor (c) applies but the grantor is a citizen of [the enacting State], the name of the grantor is the name as stated in the grantor's certificate of citizenship;

(e) If neither (a), nor (b), nor (c), nor (d) applies, the name of the grantor is the name as stated in a valid passport issued by the State of which the grantor is a citizen and, if the grantor does not have a valid passport, the name of the grantor is the name as stated in the birth certificate or equivalent document issued to the grantor by the government agency responsible for the registration of births at the place where the grantor was born;

(f) In a case not falling within subparagraphs (a) to (e) of this paragraph, the name of the grantor is the name as stated in any two official documents, such as an identification card or a social security or health insurance card, issued to the grantor by the enacting State.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) this article deals with the grantor's identifier (indexing and search criteria are dealt with in article 32); (b) in line with recommendation 59, alternative A of paragraph 1 provides that the principal grantor's identifier is the grantor's name and foresees additional grantor identification criteria (error with respect to the grantor identifier is treated differently from error in additional criteria, see recommendations 58 and 64); and (c) according to alternative B of paragraph 1, both the name and number constitute the grantor identifier and both must be entered correctly, otherwise the rule in recommendation 58 would apply.]

Article 19: Grantor identifier (legal person)

1. For the purposes of article 17, if the grantor is a legal person, the grantor identifier is

Option A

the name of the legal person, that appears in the document constituting the legal person.

Option B

the name of the legal person that appears in the document constituting the legal person [and] [or] the identification number assigned to the legal person by [the enacting State] [the State under whose authority the relevant registry is organized] pursuant to the law on [...],

Alternative A

including the abbreviation which is indicative of type of body corporate or entity, such as S.A., “Ltd”, “Inc”, “Incorp”, “Corp”, “Co”, as the case may be, or the words Société Anonyme, “Limited”, “Incorporated”, “Corporation”, “Company”;

Alternative B

with or without the abbreviation which is indicative of type of body corporate or entity, such as S.A., “Ltd”, “Inc”, “Incorp”, “Corp”, “Co”, as the case may be, or the words “Limited”, “Incorporated”, “Corporation”, “Company”.

[Note to the Working Group: The Working Group may wish to note that the note to article 18 applies to options A and B of paragraph 1 of this article.]

Article 20: Grantor identifier (other)

1. For the purposes of article 17:

(a) If the grantor is the estate of a deceased person or an administrator acting on behalf of the estate, the grantor identifier is the name of the deceased person in accordance with article 18, with the specification in a separate field that the grantor is an estate or an administrator acting on behalf of the estate;

(b) If the grantor is a trade union that is not a legal person, the grantor identifier is the name of the trade union that appears in the document constituting the trade union; [where required, additional information, such as the name of each person representing the trade union in the transaction giving rise to the registration, may be provided in accordance with article 18];

(c) If the grantor is a trust or a trustee acting on behalf of the trust, and the document creating the trust designates the name of the trust, the grantor identifier is the name of the trust in accordance with article 18, with the specification in a separate field that the grantor is a “trust” or a “trustee”;

(d) If the grantor is a trust or a trustee acting on behalf of the trust, and the document creating the trust does not designate the name of the trust, the grantor identifier is the identifier of the trustee in accordance with article 18, with the specification in a separate field that the grantor is a “trust” or a “trustee”;

(e) If the grantor is an insolvency representative acting for a natural person, the grantor identifier is the name of the insolvent person in accordance with article 18, with the specification in a separate field that the grantor is insolvent;

(f) If the grantor is an insolvency representative acting for a legal person, the grantor identifier is the name of the insolvent legal person in accordance with article 19, with the specification in a separate field that the grantor is insolvent;

(g) If the grantor is a participant in a syndicate or joint venture, the grantor identifier is the name of the syndicate or joint venture as stated in the document creating it; [where required, additional information, such as the name of each participant may also be provided in accordance with article 18 or 19, as the case may be;]

(h) If the grantor is a participant in an entity other than one already referred to in the preceding rules, the grantor identifier is the name of the entity as stated in

the document creating it[; where required, additional information, such as the names of each natural person representing the entity in the transaction to which the registration relates, may also be provided in accordance with article 18].

2. For the purposes of this article, a representative (other than an insolvency representative) is a natural person who has the power to bind the legal person or its officers or members and who has exercised that power in relation to the transaction to which the registration relates.

Article 21: Secured creditor identifier

1. For the purposes of article 17:

(a) If the secured creditor is a natural person, the identifier is the name of the secured creditor in accordance with article 18;

(b) If the secured creditor is a legal person, the identifier is the name of the secured creditor in accordance with article 19; and

(c) If the secured creditor is a kind of person described in article 20, the identifier is the name of the person in accordance with article 20.

2. If the registrant enters, instead of the identifier and address of the secured creditor, the identifier and address of a representative of the secured creditor, paragraph 1 of this article applies to the identifier of the representative of the secured creditor.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that there will be a single field in the notice in paper or electronic form to identify the “secured creditor”, whether the actual secured creditor or its representative (that is, a natural person, or a member or representative of a syndicate of banks).]

Article 22: Description of encumbered assets

1. For the purposes of article 17, the description of the encumbered assets, including proceeds, in the notice may be specific or generic as long as it reasonably allows the assets to be identified.

2. Unless otherwise provided in the law, a generic description that refers to all assets within a generic category of movable assets or to all of the grantor’s movable assets includes assets within the specified category to which the grantor acquires rights at any time during the period of effectiveness of the registration.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that additional information may be provided in the form of an attachment to a notice to identify the assets in more detail or if additional space is needed. This is particularly useful or necessary in registry systems that are designed to permit that a limited number of characters be entered in the relevant fields of a notice.]

[Article 23: Description of encumbered serial number assets]

For the purposes of article 17, if the encumbered assets are serial number assets not held by the grantor as inventory, the serial number and the type of serial number asset must be indicated in the appropriate field in the notice.]

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) the serial number (e.g. XYZ456789) and the serial number asset type (e.g. vehicle) is sufficient without providing further details (e.g. Toyota Corolla, 2009 model, etc.); and (b) the consequences of a failure of a registrant to set out the serial number and the serial number asset type in the notice is a matter of the law and there are different approaches followed in the various legal systems.]

Article 24: Description of encumbered attachments to immovable property

A registrant may register a notice of a security right in attachments to immovable property in the general security rights registry according to the law and these regulations or in appropriate immovable property registry office of this State in accordance with the regime that governs such registration.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) article 22 deals with the description of the encumbered assets in the notice (including attachments to immovable property); and (b) if the regime governing registration in an immovable property registry does not permit registration of notices, it may need to be revised to permit registration of notices relating to potential security rights in attachments to immovable property (see Guide, chap. III, para. 104).]

Article 25: Incorrect or insufficient information

1. A registration is effective only if it provides the grantor's correct identifier as set forth in articles 18-20 or, in the case of an incorrect statement of the identifier, if the notice would be retrieved by a search of the registry record using the correct grantor identifier.

[2. A registration covering a serial number asset is effective only if it provides the correct serial number as set forth in article 23 or, in the case of an incorrect statement, if the notice would be retrieved by a search of the registry record using the correct serial number.]

3. Except as provided in paragraphs 1 [and 2] of this article, an incorrect or insufficient statement of the information required to be entered in the registry record under these regulations, or in the manner of its entry, does not render the registration ineffective, unless it seriously misleads a reasonable searcher.

4. A description of encumbered assets in a registered notice that does not meet the requirements of the law or these regulations does not render a registered notice ineffective with respect to other encumbered assets sufficiently described in the notice.

[Note to the Working Group: The Working Group may wish to consider whether this article should be retained in the draft model regulations or discussed only in the commentary. Paragraph 1 addresses a matter that is dealt with in

recommendation 58; and paragraph 2 parallels recommendation 58 (and may be retained only if serial number is retained as an indexing criterion); paragraph 3 follows recommendation 64; and paragraph 4 follows recommendation 65 (and would be sufficient to cover an error in the serial number as a description requirement). A reason for retaining this article in the draft model regulations is that it addresses a very important matter that is worth drawing attention to in the draft model regulations.]

Article 26: Amendment of registered notice

1. To amend the information entered in the registry record, a registrant must provide in an amendment notice and in the appropriate field the following information:

- (a) The registration number of the notice to which the amendment relates;
- (b) The purpose of the amendment;
- (c) If information is to be added, the additional information in the manner provided by these regulations for entering information of that kind;
- (d) If information is to be changed or deleted, the new information as provided by these regulations for entering information of that kind; and
- (e) The identifier of each secured creditor authorizing the amendment.

[2. If the purpose of an amendment is to disclose a transfer of the encumbered assets to which the notice relates, the registrant must identify the transferee as a grantor in accordance with articles 18-20. If the transfer relates to only part of the encumbered assets described in the notice, the registrant has to identify the transferee as a grantor in accordance with articles 18-20 and describe the part of the encumbered assets transferred in accordance with article 22.]

3. If the purpose of the amendment is to disclose a subordination of priority of the security right to which the registered notice relates, the registrant has to describe the nature and extent of the subordination and identify the beneficiary of the subordination in the fields designated for entering such information.

4. If the purpose of the amendment is to disclose an assignment of the secured obligation, the registrant has to provide the identifier of the assignor and assignee.

5. Amendments that purport to delete all grantors and fail to provide the identifier of a new grantor, delete all secured creditors and fail to provide the identifier of a new secured creditor or delete all encumbered assets and fail to provide a description of the encumbered assets to be added to the registration are ineffective and may be rejected according to article 9.

6. Subject to article 30, a registrant may register an amendment at any time. The registration of an amendment, other than a renewal, does not extend the duration of the effectiveness of the registration.

7. An amendment is effective from the date and time when the information in a notice is entered into the registry records so as to be available to searchers of the registry record.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain the purpose of an amendment (for example, to add, change or delete information in the registry record, or renew the duration of the effectiveness of the registration) and that an amendment changing the identifier of a grantor will be indexed by adding the new identifier as if it were a new grantor. A search under either the grantor's old identifier or the grantor's new identifier will reveal the registration. The Working Group may wish to consider whether to amend or cancel a notice the registrant must identify himself or herself. In the case of registration by electronic means, the registrant who can obtain access to the registry record may not need to identify himself or herself. However, such identification may be necessary in the case of paper-based registration. The Working Group may also wish to consider whether there should be a mechanism to identify different versions of a registration. For example, an initial registration may be given the number 12345-01, the first amendment 12345-02, the third amendment 12345-03 and so on. The Working Group may also wish to consider whether, if a State chooses this option in the law (see Guide, chap. IV, paras. 78-80), in the case of a transfer of the encumbered asset (see para. 3), the transferee should be identified as the new grantor in addition to the existing grantor or whether the identifiers of both the transferor and the transferee should be retained in the publicly available registry record. Paragraph 6 is made subject to article 30, as a different rule applies in the case of a compulsory amendment of a notice.]

[Article 27: Global amendment of secured creditor information in multiple notices]

A secured creditor identified in multiple registered notices may request the registry to amend the secured creditor information in all such notices with a single global amendment.]

[Note to the Working Group: The Working Group may wish to note that article 27 appears within square brackets pending determination by the Working Group of whether there should be a secured creditor index for internal searches by the registry staff (see note to article 14).]

Article 28: Cancellation of registered notice

1. To cancel a registered notice, a registrant is required to provide in the cancellation notice and in the appropriate field the following information:

- (a) The registration number of the notice to be cancelled; and
- (b) The identifier of each secured creditor authorizing the cancellation.

2. Subject to article 30, a registrant may cancel a registered notice at any time.

[Note to the Working Group: The Working Group may wish to consider whether the grantor identifier is necessary for a registrant that has obtained access to the registry (with his/her user identification and password or otherwise, that may apply in an electronic or paper context), and has the relevant registration number. In general, the grantor identifier should not be necessary to cancel a registration. However, it may be required in order to avoid inadvertent

cancellations. Paragraph 2 is made subject to article 30, as a different rule in the case of a compulsory cancellation of a notice.]

Article 29: Copy of registration, amendment or cancellation notice

1. When a notice is registered, amended or cancelled electronically, the registry must transmit to each person identified in the notice as a secured creditor a printed or electronic copy as soon as the information in the notice is entered into the registry record.
2. Where a notice is registered, amended or cancelled otherwise than electronically, the registry is obligated to send promptly a copy to each person identified in the notice as a secured creditor at the address(es) set forth in the relevant registration, amendment or cancellation notice.
3. The registrant may obtain a copy of the registration, amendment or cancellation notice as soon as the information is entered into the registry record.
4. The registrant must send to each person identified as a grantor in a notice, within [thirty days after the registration is effected], [a printed or electronic] copy of the registration, amendment or cancellation notice, except where that person has waived in writing the right to receive it.

[Note to the Working Group: The Working Group may wish to consider whether the matter addressed in this article is a matter for the law and thus should be discussed in the commentary rather than addressed in the draft model regulations. The Working Group may also wish to note that, with respect to the waiver of rights addressed in paragraph 3 of this article, under recommendation 10 of the Guide, party autonomy applies except where otherwise provided. The relevant recommendation 55, subparagraph (c), is not among those recommendations that are not subject to party autonomy, but provides that failure of the secured creditor to meet this obligation may result in penalties and damages. The Working Group may wish to consider that a waiver of this right of the grantor should not be permitted as sending copies of registered notices to grantors is a fundamental feature of the notice-filing system and an important protection for the grantor.]

VI. Obligations of the secured creditor

Article 30: Compulsory amendment or cancellation of notice

1. Each person identified in the registered notice as a secured creditor is obliged to submit to the registry an amendment or cancellation notice, to the extent appropriate, not later than [15] days after the secured creditor's receipt of a written request by the person identified in the registered notice as the grantor if:

(a) No security agreement has been concluded between the person identified as the secured creditor and the person identified as the grantor[, or the security agreement has been revised];

(b) The security right to which the registration relates has been extinguished by payment or otherwise; or

(c) The registration has not been authorized by the grantor, [at all or to the extent described in the notice].

2. No fee or expense will be charged or accepted by the secured creditor for compliance.
3. If the person identified in the registered notice as a secured creditor does not comply in a timely manner, the person making the request is entitled to seek a cancellation or amendment through a summary judicial or administrative procedure.
4. The person identified in the registered notice as the grantor is entitled to seek a cancellation or amendment through a summary judicial or administrative procedure even before expiry of the period provided in paragraph 1, provided that there are appropriate mechanisms to protect the secured creditor.
5. Upon delivery of a judicial or administrative order ordering cancellation or amendment, the registry has to cancel or amend the registered notice.

[Note to the Working Group: The Working Group may wish to note that paragraph 1 of this article (which is based on recommendation 74 of the Guide), does not refer to the situation where there is no commitment on the part of the secured creditor to provide further credit, but this situation is covered because if there is such a commitment the security right cannot be extinguished. The Working Group may also wish to note that paragraph 1 does not refer to assets of the grantor that are not covered by the security agreement but this situation is covered because in such a case there would be no authorization by the grantor for registration of a notice relating to such unencumbered assets. Alternatively, the Working Group may wish to include language along the language contained within square brackets to clarify these matters and set out more explicitly not only the grounds for a cancellation notice, but also the grounds for an amendment notice. The Working Group may also wish to consider whether the commentary of the draft Registry Guide should refer to a different approach taken in some legal systems. Under this approach, the registered notice is cancelled automatically if the registry is informed by the grantor that the secured creditor has failed to respond to the grantor's demand in a timely manner. This approach reduces the workload of the registry staff and encourages the secured creditor to respond to amendment and cancellation requests in a timely manner. In view of the fact that secured creditors are sophisticated parties, it is considered that the risk that they will miss an amendment or cancellation demand and the registration will inadvertently be cancelled is insignificant. As to the potential for abuse of this approach by grantors, as with the potential for abuse of the registry system by secured creditors, it is left to be dealt with outside the registry system by law, including law other than secured transactions law. The commentary will also deal with the question whether the grantor may demand additional information and whether: (a) the grantor should be entitled to a limited number of responses free of charge within a specified period of time; and (b) the grantor should be entitled to damages or other remedy through a summary judicial or administrative procedure.]

VII. Searches

Article 31: Search criteria

A searcher of the registry record may request a search by using one of the following search criteria:

- (a) The grantor identifier;
- [(b) The serial number of a serial number asset;] or
- (c) The initial registration number.

Article 32: Search results

1. A search result obtained either indicates that no information was retrieved against the specified search criterion or sets forth all information that exists in the registry record with respect to the specified search criterion at the date and time when the search was performed.
2. A search result reflects information in the registry record that matches [exactly the search criterion except ...] [closely the search criterion.]
3. Upon request made by a person that has tendered or arranged for payment of any fees and used one of the search criteria set forth in article 31, the registry issues a [paper] [electronic] search certificate. The certificate reflects the search result.
4. A search certificate is admissible as evidence in a court or tribunal. In the absence of evidence to the contrary, a search certificate is proof of the registration of the notice, or the lack thereof, to which the search result relates, including the date and time of registration, if any.

[Note to the Working Group: The Working Group may wish to note paragraph 2 has been added to deal with the search logic (exact matches and exceptions or close matches). While it may be important for a registry to be designed to return close matches, this approach may be too broad. In any case, it is important for searchers to know the search logic that the registry system uses. The commentary explains that paragraph 4 is intended to provide evidence of the fact of registration and not necessarily of the information contained in the registration record.]

VIII. Fees

Article 33: Fees for registry services

Option A

1. [Subject to paragraph 2 of this article,] the following fees are payable for registry services:

- (a) Registrations:
 - (i) Paper-based [...];
 - (ii) Electronic [...];

- (b) Searches:
 - (i) Paper-based [...];
 - (ii) Electronic [...];
- (c) Certificates:
 - (i) Paper-based [...];
 - (ii) Electronic.

2. The registry may enter into an agreement with a person that satisfies all registry terms and conditions and establish a registry user account to facilitate the payment of fees.

Option B

The [specify an administrative authority] may determine the fees and methods of payment for the purposes of these regulations by decree.

Option C

The registry services are free of charge.

[Note to the Working Group: The Working Group may wish to note that, under recommendation 54, subparagraph (i), of the Guide, registry services may or may not be subject to a fee and that, if there is a fee, it should be aimed at cost recovery rather than profit level (in any case, recommendation 54, subparagraph (c), which provides for rejection of the notice if fees are not paid, would not apply to option C). The Working Group may wish to consider whether one or more of the options set forth above should be retained. In that regard, the Working Group may wish to take into account that registry services are commercial services that should not be paid by the State (that is, the taxpayers). The Working Group may also wish to note that, while regulations are normally easy to revise, in some States, a decree may be a more practical way to set registry fees. If the Working Group adopts or retains option A as a possibility, it may also wish to consider whether fees should depend on the duration of registration to more readily reflect the cost of storing the relevant information. The commentary of the draft Registry Guide may explain that article 33 is intended to set forth some possible examples and that States may wish to enact different regulations for the payment of registry fees. The commentary to option A may clarify that, if the registry is operated by the State, electronic registry services or just searches may be available without a fee or with lower fees.]

C. Report of the Working Group on Security Interests on the work of its twenty-first session (New York, 14-18 May 2012)

(A/CN.9/743)

[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 text on the registration of security rights in movable assets, pursuant to a decision taken by the Commission at its forty-third session, in 2010.¹

2. At its forty-third session, in 2010 (New York, 21 June-9 July 2010), the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at an international colloquium on secured transactions (Vienna, 1-3 March 2010), namely registration of notices with respect to security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions.² The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.³

3. The Commission's decision was based on its understanding that such a text would usefully supplement the Commission's work on secured transactions and

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 268.

² The papers presented at the colloquium are available at www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html.

³ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 264 and 273.

provide urgently needed guidance to States with respect to the establishment and operation of security rights registries. In addition, it was stated that secured transactions law reform could not be effectively implemented without the establishment of an efficient, publicly accessible security rights registry. Moreover, it was emphasized that the UNCITRAL Legislative Guide on Secured Transactions (the “Secured Transactions Guide”) did not address in sufficient detail, the various legal, administrative, infrastructural and operational questions that needed to be resolved to ensure the successful and efficient implementation of a registry.⁴ The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the Secured Transactions Guide, texts prepared by other organizations and national law regimes that introduced security rights registries similar to the registry recommended in the Secured Transactions Guide.⁵

4. At its eighteenth session (Vienna, 8-12 November 2010), the Working Group began its work on the preparation of a text on the registration of notices with respect to security rights in movable assets by considering a note by the Secretariat entitled “Registration of security rights in movable assets” (A/CN.9/WG.VI/WP.44 and Add.1 and 2). Having agreed that the Secured Transactions Guide was consistent with the guiding principles of UNCITRAL texts on e-commerce, the Working Group also considered certain issues arising from the use of electronic communications in security rights registries to ensure that, like the Secured Transactions Guide, the text on registration would also be consistent with those principles (A/CN.9/714, paras. 34-47).

5. At its nineteenth session (New York, 11-15 April 2011), the Working Group considered a note by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.46 and Add.1 to 3). At that session, differing views were expressed as to the form and content of the text to be prepared (A/CN.9/719, paras. 13-14), as well as with respect to the question whether the text should include model regulations or recommendations (A/CN.9/719, para. 46).

6. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission emphasized the significance of the Working Group’s work in particular in view of efforts undertaken by States towards establishing a registry, as well as the potential beneficial impact of such a registry on the availability and the cost of credit. With respect to the form and content of the text to be prepared, the Commission agreed that the mandate of the Working Group, leaving the specific form and content of the text to the Working Group, did not need to be modified. It was further agreed that, in any case, the Commission would make a final decision once the Working Group had completed its work and submitted the text to the Commission.⁶

7. At its twentieth session (Vienna, 12-16 December 2011), the Working Group continued its work based on a note by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.48/Add.3). The Working Group agreed that, as to the form of the text, it should be a guide (the “draft Registry Guide”) with commentary and recommendations along the lines of the Secured Transactions

⁴ Ibid., para. 265.

⁵ Ibid., para. 266.

⁶ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 225.

Guide (A/CN.9/740, para. 18). In addition, it was agreed that, where the draft Registry Guide offered options, examples of model regulations could be included in an annex to the draft Registry Guide. As to the presentation of the text, it was agreed that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive text that would be consistent with the Secured Transactions Guide, and be tentatively entitled “Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/740, para. 30). As to future work, it was agreed that, while the draft Registry Guide was an important text that was urgently needed by States, it was premature to decide to submit it, in whole or in part, to the Commission for approval at its forty-fifth session (A/CN.9/740, para. 92). It was widely felt that the Working Group should be able to consider its future work at its twenty-first session, when it expected to have a more complete overview of all the material in the draft Registry Guide. The Working Group requested the Secretariat to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group (A/CN.9/740, para. 13).

II. Organization of the session

8. The Working Group, which was composed of all States members of the Commission, held its twenty-first session in New York from 14 to 18 May 2012. The session was attended by representatives of the following States members of the Working Group: Austria, Benin, Brazil, Cameroon, Canada, Chile, China, Colombia, El Salvador, France, Gabon, Germany, India, Israel, Italy, Japan, Kenya, Mexico, Nigeria, Norway, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, South Africa, Thailand, Turkey, Uganda, United States of America and Venezuela (Bolivarian Republic of).

9. The session was attended by observers from the following States: Belgium, Croatia, Ghana, Guatemala, Indonesia, Iraq, Kuwait, Saudi Arabia and Switzerland. The session was also attended by observers from the Holy See and the European Union.

10. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: The World Bank;

(b) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Commercial Finance Association (CFA), International Insolvency Institute (III), National Law Centre for Inter-American Free Trade (NLCIFT), New York City Bar (NYCBA), New York State Bar Association (NYSBA), the European Law Students' Association (ELSA) and Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ).

11. The Working Group elected the following officers:

Chairman: Mr. Rodrigo LABARDINI FLORES (Mexico)

Rapporteur: Ms. Liv Johanne RO (Norway)

12. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.49 (Annotated Provisional Agenda), A/CN.9/WG.VI/WP.50 and Addenda 1-2 (Draft Technical Legislative Guide on the Implementation of a

Security Rights Registry), A/CN.9/WG.VI/WP.48 and Addenda 1-2 (Draft Security Rights Registry Guide).

13. 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. Registration of security rights in movable assets.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group considered a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/WG.VI/WP.50 and Add.1-2). The deliberations and decisions of the Working Group are set forth below in chapters IV and V. The Secretariat was requested to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group.

IV. Registration of security right in movable assets

A. General

15. Recalling its decision that the text to be prepared should take the form of a guide such as the Secured Transactions Guide (A/CN.9/740, para. 18), the Working Group decided to begin its deliberations with the terminology and recommendations of the draft Registry Guide (A/CN.9/WG.VI/WP.50 and Add.1). As to the question whether the draft Registry Guide should include examples of model regulations, the Working Group decided to postpone its consideration until it had completed its review of the recommendations.

B. Terminology and recommendations (A/CN.9/WG.VI/WP.50 and Add.1)

16. With respect to the term “amendment”, it was agreed that the deletion of information contained in a notice should be qualified so as not to amount to cancellation of the notice. It was also agreed that the term “cancellation” should also be explained.

17. With respect to the term “grantor”, it was agreed that, to avoid any confusion in view of the fact that that term was explained differently in the Secured Transactions Guide, the meaning of that term in the draft Registry Guide should be qualified by reference to instances when reference was made to a notice. The suggestion was made that the term “secured creditor” should also be explained

along the lines of the explanation of the term “grantor” by referring to the person identified in the notice as secured creditor, as at the time of registration there might be no actual secured creditor (or grantor). In view of the fact that that meaning was assigned to the term “registrant”, it was agreed that the matter should be postponed until the Working Group had completed its consideration of the recommendations of the draft Registry Guide and determined which term to use.

18. With respect to the term “registration” the suggestion was made that reference should also be made to amendments. However, it was agreed that such a reference was not necessary as the term “notice” included an initial, amendment or cancellation notice.

19. With respect to the term “registration number”, it was agreed that the reference to “any related subsequent notice” was unnecessary and should be deleted.

20. With respect to the term “registry record”, differing views were expressed as to whether it meant information in all notice or just a particular notice. The Working Group deferred making a decision until it had considered the relevant recommendations of the draft Registry Guide (see para. 68 below).

21. Subject to the above-mentioned changes (see paras. 16-20 above), the Working Group approved the substance of the terminology.

Recommendation 1: The registry

22. The Working Group approved the substance of recommendation 1 unchanged.

Recommendation 2: Appointment of the registrar

23. The Working Group approved the substance of recommendation 2 unchanged.

Recommendation 3: Duties of the registry

24. For pedagogical purposes, the Working Group agreed that, even though recommendation 3 did not add anything new to the draft Registry Guide, it should be retained as an indicative list of the duties of the registry. It was also agreed that subparagraph (d) should be aligned with recommendation 70 of the Secured Transactions Guide (and refer to the date and time when information in a notice became available to searchers) and subparagraph (i) should be aligned with recommendation 55, subparagraph (e) of the Secured Transactions Guide (and require that a copy of the notice be sent only to the registrant that submitted the notice). A number of drafting suggestions were made and referred to the Secretariat. Subject to those changes, the Working Group approved the substance of recommendation 3.

Recommendation 4: Public access to the registry services

25. The Working Group approved the substance of recommendation 4 unchanged.

Recommendation 5: Operating days and hours of the registry

26. It was agreed that recommendation 5 should be revised to ensure that it did not inadvertently imply that a registry should maintain a physical office. It was also agreed that the bracketed language in subparagraph (d), referring to the

circumstances in which a suspension of the registry services would be justified, should be deleted and the matter could be discussed in the commentary by reference to an indicative list of circumstances. It was also agreed that the commentary should discuss the potential liability of the registry (rather than that of the individual registry staff) referring the matter to national law. Subject to those changes, the Working Group approved the substance of recommendation 5.

Recommendation 6: Access to registration services

27. The Working Group agreed that only subparagraphs (a) (i) to (iii) and (b) (i) to (iii) should be retained in recommendation 6, as the rest of the text in recommendation 6 did not set out conditions for access to registration services, but rather conditions for effectiveness of a registration or grounds for rejection of a notice, a matter addressed in recommendation 9 (see para. 30 below). Subject to that change, the Working Group approved the substance of recommendation 6.

Recommendation 7: Access to searching services

28. The Working Group agreed that the only condition for a searcher to gain access to the searching services of a registry should be the payment or arrangement for payment of fees, if any. It was also agreed that the commentary should explain that any further requirements not addressed in the Secured Transactions Guide (for example, identification of the searcher) should be left to national law. Subject to those changes, the Working Group approved the substance of recommendation 7.

Recommendation 8: Authorization

29. The Working Group agreed that the commentary to recommendation 8 (and any other relevant recommendation) should explain which part of the recommendation included a direction to the registry and which part summarized or paraphrased the recommendations of the Secured Transactions Guide, providing background information. Subject to those changes in the commentary, the Working Group approved the substance of recommendation 8 unchanged.

Recommendation 9: Rejection of a registration or search request

30. It was agreed that only subparagraphs (d) to (e) dealt with grounds for the rejection of a registration request and should be retained, while subparagraphs (a) to (c) dealt with conditions for access to registration services and were covered in recommendation 6 (see para. 27 above). It was also agreed that the grounds for the rejection of a registration request should be treated differently from the grounds for the rejection of a search request. In that connection, it was agreed that, once a person had gained access to searching services, if a searcher did not indicate the appropriate search criterion, the search would not produce a correct result, but it would not be rejected. Moreover, it was agreed that subparagraph (f) should be limited to circumstances where only the required information was illegible. Subject to those changes, the Working Group approved the substance of recommendation 9.

Recommendation 10: Date and time of registration

31. It was agreed that recommendation 10 should set out first the rule contained in subparagraph (c) as it stated the premise of the recommendation that was based on

recommendation 70 of the Secured Transactions Guide. In addition, it was agreed that subparagraph (a) should be revised to refer also to the date and time when the information in a notice became available to searchers, namely the point of reference for determining priority under the Secured Transactions Guide. Moreover, it was agreed that subparagraph (b) should appear next to direct the registry that information in notices should be entered into the record in the order they were received. It was also agreed that the commentary should clarify that, in a hybrid system, according to recommendation 10 and in view of the policy of the Secured Transactions Guide in favour of an electronic registry (recommendation 54, subparagraph (j)), the notice that would become available to searchers first (for example, the electronic notice that would be submitted directly, even if it were submitted after the paper notice) would have priority. Subject to those changes, the Working Group approved the substance of recommendation 10.

Recommendation 11: Period of effectiveness of registration

32. The Working Group agreed that all options of recommendation 11 should be retained and the commentary should explain that the option chosen by an enacting State should correspond to its secured transactions law. With respect to option A, it was agreed that, while it could be discussed in the commentary, the possibility of the parties reducing the legal period of effectiveness by agreement should not be recommended, as it would result in additional expense for the design of the registry and the registration could be cancelled if the debt was paid before the expiry of the legal period of effectiveness. With respect to option B, it was agreed that the commentary should explain that it was consistent with the approach recommended in the Secured Transactions Guide (recommendation 69) and did not necessarily mean that a registration would remain effective indefinitely, as the period of effectiveness would be indicated in the notice and, if the debt were paid, the registration could be cancelled. It was also agreed that the requirement for the registrant to indicate in the notice the period of effectiveness of the registration should be treated as a mandatory requirement with the result that a notice would be rejected if it did not indicate the period of effectiveness. At the same time, it was agreed that the commentary could discuss the possibility of designing the registry to automatically include a certain period of effectiveness if the registrant failed to do so. Subject to those changes in the commentary, the Working Group approved the substance of recommendation 11 unchanged.

Recommendation 12: Time when a notice may be registered

33. The Working Group agreed that the commentary should explain that recommendations 12 and 13 did not deal with issues related to the operation of the registry but rather set out legal rules for instructive purposes. Subject to that clarification in the commentary, the Working Group approved the substance of recommendation 12 unchanged.

Recommendation 13: Sufficiency of a single notice

34. Subject to the above-mentioned clarification in the commentary (see para. 33), the Working Group approved the substance of recommendation 3 unchanged.

Recommendation 14: Indexing of information in the registry record

35. It was agreed that subparagraph (b) should be retained outside of square brackets but revised to state the rule that a search would only be possible by the grantor's identifier and not by the secured creditor's identifier. It was also agreed that the commentary could explain that a secured creditor should be able to search by its own name (establishing its identity) and the registry should be able to search by the name of the secured creditor to make a global amendment. Subject to those changes, the Working Group approved the substance of recommendation 14.

Recommendation 15: Integrity of the registry record

36. The Working Group approved the substance of recommendation 15 unchanged.

Recommendation 16: Amendment of information in the registry record

37. It was agreed that recommendation 16 should be revised to provide that the registry should allow the amendment of information in the registry record further to the registration of an amendment notice or according to a judicial or administrative order. It was also agreed that the commentary should clarify that only the secured creditor had the right to effect an amendment, while the grantor could seek an amendment according to recommendation 32. Subject to those changes, the Working Group approved the substance of recommendation 16.

Recommendation 17: Removal of information from the registry record

38. It was agreed that the second sentence of recommendation 17 should be revised to clarify that it dealt with compulsory cancellation according to recommendation 32. Subject to that change, the Working Group approved the substance of recommendation 17.

Recommendation 18: Archival of information removed from the registry record

39. It was agreed that recommendation 18 should be revised to clarify that the purpose of the retrieval of information was to allow that information to be searched. In addition, it was agreed that the time of archival should be left to the discretion of each enacting State. Moreover, it was agreed that the commentary should discuss the various purposes of archiving information (for example, establishing priority in the case of a prolonged court or insolvency proceeding, or for the purposes of tax or money-laundering legislation). Subject to those changes, the Working Group approved the substance of recommendation 18.

Recommendation 19: Responsibility with respect to the information in a notice

40. It was agreed that the commentary should clarify that, consistent with recommendation 54, subparagraph (d) of the Secured Transactions Guide, the registry did not have to verify the accuracy, completeness or sufficiency of information in a notice but it could do so as long as, with the exception of the circumstances described in recommendation 9, it did not reject an inaccurate, incomplete or insufficient notice and was not held liable. In addition, it was agreed that the commentary should clarify that the key objective of recommendation 19 was to state that it was the responsibility of the registrant, and not of the registry, to ensure that information in a notice was accurate, complete and legally sufficient.

Subject to those clarifications in the commentary, the Working Group approved the substance of recommendation 19 unchanged.

Recommendation 20: Language of a notice

41. It was agreed that recommendation 20 should distinguish between the language in which information in a notice should be expressed that should be indicated in the registry regulations, and a publicly available set of characters that did not necessarily need to be included in the registry regulations but could be simply published and thus more easily revised by the registry. Subject to those changes, the Working Group approved the substance of recommendation 20.

Recommendation 21: Information required in an initial notice

42. It was agreed that the need for the registrant to enter the required information in the appropriate field of the notice was an important issue and should be dealt with in a separate subparagraph. In addition, it was agreed that recommendation 25 should be aligned with recommendation 21, subparagraph (a) (ii) that referred to the secured creditor “or its representative”. In that connection, it was agreed that the commentary should clarify the reasons why recommendation 57 of the Secured Transactions Guide referred to the secured creditor’s representative. It was also agreed that the commentary should clarify that, in the case of multiple grantors or secured creditors, their identifiers and addresses should be entered in the appropriate field for grantor or secured creditor information. Subject to those changes, the Working Group approved the substance of recommendation 21.

Recommendation 22: Grantor identifier (natural person)

43. It was agreed that the bracketed text in subparagraph (a), alternative A of recommendation 22 should be deleted and alternative A should be presented as option A. It was widely felt that such an approach would bring recommendation 22 more in line with recommendation 59 of the Secured Transactions Guide. In addition, it was agreed that subparagraph (a), alternative B should be redrafted along the following lines “the name of the grantor and any other information specified by the registry to uniquely identify the grantor, such as the birth date or the personal identification number, if any” and alternative B should be presented as option B. It was generally thought that such an approach would facilitate unique identification of the grantor, provide for certainty and, at the same time, flexibility to the extent it left the matter to the discretion of each enacting State. Moreover, it was agreed that: (a) in subparagraph (d) (iii), reference should be made to high-level official documents, such as an identification card or a driver’s licence; (b) in subparagraph (d) (vi), reference should be made to “two of the following officials documents, provided that the names contained therein are the same”, leaving it to the enacting State to specify those documents (e.g., social security or health insurance card). It was widely felt that such an approach would ensure that there would be no inconsistency between those two subparagraphs and, at the same time, combine certainty with flexibility.

44. As a matter of drafting, it was suggested that reference to the grantor being a natural person could be included in the chapeau of recommendation 22 and deleted from all subparagraphs. In addition, it was agreed that the commentary should explain that, in view of the conflict-of-laws recommendations of the Secured

Transactions Guide, the law of the enacting State (including its registry regulations) could apply to a security right created by a foreign grantor. Moreover, it was agreed that the commentary should clarify that the identifier of the grantor should be established on the basis of current, official documents of the enacting State. It was also agreed that the commentary should explain that recommendation 22 dealt with the effectiveness, and not grounds for rejection, of a registration.

45. Subject to the above-mentioned changes (see paras. 43 and 44 above), the Working Group approved the substance of recommendation 22.

Recommendation 23: Grantor identifier (legal person)

46. The Working Group agreed that options A and B of recommendation 23 should be retained but revised along the following lines: “Option A: the name of the legal person that [appears] [is designated] in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person. Option B: the name of the legal person that [appears] [is designated] in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person and any other information specified by the registry to uniquely identify the grantor”. As to alternatives A and B, the Working Group agreed that they should be placed in the commentary as illustrations that would provide guidance but avoid a prescriptive approach, since the exact description of the type of body corporate involved in each case would differ from State to State. Subject to those changes, the Working Group approved the substance of recommendation 23.

Recommendation 24: Grantor identifier (other)

47. The Working Group agreed that the heading of recommendation 24 should be revised to refer to special cases, since the term “other” indicated that the grantor meant might not be a natural or a legal person and thus might not have power to create a security right. In that connection, it was noted that recommendation 24 did not deal with the issue of who could be a grantor or had the power to create a security right (which was a matter for other law), but rather with the identifier of specific grantors. In addition, it was agreed that recommendation 24 should be retained, as it dealt with the grantor identifier in some important cases. It was also agreed, however, that recommendation 24 should be placed within square brackets and understood as setting out examples for enacting States to select and adapt them to their own laws, as the treatment of those cases differed from State to State. It was widely felt that flexibility was advisable, since certain examples (such as estates and trusts) were not common to all legal systems. Subject to those changes, the Working Group approved the substance of recommendation 24.

48. As to the way in which the agreed upon approach could be implemented, a number of suggestions were made. One suggestion was that three categories of cases should be distinguished; one category would include cases in which the grantor acted on behalf of the debtor (insolvency representative); a second category would include cases in which the grantor was a participant in a syndicate or venture; and a third category would include cases in which the grantor was a different entity. Another suggestion was that only subparagraphs (e) to (f) might be retained if properly revised. Yet another suggestion was that, in line with the approach followed in recommendations 22 and 23, reference should be made in

recommendation 24 to identification numbers. The Working Group referred that matter to the Secretariat as a matter of drafting.

Recommendation 25: Secured creditor identifier

49. It was agreed that reference should be made in recommendation 25 to the secured creditor “or its representative”. It was widely felt that such an approach would be consistent with recommendation 21, subparagraph (a) (ii) of the draft Registry Guide and recommendation 57 of the Secured Transactions Guide. In addition, it was agreed that the reference to “a kind of person” in subparagraph (c) should be reviewed. Moreover, it was agreed that the commentary should clarify that the identifier for the secured creditor should simply be the name without any additional information (since, for example, registration numbers were irrelevant to the identification of legal persons). It was also agreed that the commentary to chapter IV should discuss the legal consequences of an incorrect statement of the grantor’s identifier (recommendation 58) and the secured creditor’s identifier (recommendation 64). Subject to those changes, the Working Group approved the substance of recommendation 25.

Recommendation 26: Description of encumbered assets

50. It was agreed that subparagraph (a) should be revised along the following lines “when encumbered assets are described in a notice, they should be described in a manner that reasonably allows their identification”. It was widely felt that that change would avoid giving the impression that all amendment notices needed to include a description of encumbered assets. In addition, it was agreed that subparagraph (b) should be divided into two parts, one referring to all, present and future, assets within a generic category of movable assets, and another referring to all, present and future, movable assets of the grantor. Moreover, it was agreed that the commentary should discuss in detail the description of serial-number assets. Subject to those changes, the Working Group approved the substance of recommendation 26.

Recommendation 27: Incorrect or insufficient information

51. It was agreed that reference to amendment notices in paragraph (a) should be limited to those notices that related to the amendment of the grantor identifier, as not all amendment notices would require the grantor’s correct identifier. In addition, it was agreed that the Registry Guide should use the terms effectiveness of a “registration” or a “registered notice” in a consistent manner. Moreover, it was agreed that a new subparagraph should be added to indicate that, in the case of multiple grantors, an error in the identifier of one of the grantors would not render the registration ineffective with respect to other grantors correctly identified. Subject to those changes, the Working Group approved the substance of recommendation 27.

Recommendation 28: Information required in an amendment notice

52. It was agreed that subparagraph (b) should be retained within square brackets. It was widely felt that subparagraph (b) could be enacted by a State if, pursuant to recommendation 62 of the Secured Transactions Guide, it chose the relevant approach in its secured transactions law (see Secured Transactions Guide, chap. IV,

paras. 78-80). It was also agreed that subparagraph (b) should be revised to state that an amendment notice that disclosed a transfer of the encumbered assets should indicate the identifier and address of the transferee as an additional grantor (without replacing the identifier and address of the transferor as the original grantor). It was further agreed that the impact of such an approach would need to be fully elaborated in the commentary.

53. In addition, it was agreed that subparagraph (c) should be deleted and the matter it addressed should only be discussed as a possible option in the commentary. It was generally thought that an approach along the lines of subparagraph (c) could not be recommended, in view of the fact that recommendation 94 of the Secured Transaction Guide did not foresee registration of a notice with respect to a subordination agreement. Moreover, it was agreed that subparagraph (e) should be revised to ensure that an amendment could refer to one function or to multiple functions. It was also agreed that the commentary should indicate that one function might exclude another (for example, when the secured creditor changed its identifier, the secured creditor could no longer change the description of the encumbered assets). As to who would be authorized to register an amendment notice, it was agreed that the commentary should refer to recommendation 8.

54. It was also agreed that that the commentary might explain that sequential numbering of amendment notices would not be necessary as all amendment notices would be assigned a time and date according to recommendation 10. Furthermore, it was agreed that the commentary should explain that: (a) an amendment changing the identifier of the grantor would be indexed by adding the new grantor identifier as if it were a new grantor; (b) in such a case, a search under either the old identifier or the new identifier of the grantor would reveal the registration; and (c) that approach would not cause any confusion as the notices would be indexed in a sequential order.

55. Subject to the above-mentioned changes (see paras. 52-54), the Working Group approved the substance of recommendation 28.

Recommendation 29: Global amendment of secured creditor information in multiples notices

56. It was agreed that recommendation 29 should be revised to also allow the registrant to make such a global amendment directly, if the registry was so designed (which should be discussed in the commentary). It was also stated that, in the case of a global amendment, to protect the secured creditor from fraudulent amendments, the registry should be able to request and verify the identity of the registrant (defined as “the person identified in the notice as the secured creditor”). Subject to those changes, the Working Group approved the substance of recommendation 29 and decided to retain the text without square brackets.

Recommendation 30: Information required in a cancellation notice

57. It was agreed that the heading of recommendation 30 (and other relevant recommendations) might be reviewed to reflect that recommendation 30 dealt also with the time when a cancellation notice could be registered. It was also agreed that the commentary should explain the reasons for not requiring the grantor’s identifier to be included in a cancellation notice, without discrimination to a paper or

electronic registration system. Subject to those changes, the Working Group approved the substance of recommendation 30.

Recommendation 31: Copy of notice

58. It was agreed that subparagraphs (a) and (b) should be aligned with recommendation 55, subparagraph (d) of the Secured Transactions Guide, but also formulated as recommendations rather than legal provisions dealing with obligations or liability. With respect to subparagraph (c), it was agreed that the registrant should send a copy of the notice to the grantor a short time after the registrant received such a copy from the registry. It was widely felt that the time the information was entered into the registry record could not function as a starting point for that period as it might not be known to the registrant. It was also agreed that the bracketed text in subparagraph (c) should be deleted, since sending copies of registered notices to grantors was generally considered to be a fundamental feature of the notice-registration system and an important protective measure for grantors. As to the placement of recommendation 31 in the text, it was suggested that subparagraphs (a) and (b) should be placed in a recommendation dealing with the duties of the registry (e.g., recommendation 3) and subparagraph (c) in chapter V dealing with the obligations of the secured creditor. While there was some support for that suggestion, it was agreed that recommendation 31 was appropriately placed in chapter IV dealing with registration information. For reasons of consistency, it was suggested that reference should be made to the term “record of the registration” rather than “copy of the notice”. Noting that both terms were used in the recommendations of the Secured Transactions Guide, the Working Group referred the matter to the Secretariat as a matter of drafting. Subject to those changes, the Working Group approved the substance of recommendation 31.

Recommendation 32: Compulsory amendment or cancellation

59. It was agreed that recommendation 32 should be preceded by a new recommendation that would reflect the principle that in the circumstances described in recommendation 32 (e.g., payment of the secured obligation and extinction of the security right), the secured creditor was obliged to amend or cancel the registration and would be able to charge any fees agreed upon with the grantor. In addition, it was agreed that, if the secured creditor failed to comply, the grantor could seek a compulsory amendment or cancellation under recommendation 32. With respect to subparagraph (a) (i), it was agreed that the bracketed text should be retained and reformulated along the following lines: “or the security agreement has been revised in such a way as to make the notice inaccurate”. It was also agreed that the bracketed text in subparagraph (a) (iii) should be retained outside square brackets. While some doubt was initially expressed, it was agreed that subparagraph (b) was appropriate and the secured creditor should not be entitled to charge any fees if it failed to comply with its obligations and the legitimate request of the grantor to amend or cancel the registration (which should not apply where the secured creditor had not violated its obligations and the grantor’s request was inappropriate).

60. With respect to subparagraph (e), it was agreed that: (a) the chapeau should be reformulated along the following lines: “the amendment or cancellation notice pursuant to this recommendation is registered by”; (b) alternatives A and B should be retained, and alternative C should be deleted. It was widely felt that an

amendment or cancellation order should be registered either by the registry or by a judicial or administrative officer, but not by the grantor. It was also agreed that the recommendations should include one additional form for the notice to implement a judicial or administrative order that should include all the elements required for a notice to be effective. Finally, it was agreed that the commentary should clarify: (a) that, if a security agreement had been concluded but its effectiveness was the subject of a dispute between the secured creditor and the grantor, the grantor could seek to amend or cancel the registration through a summary judicial or administrative proceeding; (b) that recommendation 32, which reiterated the principle reflected in recommendations 16 and 17, was not inconsistent with recommendation 67 (advance registration) of the Secured Transactions Guide; (c) whether the grantor could claim damages for breach of contract or tort by the secured creditor was a matter of other law; and (d) examples of proceedings referred to in recommendation 32.

61. Subject to the above-mentioned changes (see paras. 59 and 60), the Working Group approved in principle the substance of recommendation 32.

Recommendation 33: Search criteria

62. It was agreed that recommendation 33 was important, since it provided that: (a) a registry should be designed to allow searches by the grantor's identifier or the registration number; (b) a searcher could conduct a search by using one of those two search criteria. In addition, it was agreed that, while a prudent searcher would use the correct grantor identifier, search variations should be possible. It was widely felt, for example, that the indication of the kind of body corporate involved (e.g., Limited, Incorporated) would not be necessary. However, differing views were expressed as to whether a search by the grantor's family name only should be possible. Moreover, it was agreed that the commentary should discuss the possibility of searches by serial number for certain types of asset. Subject to those changes, the Working Group approved the substance of recommendation 33.

Recommendation 34: Search results

63. It was agreed that subparagraph (a) should be revised to state that a search result should indicate not only the current information with respect to a registered notice but also relevant past information, while the commentary should discuss all possible options. With respect to subparagraph (b), it was agreed that the first bracketed text ("exactly matched the search criterion") should be retained outside square brackets and the second bracketed text ("closely matched the search criterion") should be deleted and discussed in the commentary. It was widely felt that exact matches provided certainty as to the effectiveness of a registration and the reliability of a search. It was also agreed that, if alternative B in recommendation 23 was followed by a State, search results should match the name of the grantor with or without the abbreviation.

64. As to a search logic that would allow close matches to be retrieved, it was generally thought that, while modern search algorithms could be designed to limit the number of close matches, such design presented problems, such as the following: (a) not all closely matching notices would be retrieved, as it required addressing a complex question of defining "close matches" and resulted in legal uncertainty; (b) the list of closely matching notices could be long, a fact that might

lead to additional searches and result in high fees for the user and administrative burden on the registry; (c) allowing search results to retrieve close matches might have a negative impact on what constituted a sufficient grantor identifier for a registration to be effective (see recommendation 58 of the Secured Transactions Guide).

65. As to subparagraph (c), it was agreed that it should be revised as recommendation 33 dealt with search criteria and not search requests. Moreover, it was agreed that subparagraphs (d) and (e) should be deleted and discussed in the commentary as the law recommended in the Secured Transactions Guide did not include relevant provisions and, in any case, the admissibility of a search certificate as evidence and its evidentiary value were matters of law other than secured transactions law.

66. Subject to the above-mentioned changes (see paras. 63-65 above) the Working Group approved the substance of recommendation 34.

Recommendation 35: Fees for registry services

67. It was agreed that, consistent with recommendation 54, subparagraph (i) of the Secured Transactions Guide, any fees charged should be commensurate to the services provided by the registry. It was widely felt that using registration fees as a source of revenue for the State was detrimental to the availability and the cost of credit. It was also agreed that all options should be retained in recommendation 35 and additional options could be discussed the commentary. After discussion, the Working Group approved the substance of recommendation 35 unchanged.

68. After completing its discussion of the recommendations, the Working Group went back to consider the term “registry record” (see para. 20 above). It was agreed that the term should refer to the information in all registered notices. In addition, it was agreed that the commentary should: (a) explain the importance of the record including all relevant information for the determination of priority; (b) consider different drafting options; and (c) explain the difference between the terms “registry record” and “database”. Subject to those changes, the Working Group approved the substance of the term “registry record”.

C. Examples of registration forms (A/CN.9/WG.VI/WP.50/Add.2)

69. The Working Group next considered examples of registration forms. At the outset, it was agreed that those forms should be revised to reflect the decisions of the Working Group with respect to the relevant recommendations. In addition, it was agreed that it would be useful to prepare further forms, such as a form to implement a judicial or an administrative order to amend or cancel a registration, and schedule forms for additional information.

70. With regard to form A (example of initial notice), it was agreed that: (a) in the chapeau, the phrase in square brackets (“in the case of a fully electronic registry”) should be deleted as the forms should apply to both paper and electronic notices; (b) schedule forms for additional information would apply to paper notices, as information could easily be added in an electronic notice; (c) in sections A.1 and 4, and B.1, reference to father’s, mother’s and spouse’s name should be deleted; (d) in

section A.1, the phrase in square brackets (“as it appears in the identity card, if issued by the enacting State”) should be deleted; (e) in section A.2, the phrase in square brackets (“as it appears in the document constituting the legal person or other entity”) should be revised to reflect the decisions of the Working Group with respect to recommendation 23; (f) in section A, tax, voter or other number should be added to identification number and the commentary should explain that such identification numbers could vary from State to State; (g) section A.3 should be revised to implement the decisions of the Working Group with respect to recommendation 24; (h) in sections B.1 and B.2, reference to identification numbers should be deleted as they were not part of the identifier of the secured creditor; (i) section C.2 should be identified as a non-mandatory field; and (j) as access information was not required in a notice (see recommendation 57 of the Secured Transactions Guide and recommendation 21 of the Registry Guide), section G should be placed at the end of the form or in a footnote to inform registrants that they would need to provide some kind of identification to access the registry.

71. It was agreed that the changes made to form A, to the extent relevant, should also be reflected in forms B and C. In addition, it was agreed that forms B and C should be revised to reflect the changes agreed upon by the Working Group at the present session. Moreover, it was agreed that a number of other changes approved by the Working Group would need to be implemented by the Secretariat. It was also agreed that the commentary should address the situation in which one of several secured creditors might mistakenly use form C (cancellation notice) instead of form B (amendment notice) to delete its name from the notice.

72. Subject to the above mentioned changes (see paras. 69-71), the Working Group approved the substance of the examples of the registration forms.

V. Future work

73. Having generally agreed that the draft Registry Guide should be finalized and submitted to the Commission for adoption at its forty-sixth session in 2013, the Working Group considered its future work. At the outset, the Working Group noted that, at its forty-third session in 2010, the Commission had agreed that all topics before the Commission at that time were interesting and should be retained on its future work agenda for consideration at a future session (see para. 2 above).

74. The suggestion was made that a simple, short and concise model law on secured transactions could usefully complement the Secured Transactions Guide and would be extremely useful in addressing the needs of States and in promoting implementation of the Secured Transactions Guide. In that connection, the concern was expressed that a model law might be too prescriptive limiting the flexibility of States to address the relevant issues in an appropriate way that would fit their needs and suit their legal traditions.

75. However, it was widely felt that a model law based on the general recommendations of the Secured Transactions Guide would provide urgently needed guidance to States in enacting or revising their secured transactions laws. In addition, it was generally viewed that a model law was sufficiently flexible and could be adapted to the various legal traditions, while at the same time serving as a starting point for the implementation of the recommendations of the Secured

Transactions Guide. In that connection, it was widely felt that such an approach should assist States in capacity-building, while the draft Registry Guide would assist States with the establishment and operation of a security rights registry. Moreover, there was broad support for the view that such a model law would assist States in addressing urgent issues relating to access to credit and financial inclusion, in particular for small- and medium-size enterprises. It was also agreed that the topic of security rights in non-intermediated securities merited further consideration and attention.

76. After discussion, the Working Group agreed to propose to the Commission that the mandate be given to the Working Group to develop a model law on secured transactions based on the general recommendations of the Secured Transactions Guide and consistent with all the texts prepared by UNCITRAL on secured transactions. The Working Group also agreed to propose to the Commission that the topic of security rights in non-intermediated securities should be retained on its future work agenda and be considered at a future session.

D. Note by the Secretariat on the Draft Technical Legislative Guide on the Implementation of a Security Rights Registry Guide: Annex I. Terminology and recommendations, submitted to the Working Group on Security Interests at its twenty-first session

(A/CN.9/WG.VI/WP.50 and Add.1-2)

[Original: English]

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Annex I. Terminology and recommendations

[Note to the Working Group: The Working Group may wish to recall that, at its twentieth session, it decided that the text being prepared should take the form of a guide with recommendations, while examples of model regulations could be prepared where the text offered options (see A/CN.9/740, para. 18). In line with this decision and the approach taken in the UNCITRAL Legislative Guide on Secured Transactions (the “Guide”), this document reproduces in an annex the terminology and recommendations of the draft Technical Legislative Guide on the Implementation of a Security Rights Registry (the “draft Registry Guide”). Following the same approach, the terminology will also be included in the introduction and the recommendations will also be included at the end of the relevant chapters of the draft Registry Guide. In view of the specific and comprehensive formulation of the recommendations, as well as the need for a flexible approach with respect to matters addressed in these recommendations with various options, the Working Group may wish to consider that there is no need to prepare any examples of model regulations. In this context, the Working Group may wish to note that document A/CN.9/WG.VI/WP.50/Add.2 contains examples of registration forms, implementing the recommendations of the draft Registry Guide and offering concrete guidance to the registry system designers and users.]

Terminology*

(a) “Address” means: (i) a physical address, including a street address and number, city, postal code and State; (ii) a post office box number, city, postal code and State; (iii) an electronic address; or (iv) an address that is equivalent to (i), (ii) or (iii);

(b) “Amendment” means the addition, deletion or modification of information contained in the registry record;

[Note to the Working Group: The Working Group may wish to note that the commentary will include examples of amendments, such as: (a) the extension of the period of effectiveness of a registration (renewal of a registration); (b) where two or more secured creditors or grantors are identified in the registered notice, the deletion of a secured creditor or grantor identifier; (c) where one secured creditor or grantor is identified in the registered notice, the deletion of the secured creditor or grantor identifier and the addition of a new secured creditor or grantor identifier; (d) the addition or deletion of encumbered assets; (e) the modification of the identifier of the grantor; (f) the modification of the identifier of the secured creditor; (g) the modification of the address of a grantor or secured creditor; (h) the modification in the maximum monetary amount for which the security right may be enforced (if applicable); (i) the assignment of the secured obligation by the secured creditor and the addition of the identifier and address of the new secured creditor; (j) the transfer of the encumbered assets and the addition of the identifier and address of the transferee (in the case of a partial transfer) or the replacement of the information of the transferor with the information of the transferee (in the case of a transfer of all the encumbered assets); (k) the subordination by the secured creditor; and (l) the subrogation of a secured creditor’s right. The Working Group may also wish to note that the commentary will clarify that: (a) in the case of an assignment, subrogation or subordination, the registered notice may be amended to indicate the identifier and address of the new secured creditor, but a notice not so amended remains effective (see recommendation 75); (b) “amendment” means the change and the result of the change of the information in a notice entered in the registry record; and (c) an amendment is made with an “amendment notice”.]

(c) “Grantor” means the person identified in the notice as the grantor;

(d) “Law” means the law governing security rights in movable assets;

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that the law meant here is the law based on the recommendations of the Guide. The commentary will also explain that the recommendations of the draft Registry Guide may be enacted by States that have substantially implemented the recommendations of the Guide. For example, in order to enact the recommendations of the draft Registry Guide, a State would need to have in place or be prepared to enact a secured transactions law that would require notice (rather than document) registration for the purpose of making a security right effective against third parties (rather than creating a security right).]

* The terminology contained in the *Guide* (see Introduction, section B on terminology and interpretation) applies also to the draft Registry Guide, supplemented by the terminology contained in the draft Registry Guide, which is part of the commentary (see Introduction, [...]).

(e) “Notice” means a communication in writing (paper or electronic) and includes an initial notice, an amendment notice or a cancellation notice;¹

[Note to the Working Group: The Working Group may wish to note that the terminology of the Guide (which is part of the commentary and not the recommendations, same as the terminology in the draft Registry Guide) refers to the term “notice” in the sense of a medium rather than the contents of the medium so that the term could be referred to in contexts outside the registration context (for example, with respect to notices of extrajudicial disposition of an encumbered asset; see recs. 149-151). The Working Group may wish to consider using the term “notice” in the draft Registry Guide in the same sense. The commentary could clarify this approach and also refer to two other terms referred to in the registry chapter of the Guide, to put the term “notice” in context, that is, to the terms: (a) “information contained in a notice” or “the content of the notice” (see recs. 54, subpara. (d) and 57); and (b) “registry record” in the sense of information in a notice once this information has been accepted by the registry and entered into the database of the registry that is accessible to the public (see rec. 70). In view of these terminological clarifications, the recommendations in the draft Registry Guide could use the term “notice” only where the medium is meant, the term “information in a notice” where the contents of the medium are meant and the term “registry record” where information in a notice that has already been entered into the database of the registry is meant (see the term “registry record” below). If the Working Group preferred to use the term “notice” throughout the text, the term would need to be explained in the terminology differently than in the Guide, that is, by reference to information rather than (or, in addition to) the medium of communicating information to the registry. Finally, the Working Group may wish to consider whether the registration of a notice of enforcement should be discussed in the commentary, although it is not recommended in the Guide. The most important of such a notice benefit would be to warn off third parties that the grantor might wish to deal with during the enforcement period. It would also improve the value of the information in the registry for interested third parties (that under rec. 151 must be notified by the enforcing secured creditor).]

(f) “Registrant” means the person identified in the notice as the secured creditor;

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that the person identified in the notice as the secured creditor (“the registrant”) may be the secured creditor or its representative (see rec. 57, subpara. (a)).]

(g) “Registrar” means the person designated pursuant to the law and the regulations to supervise and administer the operation of the registry;

(h) “Registration” means the entry of information contained in a notice into the registry record;

(i) “Registration number” means a unique number allocated to an initial notice by the registry and permanently associated with that notice [and any related subsequent notice];

¹ See term “notice” in the introduction, section B, terminology and interpretations of the *Guide*.

[Note to the Working Group: The Working Group may wish to consider the words within square brackets. These words are intended to clarify that any subsequent notice is also associated with the registration number of the initial notice, namely that there is no other registration number (see recs. 10, 28 and 30 below).]

(j) “Registry record” means the information in [all registered notices] [a registered notice as amended] that is stored electronically in the registry database.

[Note to the Working Group: The Working Group may wish to consider whether the term “registry record” should be used in the sense of information relating to one notice as amended or to all the notices in the registry database. In the former case, the term “registry record” could be used to reflect information in a registered notice or information in a registered notice as amended; and the term “registry records” could be used to refer to information in all registered notices.]

Recommendations

I. Registry and registrar

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the recommendations below address several different sorts of issues. Recommendations 1 and 2 address the establishment of the registry and the appointment of the registrar. Recommendations 4-9 address access to the registry services. A number of recommendations reiterate or implement recommendations of the Guide because of their importance or of the need to put a technical matter in the context of the law. Such recommendations include the following: 8, subparagraph (a) (see rec. 71), subparagraph (b) (see rec. 73), subparagraph (c) (see rec. 71) and subparagraph (d) (see rec. 54, subpara. (d)); 10, subparagraph (c) (see rec. 70); 11 (see rec. 69); 12 (see rec. 67); 13 (see rec. 68); 21 (see rec. 57); 25, subparagraph (a) (see rec. 63); 27, subparagraph (a) (see rec. 58); 27, subparagraph (b) (see rec. 64); 27, subparagraph (c) (see rec. 65); 31, subparagraph (a) (see rec. 55, subpara. (d)) and subparagraph (c) (see rec. 55, subpara. (c)); and 32 (see rec. 72). The rest of the recommendations address purely technical registration matters.]

Recommendation 1: The registry

The regulations should provide that the registry is established for the purposes of receiving, storing and making accessible to the public information relating to existing or potentially existing security rights in movable assets according to the law and the regulations.

Recommendation 2: Appointment of the registrar

The regulations should provide that [the entity or person identified by the enacting State or authorized by the law] designates the person responsible to supervise and administer the operation of the registry, determines that person’s duties and monitors performance according to the law and the regulations.

[Recommendation 3: Duties of the registry]

The regulations should provide that the registry should:

- (a) Provide access to the registry services to any person entitled to have access according to recommendations 4 and 7;
- (b) Publish on the registry's website, if any, the registry office locations and their respective opening days and hours and post them at the respective office according to recommendation 5;
- (c) Provide the grounds for rejection of a registration or a search request as soon as practicable according to recommendation 9;
- (d) Assign a date and time to each registration and a unique registration number to the initial notice, as well as enter the information contained in a notice into the registry record in the order it was received according to recommendation 10;
- (e) Index or otherwise organize information in the registry record so as to make it searchable according to recommendation 14;
- (f) Remove information from the registry record that is available to the public upon the expiry of the term of effectiveness of the relevant notice or [allow the removal of such information] pursuant to a judicial or administrative order according to recommendation 16;
- (g) Amend [or allow the removal of] information in the registry record only pursuant to a judicial or administrative order according to recommendation 17;
- (h) Archive information removed from the registry record that is accessible to the public at least for a period of [20] years in a manner that enables the registry to retrieve that information according to recommendation 18;
- (i) Provide to each registrant a copy of a notice according to recommendation 31; and
- (j) Where applicable, keep user details confidential.]

[Note to the Working Group: The Working Group may wish to note that recommendation 3, which appears within square brackets for the consideration of the Working Group, sets forth in detail the role of the registry referring to recommendations of the draft Registry Guide, some of which draw on recommendations of the Guide. The advantage of listing the role of the registry in one recommendation is clarity and transparency as to the role of the registry. The possible disadvantage is that such a list may appear but not be comprehensive or may be limiting where it should not be. An alternative approach might be to delete recommendation 3 and explain the role of the registry in the appropriate context in the recommendations and in the commentary. Yet a third possible approach might be to retain both recommendation 3 as a general indication of the duties of the registry and the other recommendations setting out the duties of the registry in the appropriate context, but review these recommendations to avoid any inconsistency or unnecessary repetition. The Working Group may wish to note that subparagraphs (f) and (g) contain text within square brackets. This text is intended to ensure that a judicial or administrative officer may amend or remove information from the registry record directly. In this way, the registry would not be burdened

with this task, a result that could preserve the efficient and economic character of the registry. The Working Group may wish to consider whether this text should be retained (at least as an alternative) or deleted. The Working Group may also wish to note that the commentary will explain that the user details referred to in subparagraph (j) apply only to registry systems that grant access by way of user accounts.]

II. Access to the registry services

Recommendation 4: Public access to the registry services

The regulations should provide that any person is entitled to have access to the registry services in accordance with the law and the regulations.

Recommendation 5: Operating days and hours of the registry

The regulations should provide that:

(a) Each office of the registry is open to the public [during the days and hours specified by the enacting States];

(b) Registry office locations and their respective opening days and hours should be published on the registry's website, if any, and opening days and hours of each office should be posted at that office;

(c) Electronic access to the registry services is available at all times; and

(d) Notwithstanding subparagraphs (a) to (c) of this recommendation, the registry may suspend access to registry services in whole or in part [for maintenance purposes, because of force majeure or, in the case of an electronic registry, due to a general network failure]. Notification of the suspension of access to the registry services and its expected duration is published in advance when feasible and as soon as reasonably possible on the registry's website and posted at the respective registry offices.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that each enacting State may specify the registry office days and hours by separate administrative instructions and that the minimum registry office days and hours should be the usual business days and hours in that jurisdiction. Where the registration of paper notices is foreseen, the time for receiving paper notices may be set independently from the business hours. For example, the office may close at 17:00 but all notices should be received by 16:30 so that the registry has sufficient time to enter the information into the registry record. The Working Group may also wish to consider whether the circumstances in which the registry may suspend access to the registry services should be enumerated in the recommendation in an exhaustive or indicative way. An exhaustive list would provide more certainty but less flexibility in covering all possible circumstances, while an indicative list would provide more flexibility but less certainty. In any case, the commentary could explain the circumstances and in particular that: (a) in the case of an electronic registry, access to registry services may be suspended automatically (for example, when the Internet network goes down); and (b) access to any registry office may be suspended when circumstances arise that make it

impossible or impractical to provide access (force majeure, due, for example, to fire, flood, earthquake or war). As a separate matter, the Working Group may wish to note that the recommendations do not address the issue of liability of the registry staff. The commentary will explain that secured transactions law may foresee liability of registry staff for loss or damage suffered by a registry user as a result of negligence, gross negligence or wilful conduct on the part of the registry staff in general or in the case of specified situations (for example, information submitted in a paper notice was entered erroneously into the registry record by the registry staff) or that the registry staff are exonerated from any liability, or, alternatively, the matter may be left to general law.]

Recommendation 6: Access to registration services

The regulations should provide that:

- (a) Any person is entitled to register an initial notice if that person:
 - (i) Uses an authorized medium of communication;
 - (ii) Identifies itself as required by the law and the regulations;
 - (iii) Tenders payment or made arrangements to pay any registry fees prescribed in recommendation 35;
 - (iv) Provides a grantor identifier sufficient to allow indexing or other organization of the information in the notice so as to make it searchable;
 - (v) Provides the information with respect other items required by the law and the regulations to be included in a notice; and
 - (vi) Provides all the required information in a legible manner; and
- (b) The registrant is entitled to amend or cancel information in [the registry record] [a registered notice], if that registrant:
 - (i) Uses an authorized medium of communication;
 - (ii) Identifies itself as required by the law and the regulations;
 - (iii) Tenders payment or made arrangements to pay any registry fees prescribed in recommendation 35;
 - (iv) Provides a grantor identifier sufficient to allow indexing or other organization of the information in the [registry record] [registered notice] so as to make it searchable;
 - (v) Provides the information with respect to other items required by the law and the regulations to be included in a notice; and
 - (vi) Provides all the required information in a legible manner; and
- (c) The registry does not require verification of the identity or the existence of authorization for registration of the notice or conduct other scrutiny of the content of the notice.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain this recommendation by referring to: (a) recommendations 54, subparagraph (c), and 55, subparagraph (b), setting out the rule that the registry, in

principle, accepts a notice with the exception of certain situations listed in that recommendation; and (b) the discussion of identification of the registrant in the Guide, which refers to the registry requiring the registrant's identity but no proof of the registrant's identity or at least minimal proof (see recommendations 54, subpara. (d) and 55, subpara. (b); see also the Guide, chap. IV, para. 48, which refers to the identification procedure being built in the payment process or to the assignment of a permanent secure code to repeat users of the registry, thus eliminating the need to repeat the identification procedure).]

Recommendation 7: Access to searching services

The regulations should provide that any person is entitled to conduct a search of the registry record accessible to the public using the search criteria prescribed in the regulations, provided that that person tendered payment or made arrangements to pay any search fees. That person need not identify itself or provide any reasons for the search.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the search relates to the registry record accessible to the public through the interface that is just a gateway to the database that contains the data.]

Recommendation 8: Authorization

The regulations should provide that:

(a) Except as provided in subparagraph (b) of this recommendation, registration of an initial or amendment notice has to be authorized by the grantor;

(b) Registration of an amendment notice that affects only the rights of the secured creditor [the enacting State to specify types of amendment] or a cancellation notice need only be authorized by the secured creditor;

(c) Authorization of a notice should be in writing and may be given before or after registration. A written security agreement is sufficient to constitute authorization; and

(d) The registry does not require verification of the existence of authorization for registration of a notice.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) subparagraph (a) is based on recommendation 71; (b) subparagraph (b) is based on recommendation 73; (c) subparagraph (c) is based on recommendation 71; and (d) subparagraph (d) is based on recommendations 54, subparagraph (d), and 55, subparagraph (b). Accordingly, if someone submitted a notice without authorization or otherwise fraudulently and that resulted in harm to the grantor or the secured creditor, they would have to prove that the registrant had no authority to effect the notice. However, this would be done outside of the registry system. The function of the registry is to do what is set forth in the recommendations mentioned above. Whether or not the registrant had authority to submit a notice, or whether the submission could be attributed to a user account holder is outside the scope of the registry regulations. The commentary may also explain that, where electronic access to the registry is used, there are very effective methods to prevent fraudulent registrations, amendments or discharges. For example, in an electronic

registry system, a secured creditor could request a user identification number when effecting a registration. No amendments to or discharge of the registration would be possible unless that number were used. If the secured creditor were careless and allowed anyone to use the number, he or she should have no basis for a complaint about unauthorized discharges or amendments. However, if he or she were careful it would be virtually impossible for the registration to be changed in any way without his or her involvement. However, where paper is used, the registry has no way to determine whether an amendment or discharge was submitted by the secured creditor or fraudulently by someone else forging the signature of the secured creditor. For this reason, some paper-based registry systems built in the “fail safe” mechanisms that provide for automatic notification of the secured creditor of a discharge and an opportunity to reinstate a discharged registration within a short period after discharge. The Working Group may also wish to note that the commentary will also explain that possibly, all amendments affect the rights of the secured creditor. Typically, only two amendments, the addition of a grantor and of encumbered assets, require only the grantor’s authorization.]

Recommendation 9: Rejection of a registration or search request

The regulations should provide that a registration or search request may be rejected by the registry if:

- (a) It is not transmitted to the registry in one of the authorized media of communication;
- (b) It is not accompanied by any registry fee or arrangements to pay any registry fees have not been made;
- (c) It fails to provide the identity of the registrant as required by the law and the regulations;
- (d) The registration request fails to provide a grantor identifier sufficient to allow indexing or other organization of the information in the notice so as to make it searchable;
- (e) It fails to provide the information with respect to other items required under the law and the regulations to be included in the notice; or
- (f) The information in the notice is illegible.

The grounds for rejection of a registration or search request should be provided by the registry as soon as practicable.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) recommendation 6 above deals with the conditions for a person to obtain access to the registry services in line with recommendations 54, subparagraph (c), and 55, subparagraph (b); (b) recommendation 9 deals with the conditions of rejection of a registration or search request, reiterating the conditions set out in recommendation 6 and recommendations 54, subparagraph (c), and 55, subparagraph (b); (c) recommendation 15 below deals with the question whether the registry may remove from the record accessible to the public information already registered; (d) the registry may reject non-conforming requests submitted in paper form, while an electronic registry will be designed so as to reject automatically non-conforming

requests; and (e) while in the case of a paper registry the grounds for rejection will be communicated as soon as practicable, in the case of an electronic registry, the reasons for the rejection will be immediately displayed to the user.]

III. Registration

Recommendation 10: Date and time of registration

The regulations should provide that:

(a) The registry assigns a date and time to each registration, as provided under subparagraphs (b) and (c) of this recommendation, and a unique registration number to an initial notice, by which the initial notice and any subsequent notice are identified;

(b) The registry enters into the registry record and indexes or otherwise organizes information in a notice so as to make it available to searchers in the order it was received;

(c) [Notwithstanding subparagraph (b) of this recommendation,] the registration of a notice is effective from the date and time when the information in the notice is entered into the registry record so as to be available to searchers of the registry record.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that this recommendation is intended to provide a basis for the application of a rule along the lines of recommendation 70. Subparagraphs (a) and (b) deal with technical issues, while subparagraph (c) states the substance of recommendation 70 (which may be retained in the recommendations of the draft Registry Guide because of its importance or simply discussed in the commentary). The date and time when information in a notice becomes available to searchers may be different from the time the notice was received (in particular where paper notices are submitted by registrants and entered into the registry record by the registry), but should follow the order in which the notice was received by the registry (that is, a notice received on 1 January at 08:00 am should become available to searchers before a notice received by the registry on the same date at 08:01 am). If as a result of negligent or wilful conduct or malfunction of the registry, a registrant loses its priority, the registry may be liable to the registrant for damages. In the case of an acquisition security right, if a notice is registered within the time period specified in the law, the acquisition security right obtains priority even over a previously registered non-acquisition security right (see recommendation 180, alternative A, subparagraph (a) (ii)). Thus, where the registry enters the information in a notice into the registry record and if the law requires that the notice specifies that it relates to an acquisition security right (the Guide does not require that), it is important that this be done within the time period specified in the law for registration of an acquisition security right. Otherwise, as a matter of the law of the enacting State (the Guide does not address this issue), the registry may be liable for damages sustained by a registrant as a result of loss of priority. The Working Group may wish to note that the rule in subparagraph (b) is fine if the registry system is entirely electronic or entirely paper based. However, it could create problems in a hybrid registry system where for instance, a paper notice is received at 08:00 am and is

entered into the registry record by the registry staff at 08:10, after a notice that was transmitted electronically entered the registry record at 08:05. The text in square brackets in subparagraph (b) is intended to ensure that, even in the case just described, the electronically transmitted notice would have an earlier date and time of effectiveness than the paper notice, even though the latter was received a little later than the former. The Working Group may wish to consider whether the bracketed text in subparagraph (b) should be retained or deleted, and, if deleted, whether it should be replaced by another text.]

Recommendation 11: Period of effectiveness of registration

The regulations should provide that:

Option A

- (a) A registration is effective for the period of time specified in the law;
- (b) The period of effectiveness of a registration may be extended for an additional period of time equal to the initial period specified in the law at any time before the period of effectiveness of the registration expires.

Option B

- (a) A registration is effective for the period of time indicated in the initial notice;
- (b) The period of effectiveness of a registration may be extended or reduced for the period of time indicated in an amendment notice at any time before the period of effectiveness of the registration expires.

Option C

- (a) A registration is effective for the period of time indicated in the initial notice, not exceeding [20] years;
- (b) The period of effectiveness of a registration may be extended or reduced for the period of time indicated in an amendment notice not exceeding [20] years at any time before the period of effectiveness of the registration expires.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that, whether a State enacts option A or B, the rules applying to the calculation of the periods in national law will apply to the period of effectiveness of a registration, unless the secured transactions law provides otherwise. For example, national law may provide that where the calculation is from the day of registration or from the anniversary of the day of registration, a year runs from the beginning of that day. The Working Group may also wish to note that the commentary will explain that, where the law requires the registrant to enter the period of effectiveness of registration in a notice, the requirement is a mandatory requirement. This means that, if the period of effectiveness of registration is not entered in a notice, the notice will likely be rejected. The Working Group may wish to consider whether the registry may be designed to automatically include a certain period of effectiveness of registration, if the registrant fails to do so. If the Working Group considers this approach desirable and feasible, it may include a default rule along the following lines: "When no period of time is indicated in the notice, the

registration is effective for [5] years". The commentary will also explain that: (a) while in option A the renewal period is specified in the law, in options B and C, the renewal period can be specified by the registrant in the amendment notice; (b) under option A there is no possibility to reduce the period of effectiveness by a voluntary amendment submitted by the creditor or by an amendment that is compelled by the grantor and, as a result, this additional function to amend the period of registration will not have to be designed and built; and (c) a renewal extends the period of effectiveness of the registration so that effectiveness is continuous (see recommendation 28, subpara. (f)). In addition, the Working Group may wish to note that, while option B is consistent with recommendation 69, it is not realistic (at least for movable property registries; immovable property registries are different in this respect too). This is so because, unless there is a control mechanism, all registrations will be effective for infinity. Arguably, it is one thing to give flexibility to registrants to choose the duration of the period of effectiveness of a registration, but it is quite another thing to permit this choice without some control (other than the period authorized by the grantor). Some modern registry systems provide for infinity registrations but charge a very large registration fee to control abuse. In addition, in such systems, fees are calculated on a per year basis, thus discouraging overreaching in the choice of the duration of the period of effectiveness of a registration. In view of this problem, the Working Group may wish to consider whether option B should be retained or deleted and, if option B is retained, whether the commentary should include the above-mentioned or other explanations.]

Recommendation 12: Time when a notice may be registered

The regulations should provide that a notice may be registered before or after the creation of the security right or the conclusion of the security agreement.

Recommendation 13: Sufficiency of a single notice

The regulations should provide that a registration of a single notice is sufficient to achieve third-party effectiveness of one or more than one security right, 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 note that the commentary may explain that the single notice would be sufficient with respect to future security rights only as long as the description of the encumbered assets in the notice is sufficient according to recommendation 63.]

Recommendation 14: Indexing of information in the registry record

The regulations should provide that:

(a) Information in the registry record contained in an initial notice is indexed or otherwise organized so as to become searchable according to the grantor identifier as provided in the law and the regulations;

(b) [For internal purposes of the registry, information in the registry record contained in an initial notice may be indexed or otherwise organized so as to become searchable by the registry staff according to the secured creditor identifier; and

(c)] Information in the registry record contained in an amendment or cancellation notice is indexed or otherwise organized so as to become searchable in a manner that associates it with the information in the initial notice.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) information may be organized with an index or not as long as it is organized in a way that makes it searchable (see rec. 54, subpara. (h)); (b) if the secured transactions law permits it, indexing may be made by serial number (in addition to grantor indexing (see the Guide, chap. IV, paras. 31-36); and (c) for internal purposes of the registry (for example, global amendments; see recommendation 28 below), indexing may be made by secured creditor identifier. With respect to indexing or other organization of information, the commentary will also explain that that it is possible to organize information so as to allow searches without an index (for example, by using a free text or wild card searching with key words). While there may be no registry of security rights that uses this type of search logic as an official search logic, some registries that have a debtor-based index provide in addition unofficial or wild card searches with key words. With respect to indexing by secured creditor identifier, the commentary will also explain that the Guide referred to in the commentary, but did not recommend general indexing by secured creditor identifier in order to avoid violating commercial expectations of confidentiality or damaging public trust in the registry system (see the Guide, chap. IV, para. 29). This is the reason why subparagraph (b) of this recommendation and recommendation 28 below appear within square brackets.]

Recommendation 15: Integrity of the registry record

The regulations should provide that, except as provided in recommendations 16 and 17, the registry may not change information in or remove information from the registry record.

Recommendation 16: Amendment of information in the registry record

The regulations should provide that the registry should amend [or allow the amendment of] information in the registry record accessible to the public only pursuant to an amendment notice according to recommendations 28 and 29 or a judicial or administrative order according to recommendation 32.

[Note to the Working Group: The Working Group may wish to consider the text in square brackets in recommendations 16 and 17. This text is intended to permit an amendment or cancellation of information in the registry record without intervention of the registry staff. For example, in an electronic registry system, the registry staff need not intervene for a registrant to amend information in the registry record. Similarly, a judicial or administrative officer should be able to take the action necessary to implement the amendment or cancellation order directly rather without having to send it to the registry and rely on the registry staff to make the necessary amendment or cancellation. This approach would reduce the responsibility and the risk of error on the part of the registry and preserve the time- and cost-efficiency of the registry.]

Recommendation 17: Removal of information from the registry record

The regulations should provide that the registry should promptly remove information from the registry record accessible to the public upon the expiry of the period of effectiveness of the registration or upon cancellation. The registry should also remove information from the registry record accessible to the public [or allow the removal of such information] pursuant to a judicial or administrative order according to recommendation 32.

Recommendation 18: Archival of information removed from the registry record

The regulations should provide that information removed from the registry record accessible to the public should be archived for at least a period of [20] years in a manner that enables the information to be retrieved by the registry.

[Note to the Working Group: The Working Group may wish to note that the commentary will make it clear that: (a) the registry may not remove or change information in the registry record; (b) a subsequent amendment will change the substance of the registry record through another notice, but it will never change the text of the initial notice; (c) under recommendation 74, when the time of effectiveness of a registered notice has expired or a notice has been cancelled, the registry should remove information from the record accessible to the public and archive it so as to be capable of retrieval if necessary; (d) the archival period may be influenced by the length of the period within which claims may be submitted under a loan agreement (for example, in some legal systems, no action may be brought later than 15 years from the date on which the act that would be the basis of a claim occurred; in those systems, the regulations provide that all registrations must be kept for 15 years; and while it is possible that the 15 year period can be extended through acknowledgment by the debtor of the debt, the registry is not obligated to keep the records beyond the initial limitation period); and (e) in many States, information in expired or cancelled notices may be retained in the registry record accessible to the public with an indication that it has expired or cancelled. The commentary may also explain that, in many States, where information submitted to the registry is entered in the registry record by the registry, the registry may correct errors that it made in the process of entering information in the registry record. This is intended to ensure that the registry may correct errors made in entering into the record information submitted in a paper form (correctness of the information on the form being the responsibility of the registrant), but may not scrutinize and correct information entered by a registrant electronically, as this would run counter to recommendation 54, subparagraph (d), which is intended to limit the role of the registry and accordingly the scope of error and liability for error. The registry may effectuate the change correcting its error by registering a correction form that identifies the clerk making the corrections and the corrections made. Furthermore, the commentary may explain that enacting States that may wish to allow such corrections by the registry will need to provide rules on the legal consequences of errors made by the registry in entering information in the registry record and in particular whether a "correction" may change the order of priority.]

(A/CN.9/WG.VI/WP.50/Add.1) (Original: English)

Note by the Secretariat on the Draft Technical Legislative Guide on the Implementation of a Security Rights Registry Guide: Annex I. Terminology and recommendations (*continued*), submitted to the Working Group on Security Interests at its twenty-first session

ADDENDUM**CONTENTS**

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Annex I. Terminology and recommendations (*continued*)**IV. Registration information****Recommendation 19: Responsibility with respect to the information in a notice**

The regulations should provide that it is not the responsibility of the registry to ensure that the information in a notice is accurate, complete or legally sufficient.

Recommendation 20: Language of a notice

The regulations should provide that the information in a notice should be expressed in [enacting State to specify] language and in a publicly available set of characters.

[Note to the Working Group: The Working Group may wish to consider the impact of this recommendation. For example, under recommendation 22, alternative B, subparagraph (d) (v) below, a grantor that is not a citizen of the enacting State would need an identification document in the language of the enacting State. Also, if the language used to describe the encumbered asset is the language in the State of the manufacturer, a searcher may be misled because he or she will not be able to determine what the encumbered asset is. In any case, the commentary may refer to other systems where a set of foreign characters may be used in the notice as long as the registry is able to rely on a set of rules for the transliteration of names with foreign characters in the alphabet of the official language(s) of the enacting State.]

Recommendation 21: Information required in an initial notice

The regulations should provide that:

(a) Only the following information is required to be provided in the appropriate field of the initial notice:

(i) The identifier and address of the grantor according to recommendations 22-24;

(ii) The identifier and address of the secured creditor or its representative according to recommendation 25;

(iii) A description of the encumbered assets according to recommendations 26 and 27;

[(iv) The period of effectiveness of the registration according to recommendation 11;¹ and

(v) The maximum monetary amount for which the security right may be enforced];² and

(b) If there is more than one grantor or secured creditor, the required information should be provided separately for each grantor or secured creditor in the appropriate field of the same notice or of different notices.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) if the information is entered in the inappropriate field (for example, the grantor identifier is entered in the secured creditor field), a notice that contains otherwise correct and sufficient information may be ineffective; (b) naming conventions of the enacting State would apply; (c) the registry system should be designed so that a search against the identifier of one of the grantors identified in the registered notice would reveal the registered notice in which all of the other grantors would be identified; and (d) for the purposes of the recommendations 21-25 and the regulations that would implement them, the grantor and the secured creditor identifier should be the identifier at the time of the registration. The Working Group may wish to consider the order of the recommendations and in particular whether right after recommendation 21, dealing with the information required for the initial notice, recommendations 28-30 should follow, dealing with the information required in an amendment or cancellation notice. If that order were followed, recommendations 22-27, dealing with grantor and secured creditor information, and encumbered asset description would follow and apply, to the extent relevant, to an initial, amendment or cancellation notice.]

¹ If the enacting State has chosen option B or C in recommendation 11 (see recommendation 69).

² If the Law allows it (see recommendation 57(d)).

Recommendation 22: Grantor identifier (natural person)

The regulations should provide that:

- (a) If the grantor is a natural person, the grantor identifier is:

Alternative A

the name of the grantor [where necessary, additional information, such as the birth date or the personal identification number issued to the grantor by the enacting State, should be required to uniquely identify the grantor];

Alternative B

the name of the grantor [and] [or] the personal identification number issued to the grantor by the enacting State. Where the grantor has not been issued a personal identification number by the enacting State, the grantor identifier is the grantor's name;

- (b) Where the grantor is a natural person whose name includes a family name and one or more given names, the name of the grantor consists of the grantor's family name and the grantor's first and second given names;

- (c) Where the grantor is a natural person whose name consists of only one word, the name of the grantor consists of that word and should be entered in the family name field;

- (d) The name of the grantor is determined as follows:

- (i) If the grantor was born and the grantor's birth is registered in [the enacting State] with a government agency responsible for the registration of births, the name of the grantor is the name as stated in the grantor's birth certificate or equivalent document issued by the government agency;

- (ii) If the grantor was born but the grantor's birth is not registered in [the enacting State], the name of the grantor is the name as stated in a valid passport issued to the grantor [by the enacting State];

- (iii) If neither (i) nor (ii) applies, the name of the grantor is the name stated in a valid official document, such as an identification card or driver's licence, issued to the grantor by [the enacting State];

- (iv) If neither (i), nor (ii), nor (iii) applies but the grantor is a citizen of [the enacting State], the name of the grantor is the name as stated in the grantor's certificate of citizenship;

- (v) If neither (i), nor (ii), nor (iii), nor (iv) applies, the name of the grantor is the name as stated in a valid passport issued by the State of which the grantor is a citizen and, if the grantor does not have a valid passport, the name of the grantor is the name as stated in the birth certificate or equivalent document issued to the grantor by the government agency responsible for the registration of births at the place where the grantor was born;

- (vi) In a case not falling within subparagraphs (i) to (v), the name of the grantor is the name as stated in any two valid official documents, such as an

identification card or a social security or health insurance card, issued to the grantor by the enacting State.

[Note to the Working Group: The Working Group may wish to consider whether: (a) the text within square brackets in alternative A of subparagraph (a) of this recommendation (which reiterates the wording of the second sentence of rec. 59) should be retained in the recommendations and in the examples of the forms (see A/CN.9/WG.VI/WP.50/Add.2); and (b) if so, whether it should be included in this recommendation or in a separate recommendation. The Working Group may also wish to consider that there are four different possibilities for the identifier under alternative B of subparagraph (a): (a) just the name; (b) just the number; (c) name or number; and (d) the name and the number. The Working Group may wish to consider whether the identifier should be just one. The Working Group may also wish to note that the commentary will explain that: (a) this recommendation deals with the grantor's identifier (indexing and search criteria are dealt with in recommendation 33 below); (b) in line with recommendation 59, alternative A of subparagraph (a) of this recommendation provides that the principal grantor's identifier is the grantor's name and foresees additional grantor identification criteria (however, error with respect to the grantor identifier is treated differently from error in additional criteria, see recs. 58 and 64); (c) if according to alternative B of subparagraph (a) of this recommendation both the name and number constitute the grantor identifier, both should be entered correctly in the appropriate field (otherwise the rule in recommendation 58 would apply); and (d) if the name consists of one word, that word should be entered in the family name field and the registry system should be designed not to reject notices that have blanks in the given name field.]

Recommendation 23: Grantor identifier (legal person)

The regulations should provide that, if the grantor is a legal person, the grantor identifier is:

Option A

the name of the legal person that is stated in the document constituting the legal person.

Option B

the name of the legal person that is stated in the document constituting the legal person [and] [or] the identification number assigned to the legal person by [the enacting State] [the State under whose authority the relevant registry is organized] pursuant to the law on [...],

Alternative A

including the abbreviation which is indicative of type of body corporate or entity, such as S.A., "Ltd", "Inc", "Incorp", "Corp", "Co", as the case may be, or the words Société Anonyme, "Limited", "Incorporated", "Corporation", "Company";

Alternative B

with or without the abbreviation which is indicative of type of body corporate or entity, such as S.A., “Ltd”, “Inc”, “Incorp”, “Corp”, “Co”, as the case may be, or the words “Limited”, “Incorporated”, “Corporation”, “Company”.

[Note to the Working Group: The Working Group may wish to note that the discussion of options A and B in the note to recommendation 21 applies to options A and B of this recommendation.]

Recommendation 24: Grantor identifier (other)

The regulations should provide that:

(a) If the grantor is the estate of a deceased person or an administrator acting on behalf of the estate, the grantor identifier is the name of the deceased person in accordance with recommendation 22, with the specification in a separate field that the grantor is an estate or an administrator acting on behalf of the estate;

(b) If the grantor is a trade union that is not a legal person, the grantor identifier is the name of the trade union stated in the document constituting the trade union; [where necessary, additional information, such as the name of each person representing the trade union in the transaction giving rise to the registration, should be required to uniquely identify the grantor in accordance with recommendation 22];

(c) If the grantor is a trust or a trustee acting on behalf of the trust, and the document creating the trust designates the name of the trust, the grantor identifier is the name of the trust in accordance with recommendation 22, with the specification in a separate field that the grantor is a “trust” or a “trustee”;

(d) If the grantor is a trust or a trustee acting on behalf of the trust, and the document creating the trust does not designate the name of the trust, the grantor identifier is the identifier of the trustee in accordance with recommendation 22, with the specification in a separate field that the grantor is a “trust” or a “trustee”;

(e) If the grantor is an insolvency representative acting for a natural person, the grantor identifier is the name of the insolvent person in accordance with recommendation 22, with the specification in a separate field that the grantor is insolvent;

(f) If the grantor is an insolvency representative acting for a legal person, the grantor identifier is the name of the insolvent legal person in accordance with recommendation 23, with the specification in a separate field that the grantor is insolvent;

(g) If the grantor is a participant in a syndicate or joint venture, the grantor identifier is the name of the syndicate or joint venture as stated in the document creating it; [where necessary, additional information, such as the name of each participant should be required to uniquely identify the grantor in accordance with recommendation 22 or 23,]; and

(h) If the grantor is a participant in an entity other than one already referred to in the preceding rules, the grantor identifier is the name of the entity as stated in the document creating it[; necessary, additional information, such as the names of

each natural person representing the entity in the transaction to which the registration relates, should be required to uniquely identify the grantor in accordance with recommendation 22].

Recommendation 25: Secured creditor identifier

The regulations should provide that:

- (a) If the secured creditor is a natural person, the identifier is the name of the secured creditor in accordance with recommendation 22;
- (b) If the secured creditor is a legal person, the identifier is the name of the secured creditor in accordance with recommendation 23; and
- (c) If the secured creditor is a kind of person described in recommendation 24, the identifier is the name of the person in accordance with recommendation 24.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that there will be a single field in the notice in paper or electronic form to identify the “secured creditor”, whether that is the actual secured creditor or its representative (that is, a natural person, or a member or representative of a syndicate of banks).]

Recommendation 26: Description of encumbered assets

The regulations should provide that:

- (a) The encumbered assets should be described in the initial or amendment notice in a manner that reasonably allows their identification; and
- (b) Unless otherwise provided in the law, a generic description that refers to all assets within a generic category of movable assets or to all of the grantor’s movable assets includes assets within the specified category to which the grantor acquires rights at any time during the period of effectiveness of the registration.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that: (a) recommendation 26 deals with the description of the encumbered assets in the notice (including attachments to immovable property); (b) if the regime governing registration in an immovable property registry does not permit registration of notices, it may need to be revised to permit registration of notices relating to potential security rights in attachments to immovable property (see the Guide, chap. III, para. 104); and (c) additional information may be provided in the form of an attachment to a notice to identify the assets in more detail or if additional space is needed. This is particularly useful or necessary in registry systems that are designed to permit that a limited number of characters be entered in the relevant fields of a notice.]

Recommendation 27: Incorrect or insufficient information

The regulations should provide that:

- (a) A registration of an initial or amendment notice is effective only if it provides the grantor’s correct identifier as set forth in recommendations 22-24 or, in the case of an incorrect statement of the identifier, if the notice would be retrieved by a search of the registry record using the grantor’s correct identifier;

(b) Except as provided in subparagraph (a) of this recommendation, an incorrect or insufficient statement of the information required to be entered in the registry record under the law and the regulations does not render the registration ineffective, unless it seriously misleads a reasonable searcher;

(c) A description of encumbered assets in a notice that does not meet the requirements of the law and the regulations does not render a notice ineffective with respect to other encumbered assets sufficiently described in the notice.

[Note to the Working Group: The Working Group may wish to consider whether this recommendation should be retained here or discussed only in the commentary. Subparagraph (a) addresses a matter that is dealt with in recommendation 58; subparagraph (b) follows recommendation 64; and subparagraph (c) follows recommendation 65. A reason for retaining this recommendation may be that it addresses a very important matter that is worth drawing attention to in the registry recommendations. The Working Group may also wish to consider whether this recommendation or the relevant commentary should make it clear that, in the case of more than one grantor, an error in the identifier of one grantor does not render the notice ineffective with respect to the other grantor(s) identified correctly.]

Recommendation 28: Information required in an amendment notice

The regulations should provide that:

(a) The following information is required to be provided in the appropriate field of an amendment notice:

- (i) The registration number of the notice to which the amendment relates;
- (ii) If information is to be added, the additional information in the manner provided by the regulations for entering information of that kind; and
- (iii) If information is to be changed, the new information as provided by these regulations for entering information of that kind;

[(b) An amendment notice that discloses a transfer of the encumbered assets should indicate the identifier and address of the transferee as a grantor in accordance with recommendations 22-24. An amendment that discloses a transfer that relates to only part of the encumbered assets, should indicate the identifier and address of the transferee as a grantor in accordance with recommendations 22-24 and describe the part of the encumbered assets transferred in accordance with recommendation 26;]

(c) An amendment notice that discloses a subordination of priority of the security right should describe the nature and extent of the subordination and identify the beneficiary of the subordination in the appropriate field;

(d) An amendment notice that discloses an assignment of the secured obligation should indicate the identifier and address of the assignee as a secured creditor in accordance with recommendation 25 and, in the case of a partial assignment, describe the encumbered assets to which the partial assignment relates in the appropriate field; and

(e) An amendment notice may be registered at any time [and refer at one or more of the above-mentioned functions].

[Note to the Working Group: The Working Group may wish to note that the commentary will explain the purpose of an amendment (for example, to add, change or delete information in the registry record, or renew the period of effectiveness of the registration) and that an amendment changing the identifier of a grantor will be indexed by adding the new identifier as if it were a new grantor. A search under either the grantor's old identifier or the grantor's new identifier will reveal the registration. The Working Group may also wish to consider whether there should be a mechanism to identify different versions of a registration. For example, an initial registration may be given the number 12345-01, the first amendment 12345-02, the second amendment 12345-03 and so on. The Working Group may also wish to consider whether, if a State chooses this option in the law (see Guide, chap. IV, paras. 78-80), in the case of a transfer of the encumbered asset (see para. 3), the transferee should be identified as the new grantor in addition to the existing grantor or whether the identifiers of both the transferor and the transferee should be retained in the publicly available registry record. The Working Group may also wish to consider whether a user should be able to select multiple amendment functions in a single notice, such as, for example, to add a grantor and to also add new encumbered assets (see bracketed text in subparagraph (e) of this recommendation).]

[Recommendation 29: Global amendment of secured creditor information in multiple notices

The regulations should provide that the registrant in multiple registered notices may request the registry to amend the secured creditor information in all such notices with a single global amendment.]

[Note to the Working Group: The Working Group may wish to note that this recommendation appears within square brackets pending determination by the Working Group of whether there should be a secured creditor index for internal searches by the registry staff (see note to recommendation 14, subpara. (b) above).]

Recommendation 30: Information required in a cancellation notice

The regulations should provide that a cancellation notice should include the registration number of the initial notice in the appropriate field. A cancellation notice may be registered at any time.

[Note to the Working Group: The Working Group may wish to note that the commentary will explain that the grantor identifier does not have to be included in a cancellation notice as long as the registrant has obtained access to the registry (for example, with his/her user identification and password), and has the relevant registration number.]

Recommendation 31: Copy of notice

The regulations should provide that:

(a) When a notice is registered electronically, the registry should transmit a copy of the notice to each registrant at the address(es) set forth in the notice as soon as the information in the notice is entered into the registry record;

(b) When a notice is registered otherwise than electronically, the registry is obligated to send promptly a copy of the notice to each registrant at the address(es) set forth in the notice; and

(c) The registrant should send a copy of the notice to each grantor at the address(es) set forth in the notice within [thirty] days after the information in the notice is entered in the registry record[, except where that grantor has waived in writing the right to receive it].

[Note to the Working Group: The Working Group may wish to consider whether the matter addressed in this recommendation is a matter for the law and thus should be discussed in the commentary rather than addressed in the recommendations. The Working Group may wish to note that the commentary will explain that whether the registry would send a printed or electronic copy would depend on what type of address the grantor has given in the notice. The Working Group may also wish to note that, with respect to the waiver of rights addressed in the bracketed text of subparagraph (c) of this recommendation (which may fit more under chapter V on the obligations of the secured creditor), under recommendation 10 of the Guide, party autonomy applies except where otherwise provided. The relevant recommendation 55, subparagraph (c), is not among those recommendations that are not subject to party autonomy, but provides that failure of the secured creditor to meet this obligation may result in penalties and damages. The Working Group may wish to consider that a waiver of this right of the grantor should not be permitted as sending copies of registered notices to grantors is a fundamental feature of the notice-registration system and an important protection for the grantor.]

V. Obligations of the secured creditor**Recommendation 32: Compulsory amendment or cancellation**

The regulations should provide that:

(a) Each registrant is obliged to submit to the registry an amendment or cancellation notice to the extent appropriate, not later than [15] days after the secured creditor's receipt of a written request by the grantor if:

(i) No security agreement has been concluded between the registrant and the grantor[, or the security agreement has been revised];

(ii) The security right to which the registration relates has been extinguished by payment or otherwise; or

(iii) 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] according to recommendation 8;

(b) No fee or expense will be charged or accepted by the secured creditor for compliance;

(c) If the registrant does not comply within the time period provided in subparagraph (a), the grantor is entitled to seek a cancellation or amendment through a summary judicial or administrative procedure;

(d) The grantor is entitled to seek a cancellation or amendment through a summary judicial or administrative procedure even before expiry of the period provided in subparagraph (a), provided that there are appropriate mechanisms to protect the registrant; and

(e) The amendment or cancellation is effected by

Alternative A

the registry promptly upon delivery of the relevant a judicial or administrative order.

Alternative B

a judicial or administrative officer [attaching a copy of the relevant judicial or administrative order].

Alternative C

the grantor attaching a copy of the relevant judicial or administrative order.

[Note to the Working Group: The Working Group may wish to note that subparagraph (a) of this recommendation (which is based on recommendation 74), does not refer to the situation where there is no commitment on the part of the secured creditor to provide further credit, but this situation is covered because if there is such a commitment the security right cannot be extinguished. The Working Group may also wish to note that subparagraph (a) does not refer to the situation where the notice refers to assets that are not mentioned in the security agreement but this situation is also covered because in such a case there would be a partly unauthorized and thus partly ineffective registration. In this context, the Working Group may wish to consider the language within square brackets in subparagraph (a)(i) to clarify these matters and set out more explicitly that the absence of any authorization is a ground for a cancellation notice, while partial authorization is a ground for an amendment notice. The Working Group may also wish to consider whether the commentary of the draft Registry Guide should refer to a different approach taken in some legal systems. Under this approach, the registered notice is cancelled automatically (without having to conduct any search or scrutiny) if the registry receives a notice by the grantor that the secured creditor has failed to respond to the grantor's request within the time period provided in subparagraph (a) of this recommendation. This approach reduces the workload of the registry staff and encourages the secured creditor to respond to amendment and cancellation requests in a timely manner. In view of the fact that secured creditors are sophisticated parties, it is considered that the risk that they will miss and fail to act on an amendment or cancellation request by the grantor and thus see their registrations being inadvertently cancelled is insignificant. As to the potential for abuse of this approach by grantors, as with the potential for abuse of the registry system by secured creditors, it is left to be dealt with outside the registry system by

law, including law other than secured transactions law. The Working Group may also wish to consider whether: (a) all the alternatives in subparagraph (c) could be retained; and (b) the recommendations should include a request form for the grantor's request addressed in this recommendation. Finally, as a separate but related matter, the commentary may also deal in this context with the question whether the grantor may demand additional information with respect to the debt and whether: (a) the grantor should be entitled to a limited number of responses free of charge within a specified period of time; and (b) the grantor should be entitled to damages or other remedy through a summary judicial or administrative procedure if the secured creditor fails to provide that information.]

VI. Searches

Recommendation 33: Search criteria

The regulations should provide that any person may conduct a search of the registry record in accordance with recommendation 7 by using one of the following search criteria:

- (a) The grantor identifier; or
- (b) The registration number.

[Note to the Working Group: The Working Group may wish to note that the commentary will refer to the approach taken in some States where serial number may be a search criterion for serial number assets in order to provide protection to transferees of encumbered serial number assets and their secured creditors (see A/CN.9/WG.VI/WP.48, para. 67, and A/CN.9/WG.VI/WP.48/Add.2, paras. 38-40).]

Recommendation 34: Search results

The regulations should provide that:

- (a) A search result either indicates that no information was retrieved against the specified search criterion or sets forth all information that exists in the registry record with respect to the specified search criterion at the date and time when the search was performed;
- (b) A search result reflects information in the registry record that matches [exactly the search criterion except ...] [closely the search criterion];
- (c) Upon request made by searcher according to recommendation 33, the registry issues a [paper] [electronic] search certificate reflecting indicating the search result;
- (d) A search certificate is admissible as evidence in a court or tribunal; and
- (e) In the absence of evidence to the contrary, a search certificate is proof of the registration of a notice, or the lack thereof, to which the search certificate relates, including the date and time of registration.

[Note to the Working Group: The Working Group may wish to note that subparagraph (b) deals with the search logic (exact matches and exceptions or

close matches). While it may be important for a registry to be designed to return close matches, this approach may be too broad. In any case, it is important for searchers to know the search logic that the registry system uses. The Working Group may wish to retain both possibilities within square brackets for States to choose from. The commentary will explain that a search result referred to in paragraphs (d) and (e) is intended to provide evidence of the fact of registration and not necessarily of the accuracy of the information contained in the registry record.]

VII. Fees

Recommendation 35: Fees for registry services

The regulations should provide that:

Option A

(a) [Subject to subparagraph (b) of this recommendation,] the following fees are payable for registry services:

- (i) Registrations:
 - a. Paper-based [...];
 - b. Electronic [...];
- (ii) Searches:
 - a. Paper-based [...];
 - b. Electronic [...];
- (iii) Certificates:
 - a. Paper-based [...];
 - b. Electronic.

(b) The registry may enter into an agreement with a person that satisfies all registry terms and conditions and establish a registry user account to facilitate the payment of fees.

Option B

The [enacting State to specify an administrative authority] may determine the fees and methods of payment for the purposes of the regulations by decree.

Option C

The [registry] [search] [electronic search] services are free of charge.

[Note to the Working Group: The Working Group may wish to note that, under recommendation 54, subparagraph (i), all or some of the registry services may or may not be subject to a fee and that, if there is a fee, it should be aimed at cost recovery rather than profit level (in any case, recommendation 54, subparagraph (c), which provides for rejection of the notice if fees are not paid, would not apply to option C). The Working Group may wish to consider whether one or more of the

options set forth above should be retained. In that regard, the Working Group may wish to take into account that registry services are commercial services that should not be paid by the State (that is, the taxpayers). The Working Group may also wish to note that, while regulations are normally easy to revise, in some States, a decree may be a more practical way to set registry fees. If the Working Group adopts or retains option A as a possibility, it may also wish to consider whether fees should depend on the period of effectiveness of a registration to more readily reflect the cost of storing the relevant information. The commentary of the draft Registry Guide may explain that recommendation 35 is intended to set forth some possible examples and that States may wish to enact different regulations for the payment of registry fees. The commentary to option A may clarify that, if the registry is operated by the State, electronic registry services or just searches may be available without a fee or with lower fees.]

(A/CN.9/WG.VI/WP.50/Add.2) (Original: English)

**Note by the Secretariat on the Draft Technical Legislative Guide on
the Implementation of a Security Rights Registry Guide: Annex II,
Examples of Registration Forms, submitted to the Working Group on
Security Interests at its twenty-first session**

ADDENDUM

The Working Group may wish to consider the examples of notice forms contained in this note. The examples are presented as annex II of the draft Technical Legislative Guide on the Implementation of a Security Rights Registry Guide, following annex I on terminology and recommendations. The Working Group may wish to consider whether examples of other forms should also be prepared (for example, schedules for additional information and rejection of a notice by the registry indicating the grounds for such rejection).

REGISTRY OF SECURITY RIGHTS IN MOVABLE PROPERTY
EXAMPLE OF INITIAL NOTICE
(FORM A)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND [IN THE CASE OF A FULLY ELECTRONIC REGISTRY] ENTERED IN THE APPROPRIATE FIELD OF THE NOTICE IN A LEGIBLE MANNER.¹ IF THE SPACE ON THIS FORM IS INSUFFICIENT, ENTER THE ADDITIONAL INFORMATION ON THE APPROPRIATE SCHEDULE.

[Registration No. _____ Registry office generated]²

A. GRANTOR INFORMATION

1. NATURAL PERSON [Recommendation 22]

Family Name	First Given Name	Second Given Name
[Father's Name]	[Mother's Name]	[Spouse's Name]

[as it appears in the identity card, if issued by the enacting State]³

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
 and/or

E-Mail Address _____

¹ Note to the Working Group: The Working Group may wish to note that the commentary will explain that the registrant enters information in the notice and, in an electronic registry, the information is placed in the registry record without intervention of the registry staff, thus eliminating the risk of entry error by and liability of the registry. In a system that accepts paper notices, the information is entered into the registry record by the registry staff, thus leaving the risk of error and liability to the registry. The Working Group may wish to consider whether these clarifications should be included in the commentary.

² Note to the Working Group: The Working Group may wish to consider whether this wording should be retained in the notice. It may not be necessary as this information would be generated automatically by the registry.

³ Note to the Working Group: The Working Group may wish to note that references to the recommendations are included for the easy reference of the Working Group in considering these examples and will be removed in the final text. The Working Group may also wish to note that, if the enacting State issues national identity cards to citizens and residents, the name provided should be that shown on the identity card (same as the form states for identification numbers). The Working Group may also wish to consider whether the recommendations or the commentary should address electronic matching of names and numbers (for both individuals and entities) in any national databases automatically on submission.

2. LEGAL PERSON OR OTHER ENTITY [Recommendations 23 and 24]

NAME _____

[as it appears in the document constituting the legal person or other entity]

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
and/or

E-Mail Address _____

3. INDICATE IF THE GRANTOR IS

_____ a named trust

_____ a trustee that is a legal person acting on behalf of an unnamed trust

_____ an insolvent legal person represented by an insolvency administrator

4. ADDITIONAL GRANTOR INFORMATION (if applicable) [Recommendation 24]

NAME: _____ / _____ / _____

Family Name

First Given Name

Second Given Name

_____ / _____ / _____

[Father's Name]

[Mother's Name]

[Spouse's Name]

[as it appears in the identity card, if issued by the enacting State]

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
and/or

E-Mail Address _____

B. SECURED CREDITOR INFORMATION

1. NATURAL PERSON [Recommendation 25, subpara. (a)]

_____ / _____ / _____

Family Name

First Given Name

Second Given Name

_____ / _____ / _____

[Father's Name]

[Mother's Name]

[Spouse's Name]

[as it appears in the identity card, if issued by the enacting State]

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
and/or

E-Mail Address _____

2. LEGAL PERSON OR OTHER ENTITY [Recommendation 25, subparas. (b) and (c)]

NAME _____

[as it appears in the document constituting the legal person or other entity]

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
and/or

E-Mail Address _____

C. DESCRIPTION OF ENCUMBERED ASSETS [Recommendation 26]**1. SPECIFIC OR GENERIC DESCRIPTION⁴**

2. SPECIFIC DESCRIPTION OF SERIAL NUMBERED ASSETS⁵

Type Code	Serial Number	Manufacturer	Model
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

[E. PERIOD OF EFFECTIVENESS OF REGISTRATION _____ (dd) _____ (mm) _____ (yyyy)]
 [Recommendations 11 and 21, subpara. (a) (iv)]

⁴ Note to the Working Group: The Working Group may wish to note that, according to the law recommended in the Guide, the description of the encumbered assets in the security agreement and in the notice has to be “in a manner that reasonably allows their identification” (see recommendations 14, subpara. (d) and 63).

⁵ Note to the Working Group: The Working Group may wish to note that, while serial number may not be an indexing and search criterion under the law recommended in the Guide, it may well be part of a description of the asset “that reasonably allows their identification” (see recommendations 14, subpara. (d) and 63).

[F. **MAXIMUM AMOUNT FOR WHICH SECURITY RIGHT IS ENFORCEABLE** _____ [in numbers and/or words]⁶ [Recommendation 21, subpara. (a) (v)]

[G. **REGISTRY USER INFORMATION**⁷

IDENTIFICATION _____

PASSWORD _____

SIGNATURE _____] (not required in user identification/password systems)

⁶ Note to the Working Group: The Working Group may wish to note that the commentary will explain that, if the registry is programmed to process only digits in this field and the amount is entered in words, the notice may be rejected.

⁷ Note to the Working Group: The Working Group may wish to consider whether this field should be retained. It is not part of the minimum requirement of a sufficient notice under recommendation 57 of the *Guide*. In addition, in the case of an electronic account system, the user presumably has to first log in and thus no further user identification on the notice is required. Moreover, in the case of a paper system, there is no password, and, even if there is, a user may not wish to disclose this password to the registry. Finally, the law recommended in the *Guide* does not require the user to sign a notice.

REGISTRY OF SECURITY RIGHTS IN MOVABLE PROPERTY
EXAMPLE OF AMENDMENT NOTICE
(FORM B)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND [IN THE CASE OF A FULLY ELECTRONIC REGISTRY] ENTERED IN THE APPROPRIATE FIELD OF THE NOTICE IN A LEGIBLE MANNER. IF THE SPACE ON THIS FORM IS INADEQUATE, ENTER THE ADDITIONAL INFORMATION ON THE APPROPRIATE SCHEDULE.

SELECT ONE OR MORE OF THE FOLLOWING:

[Recommendation 28]

- Add or delete a grantor or change/edit grantor information
- Add or delete a secured creditor or change/edit secured creditor information
- Otherwise modify description of encumbered assets (including adding or deleting items or kinds of encumbered assets and adding a description of assets that are proceeds of the original encumbered assets) [Recommendations 39 and 40 of the *Guide*]
- [Add or delete encumbered serial numbered assets (including adding a description of serial numbered assets that are proceeds of the original encumbered assets)]
- Extend the period of effectiveness of registration (if the enacting State has specified a universal period of effectiveness of registration or a maximum initial registration period)]
- [Extend or reduce the period of effectiveness of registration (if the enacting State permits secured creditors to specify the period of effectiveness of the registration)]
- [Change the maximum amount for which the security right is enforceable (if the enacting State permits it)]
- [Add information about assignment of the security right]
- [Add information about transfer of encumbered assets]
- [Add information about subordination of priority]

[Recommendation 29]

- Edit secured creditor information in all such notices with a single global amendment

[Recommendation 32]

- Add or delete information pursuant to a request by the grantor or an order of a judicial or administrative authority

Note: Where the amendment relates to an assignment/transfer by a secured creditor of its rights: (a) in the case of a full transfer, delete the secured creditor that is the transferor, add the transferee as a secured creditor and indicate that a full transfer is involved; and (b) in the case of a partial transfer, add the transferee as a secured creditor and indicate that a partial transfer is involved. Where the amendment relates to a transfer of the encumbered asset by the grantor, add the transferee as a grantor, and indicate whether all or some of the encumbered assets are transferred and, if some are transferred, indicate which ones.

Registration No. of Initial Registration Notice to which this Amendment relates _____

[Recommendation 28, subpara. (a) (i)]

A. ADD OR DELETE GRANTOR OR CHANGE GRANTOR INFORMATION

1. NATURAL PERSON [Recommendation 22]

/	/	/
Family Name	First Given Name	Second Given Name
/	/	/
[Father's Name]	[Mother's Name]	[Spouse's Name]

[as it appears in the identity card, if issued by the enacting State]

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
and/or

E-Mail Address _____

2. LEGAL PERSON OR OTHER ENTITY [Recommendation 23 and 24]

NAME _____

[as it appears in the document constituting the legal person or other entity]

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
and/or

E-Mail Address _____

3. INDICATE IF THE GRANTOR IS

_____ a named trust

_____ a trustee that is a legal person acting on behalf of an unnamed trust

_____ an insolvent legal person represented by an insolvency administrator

4. ADDITIONAL GRANTOR INFORMATION (if applicable)

NAME: _____		
/	/	/
Family Name	First Given Name	Second Given Name
/	/	/
[Father's Name]	[Mother's Name]	[Spouse's Name]

[as it appears in the identity card, if issued by the enacting State]

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
and/or

E-Mail Address _____

B. ADD OR DELETE SECURED CREDITOR OR CHANGE SECURED CREDITOR INFORMATION

1. NATURAL PERSON [Recommendation 25, subpara. (a)]

_____ / _____ / _____ /
Family Name First Given Name Second Given Name
_____ / _____ / _____ /
[Father's Name] [Mother's Name] [Spouse's Name]

[as it appears in the identity card, if issued by the enacting State]

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
and/or

E-Mail Address _____

2. LEGAL PERSON OR OTHER ENTITY [Recommendation 25, subparas. (b) and (c)]

NAME _____

[as it appears in the document constituting the legal person or other entity]

IDENTIFICATION NUMBER [if issued by the enacting State] _____

ADDRESS _____
and/or

E-Mail Address _____

C. ADD OR DELETE ENCUMBERED ASSETS OR CHANGE DESCRIPTION OF ENCUMBERED ASSETS [Recommendation 25]

D. ADD OR DELETE SERIAL NUMBER ASSETS OR CHANGE DESCRIPTION OF SERIAL NUMBERED ASSETS [Recommendation 25]

Type Code	Serial Number	Manufacturer	Model
_____	_____	_____	_____
_____	_____	_____	_____

E. EXTEND PERIOD OF EFFECTIVENESS OF REGISTRATION (if the enacting State has specified a universal registration term or a maximum initial registration term ____ (enter extended period)
[Recommendations 11, option A, and 21, subpara. (a) (iv)]

F. EXTEND OR REDUCE PERIOD OF EFFECTIVENESS OF REGISTRATION (if the enacting State permits secured creditors to specify the duration of the registration) ____ (dd) ____ (mm) ____ (yyyy)]
[Recommendations 11, options B and C, and 21, subpara. (a) (iv)]

G. CHANGE MAXIMUM AMOUNT FOR WHICH SECURITY RIGHT IS ENFORCEABLE
[Recommendation 21, subpara. (a) (v)]

H. ADD OR DELETE INFORMATION PURSUANT TO A REQUEST BY THE GRANTOR OR AN ORDER OF A JUDICIAL OR ADMINISTRATIVE AUTHORITY [Recommendation 32]

[REGISTRY USER INFORMATION]

IDENTIFICATION _____

PASSWORD _____

SIGNATURE _____] (not required in user identification/password systems)

REGISTRY OF SECURITY RIGHTS IN MOVABLE PROPERTY
EXAMPLE OF CANCELLATION NOTICE
(FORM C)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND [IN THE CASE OF A FULLY ELECTRONIC REGISTRY] ENTERED IN THE APPROPRIATE FIELD OF THE NOTICE IN A LEGIBLE MANNER.

Registration No. of Initial Notice to be cancelled: _____⁸

[REGISTRY USER INFORMATION]

IDENTIFICATION _____

PASSWORD _____

SIGNATURE _____] (not required in user identification/password systems)

⁸ Note to the Working Group: The Working Group may wish to note that the authorization by the grantor or the secured creditor for an initial, amendment or cancellation notice has to exist before or after the notice is registered, but need not be stated in the notice. The Working Group may wish to consider whether this would be necessary in the case of a cancellation where only one of several secured creditors cancels a notice.

VI. PROCUREMENT

A. Report of the Working Group on Procurement on the work of its twenty-first session (New York, 16-20 April 2012)

(A/CN.9/745)

[Original: English]

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I. Introduction

1. At its forty-fourth session, the Commission adopted the UNCITRAL Model Law on Public Procurement (A/66/17, para. 192) and instructed the Secretariat to finalize a draft Guide to Enactment for consideration by the Commission in 2012 (A/66/17, para. 181). It gave guidance to the Secretariat for this task (A/66/17, paras. 181-187).

2. At its nineteenth session, the Working Group recalled that it had deferred a number of issues for discussion in the revised Guide and that decisions on them should be maintained, unless they were superseded by subsequent discussion in the Working Group or Commission. It was also recalled that additional sections addressing issues of procurement planning and contract administration, a glossary of terms and table of correlation with the Model Law were agreed to be included in the revised Guide. The understanding was that, for lack of time, it was unlikely to be feasible to prepare an expanded Guide for implementers or end-users, and thus the revised Guide would primarily be addressed to legislators (A/CN.9/713, para. 139).

3. At that session, the Working Group requested the Secretariat to follow the following guidelines in preparing the revised Guide: (a) to produce an initial draft of the general introductory part of the revised Guide, which would ultimately be used by legislators in deciding whether the Model Law on Public Procurement should be enacted in their jurisdictions; (b) in preparing that general part, to highlight changes that had been made to the Model Law and reasons therefor; (c) to issue a draft text for the revised Guide on a group of articles or a chapter at or about the same

time, to facilitate the discussions on the form and structure of the revised Guide; (d) to ensure that the text of the revised Guide was user-friendly and easily understandable by parliamentarians who were not procurement experts; (e) to address sensitive policy issues, such as best value for money, with caution; and (f) to minimize to the extent possible repetitions between the general part of the revised Guide and article-by-article commentary; where they were unavoidable, consistency ought to be ensured. It was agreed that the relative emphasis between the general part of the revised Guide and article-by-article commentary of the revised Guide should be carefully considered (A/CN.9/713, para. 140).

4. At its twentieth session, the Working Group commenced its work on the elaboration of proposals for the Guide. It confirmed its understanding that the Guide should consist of two parts: the first describing the general approach to drafting the revised Model Law and the second part containing article-by-article commentary, and instructed the Secretariat to revise the proposals relating to the general approach section, and those relating to the provisions of the revised Model Law on challenges and appeals, restricted tendering, request for quotations, request for proposals without negotiation, request for proposals with consecutive negotiations, two-stage tendering, request for proposals with dialogue, competitive negotiations and single-source procurement. The Working Group deferred its consideration of the remaining proposals (A/CN.9/718, paras. 17-136).

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its twenty-first session in New York, from 16 to 20 April 2012. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Brazil, Canada, Chile, China, Colombia, El Salvador, France, Germany, India, Israel, Japan, Kenya, Malaysia, Mexico, Morocco, Nigeria, Philippines, Poland, Republic of Korea, Russian Federation, Senegal, Spain, Thailand, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Angola, Bangladesh, Croatia, Indonesia, Iraq, Kuwait, Panama, Qatar, Samoa, Sweden 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) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: European Space Agency (ESA), International Development Law Organization (IDLO) and World Trade Organization (WTO);

(c) *International non-governmental organizations invited by the Working Group*: Forum for International Conciliation and Arbitration (FICACIC), New York State Bar Association (NYSBA), the European Law Students' Association (ELSA) and the New York City Bar Association.

9. The Working Group elected the following officers:
Chairman: Mr. Tore WIWEN-NILSSON (Sweden)¹
Rapporteur: Mr. Seung Woo SON (Republic of Korea)
10. The Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.I/WP.78);
 - (b) Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.79 and Add.1-19).
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 proposals for the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement.
 5. Other business.
 6. Adoption of the report of the Working Group.

III. Deliberations and decisions

12. At its twenty-first session, the Working Group continued and completed its work on the elaboration of proposals for the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement.

IV. Consideration of proposals for the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

A. Review of provisions for the revised Guide to Enactment (A/CN.9/WG.I/WP.79 and Add.1-19)

13. As a general drafting instruction, it was agreed that the Guide should not cross-refer to any further explanatory materials to facilitate the implementation of the Model Law (which might subsequently be issued by the UNCITRAL secretariat), but that it should be self-contained.
14. As regards document A/CN.9/WG.I/WP.79, it was agreed to replace in the last sentence of paragraph 22 the word “can” with the word “may in some circumstances” and to revise the second sentence of paragraph 52 to note that the economic benefits of e-procurement might exceed 5 per cent.
15. No comments were made as regards document A/CN.9/WG.I/WP.79/Add.1.

¹ Elected in his personal capacity.

16. As regards document A/CN.9/WG.I/WP.79/Add.2, the Working Group agreed:

(a) To delete the discussion of “collusion” in paragraph 16. The discussion of collusion elsewhere in the Guide would explain that collusion was not limited to the absence of competition but also encompassed competition on agreed terms, for example;

(b) To reorder the discussion of competition in paragraphs 16-18 (the general discussion in paragraph 18 would follow the remainder of paragraph 16 to set the explanation of the requirement to “maximize competition” in article 28 (2) of the Model Law into context, in particular noting that this provision constituted a key application of the principle of competition set out in the Preamble); to explain in that section of the Guide and in the commentary to article 28 that in both cases the Model Law promoted the broadest and most rigorous competition appropriate in the circumstances concerned; and to add the words “among other things” in the second sentence of paragraph 17, to emphasize that the reference was to one example of promoting competition only;

(c) To explain in paragraph 20 the historical grounds for referring to “fair, equal and equitable treatment”, and to explain that the term conveyed one generic concept.

17. As regards document A/CN.9/WG.I/WP.79/Add.3, the Working Group agreed:

(a) (With reference to footnote 1) To delete the last two sentences in paragraph 8 and to address issues arising from groupings of procuring entities in a new section of the General remarks part of the Guide, to be called “International procurement cooperation” (to be located as part of the Introduction to the Model Law, before or after the discussion of the scope of the Model Law); to discuss in that new section groupings of procuring entities that might be formed not only in the international but also in the national context; to avoid the term consortium as it implied groupings of suppliers; to alert States that issues such as choice of law and applicable law, power of administration, legal responsibility and legal representation, among others, would need to be addressed for such international cooperation to succeed; in drafting such a new section, to cross-refer to article 3; to avoid exceeding the scope of the Model Law but instead to emphasize that its provisions, including the definition of the procuring entity, were included to accommodate procurement by more than one procuring entity;

(b) With respect to paragraph 29 and footnote 2, to delete the reference to “ensure the accuracy” in the last sentence; to focus on the major differences between the two paragraphs of article 5 of the Model Law rather than between the terms “accessible” and “available” (emphasizing that they revolved around the promptness of publication, and the nature and the author of information to be published. In this regard, decisions with precedent value and thus falling within the scope of paragraph 2 of the article might include judicial as well as executive publications, and the executive branch of government would and should not have control over the judicial publications).

18. As regards document A/CN.9/WG.I/WP.79/Add.4, the Working Group agreed:

(a) (With reference to footnote 1) To delete the references to “information systems” in this commentary, which were considered to be outdated; to provide in paragraphs 2-3 of the commentary an updated explanation of the requirement in

article 7 (4) for tools for such communications to be “in common use”, using the substantive provisions in those paragraphs for that purpose;

(b) In paragraph 6, to replace the phrase “the system has to guarantee” with “the system should guarantee” (i.e. to emphasize that this was a matter of good practice rather than a requirement);

(c) (With reference to footnote 2) That paragraph 12 would refer only to measures that were permissible under the procurement regulations or other laws, and that a cross-reference would be made to the discussion in A/CN.9/WG.I/WP.79 of the benefits and negative economic costs to be taken into account when regulating the socioeconomic policies that could be pursued through procurement; and to state that, in formulating these exceptional policies, the State must also consider its obligations under applicable treaties and all consequences, whether intentional or inadvertent (it was suggested that further material, discussing how to explain and justify any discriminatory effect, for example, and some points raised in footnote 2, might be considered at a later date);

(d) In paragraph 19, to delete the words “and should therefore be used by the procuring entity only when necessary”; and to emphasize that while there was no rule limiting the use of pre-qualification or pre-selection under article 49 of the Model Law, good practice would be not to use either tool absent a reason for doing so;

(e) (With reference to the Guiding Principles on Business and Human Rights (A/HRC/17/31)) In paragraph 22, to include a generic reference to human rights standards as appropriate examples of other standards that enacting States may list in the law or specify in the procurement regulations as a requirement against which the procuring entity would ascertain qualifications of suppliers or contractors;

(f) (With reference to footnotes 3 and 4) To explain in the commentary to article 9 (8)(a)-(c) that “materiality” was a threshold concept; to add an explanation that it referred to omissions or inaccuracies that might affect the integrity of the competition in the circumstances of the procurement concerned; in paragraph 30, to delete the phrase “while conferring an element of flexibility as regards insignificant inaccuracies”; and to ensure that the discussion of materiality in the commentary to article 15 (3) and of this concept in the commentary to article 9 (8)(a)-(c) were not inconsistent;

(g) (With reference to footnote 5) In paragraph 34, to add a cross-reference to the commentary to chapter VII on framework agreements, which would clarify how the requirement for a detailed description would operate in such agreements; and to delete the reference to two-stage tendering;

(h) (With reference to footnote 6) Not to add any further explanation in paragraph 36 on how socioeconomic factors are to be addressed in the rules on descriptions;

(i) To revise the drafting of paragraph 38 to make it less obscure, deleting all unnecessary text;

(j) (With reference to footnote 9) In paragraph 41, to delete the second sentence and to reword the third and fourth sentences to read along the following lines: “Accordingly, the Model Law enables the procuring entity to

select the successful submission on the basis of the criteria that the procuring entity considers appropriate in the context of the procurement concerned. Paragraphs 2(a)-(c) provide illustrations for such criteria, noting that paragraph 5 requires price to be an evaluation criterion for all procurement”;

(k) (With reference to footnote 10) To add a reference in paragraph 46 to the provisions of the revised WTO Government Procurement Agreement (the revised WTO GPA)² on offsets and price preference programmes, available as negotiated transitional measures to developing countries, which might assist in understanding how the concepts of “domestic” suppliers and “local content” have been applied in practice;

(l) (With reference to footnote 11) To revise paragraph 46 to make it easier to follow; to include a statement that there were various ways in which margins of preference were applied in practice; and to include cross-references to publicly-available information (such as that annexed to the World Bank Procurement Guidelines),³ but without indicating that any particular approach was preferred by the Model Law or Guide; and to alert enacting States about the risk of inadvertent duplication of measures aimed at achieving the same goal, such as a margin of preference and socioeconomic evaluation policies favouring domestic suppliers.

19. As regards document A/CN.9/WG.I/WP.79/Add.5, the Working Group agreed:

(a) (With reference to footnotes 1 and 2) To delete the second and last sentences from paragraph 21; and to emphasize in the paragraph that article 16 required purely arithmetical errors to be corrected;

(b) To delete paragraphs 22 to 27 except for (i) the first two sentences of paragraph 26 and (ii) the first sentence of paragraph 27, which addressed paragraphs (3) and (4) of article 16 respectively;

(c) To focus in paragraphs 21 onwards on the provisions of article 16 rather than on other provisions of the Model Law, such as article 43 (1)(b) and chapter VIII (but to raise relevant issues in the commentary to those parts of the Model Law); to analyse the provisions of the article and their application to various types of procurement and procurement methods (e.g. tendering and other procurement methods); to address various categories of errors (those by suppliers and those of procuring entities, and omissions); to cross refer to the relevant provisions of the WTO GPA to assist in understanding; to clarify the relationship between articles 16 and article 43 (1)(b) of the Model Law; and to alert States that the Model Law and the Guide did not seek to address exhaustively all issues of clarification, errors, omissions and corrections and that some such issues might be regulated in contract law;

(d) To address the issues raised in footnotes 3 and 4 in the context of the commentary to article 43 (1)(b) (see further paragraph 22 below);

² Document GPA/113 of 2 April 2012, available at the date of this report from www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

³ Available at the date of this report from <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>.

(e) (With reference to footnote 6) To retain the commentary to article 17 as drafted, without adding any reference to the form of tender securities (electronic, paper-based, etc.) as suggested in the footnote;

(f) To reformulate the first sentence in paragraph 30 in more neutral terms, and in particular to avoid giving any message that tender securities were necessary or recommended for some types of procurement;

(g) (With reference to footnote 7) To revise the fourth sentence of paragraph 30 to state that a tender security in the context of a framework agreement should be considered as an exceptional measure and might not be advisable, and to note that, in any event, it might not be possible to obtain such a security in framework agreements because of their nature;

(h) To redraft paragraph 33 to state that the law should not discriminate among tender securities on the basis of their issuer and to explain the practical reasons for including provisions in the Model Law on confirming the acceptability of a proposed issuer of a tender security (e.g. to address difficulties in enforcing securities issued abroad and uncertainty as to the creditworthiness of foreign issuers);

(i) (With reference to footnote 8) To add in the end of paragraph 34 a sentence addressing the issues raised in the footnote;

(j) (With reference to footnote 9) To provide balanced commentary to article 17 as regards the advantages and disadvantages of tender securities, in particular in the context of participation by small and medium enterprises (SMEs) (for example, in some jurisdictions, tender securities might facilitate SMEs' participation in public procurement by removing any concerns of the procuring entity as regards their qualifications and capacities; in others, the costs of such securities might discourage SME participation); to discuss situations in which tender securities could be considered an excessive safeguard by the procuring entity and, conversely, where they might be justified; and to note that the procuring entity should consider the costs and benefits of requiring a security for each procurement, rather than requiring a tender security as standard practice;

(k) (With reference to footnote 10) Not to add further commentary in paragraph 37 to discourage the use of pre-qualification in open tendering proceedings;

(l) To redraft paragraph 42 and other relevant provisions of the Guide to reflect that the Guide would not contain a glossary, but that a glossary would be issued separately (see further paragraph 36 below);

(m) (With reference to footnote 12) Not to make any changes in paragraph 43;

(n) (With reference to footnote 13) To delete the last two sentences in paragraph 50 and to refer to "reasons" for decisions, rather than to "justifications", throughout the Guide.

20. As regards document A/CN.9/WG.I/WP.79/Add.6, the Working Group agreed:

(a) (With reference to footnote 1) To delete the last sentence in paragraph 3, as suggested in the footnote;

(b) (With reference to footnote 2) To rephrase paragraphs 6 and 7 to avoid referring to the assessment of costs, and to underscore that procedures of the article were aimed at investigating prices, not underlying costs; in this connection to consider deleting the last three sentences in paragraph 7 of the commentary;

(c) To emphasize in paragraphs 6 and 7 that the provisions of the article allowed the investigation of abnormally low submissions on the basis that the procuring entity held concerns as to the ability of the supplier or contractor that presented that submission to perform the procurement contract;

(d) (With reference to footnote 3) To reword the last sentence in paragraph 9 to alert enacting States that they might wish to provide in their procurement law that the procuring entity must reject an abnormally low submission, or to retain flexibility in this regard, as in the Model Law, particularly given that the assessment of whether there was a performance risk was highly subjective;

(e) To update the commentary to article 20 of the Model Law to reflect changes made to that article at the forty-fourth session of the Commission;

(f) (With reference to footnote 4) To add in the commentary to article 21 a reference to the practice in some jurisdictions of defining what would constitute an inducement by reference to a *de minimus* threshold;

(g) (With reference to footnote 5) Not to add any further text in paragraph 16, as suggested in the footnote;

(h) (With reference to footnote 6) To delete the example provided in paragraph 18; to alert enacting States that an unfair competitive advantage was an open-ended concept difficult to define (involving issues of fairness, anti-monopoly legislation and market conditions); to note in particular that the scope of relevant existing definitions varied (e.g. the situation where a supplier employed a former procurement official with specialist knowledge of procedures and organizational structures might be classed as a conflict, as conferring an unfair competitive advantage or both, depending on the definitions involved); in this regard, to acknowledge that an unfair competitive advantage might stem from a conflict of interest but that they were two distinct concepts; to add that the essence of an unfair competitive advantage was that a supplier was in possession of information to which other suppliers had not been given access, or that suppliers might have been treated unfairly by the procuring entity (e.g. a threshold or terms of reference could be set out to favour a particular supplier); to explain in the paragraph that where there were relevant legal definitions of the concepts concerned in an enacting State, they should be disseminated as part of the legal texts governing procurement; to state that where there was no definition, examples of what did and did not constitute practices intended to be covered by the article should be provided (for example, exclusion of a supplier that was involved by the procuring entity in preparing the specifications for a particular procurement as a consultant from the procurement proceedings concerned would be appropriate in most cases while in highly concentrated markets some flexibility might be needed to allow for competition and to avoid a monopolistic situation);

(i) (With reference to footnote 7) Not to add in paragraph 20 a reference to dialogue between the procuring entity and the supplier or contractor concerned in the situations suggested in the footnote;

(j) In paragraph 20, to refer to the “supplier concerned” in the first sentence, rather than to the “alleged wrongdoer”;

(k) (With reference to footnote 8) To explain in paragraph 35 that no standstill period was applicable in the context of framework agreements without second-stage competition because the award of contracts under this type of agreement was supposed to be straightforward (since all terms and conditions were agreed upon at the time of the award of the framework agreement);

(l) (With reference to footnote 9) To retain the example in question in paragraph 53; and to redraft the second sentence along the following lines: “Security interests of the enacting State can be broader than national defence. They can include security related to the protection of health and welfare of the State’s citizens, for example ...”.

21. No changes were made in document A/CN.9/WG.I/WP.79/Add.7.

22. As regards document A/CN.9/WG.I/WP.79/Add.8, the Working Group agreed:

(a) (With reference to footnotes 1 and 2) Not to add further language to paragraphs 19 and 40, as suggested in footnotes 1 and 2, and to delete the example included in paragraph 19, which was considered unnecessary;

(b) In paragraph 40, to clarify that the procuring entity was permitted to take these steps for the purposes of evaluating tenders; as regards terminology, to ensure that the commentary closely tracked the language of the Model Law;

(c) To update the commentary to article 43 in the light of changes made to the article at the forty-fourth session of the Commission;

(d) To align the last sentence in paragraph 41 more closely with the wording in article 43 (1)(b) (as regards the qualifier “to the extent possible”);

(e) (With reference to footnote 3) In paragraph 41, to adapt the explanation of the concept of materiality and its impact on the integrity of the competition included in the commentary to article 9 (see paragraph 18 (f) above) to explain minor deviations addressed in article 43 (1)(b); to align the text of paragraph 41 generally with that of article 43 (1)(b); to insert a cross-reference to the commentary to article 16 regarding errors; to ensure consistency in the discussion of related concepts throughout the Guide (articles 9 (8)(b) and 15 (3) as regards materially inaccurate or materially incomplete information, article 16 as regards corrections and substantive changes and article 43 as regards minor deviations, material alterations or departures and corrections to the substance of the tender).

23. As regards document A/CN.9/WG.I/WP.79/Add.9, the Working Group agreed:

(a) (With reference to the issue of objectivity in selection, raised in paragraph 3 (e) of A/CN.9/WG.I/WP.79) To add at the beginning of paragraph 20 that selection on the basis of rotation could also be a relevant method for selecting suppliers; to clarify the reference to “non-selection per se” in that paragraph; to follow the same approach in paragraphs 30 and 59;

(b) To delete the penultimate sentence in paragraph 53;

(c) (With reference to footnote 1) To add the first sentence of the footnote to paragraph 56, and to enhance the clarity of the paragraph as a whole.

24. As regards document A/CN.9/WG.I/WP.79/Add.10, the Working Group agreed:

(a) To note in paragraph 11 that some participants were reluctant to use this method because of elevated risks of corruption and that putting in place the institutional frameworks and safeguards were required to ensure the proper use of this procurement method;

(b) (With reference to footnote 1) To relate the capacity issues discussed in paragraph 17 to all chapter V procurement methods, as suggested in the footnote; and to delete the last sentence in paragraph 17;

(c) (With reference to footnote 2) To delete the reference to favoured suppliers in paragraph 18; to add a reference to the effect that the presence of an independent observer during the proceedings might be a further tool to assist in avoiding corruption and abuse, particularly where delicate issues or highly competitive contracts were involved, but without implying any particular powers; to distinguish such observers from auditors or other oversight personnel, which considered the procedure after the award of the contract; and to emphasize in this context considerations of confidentiality and that observers should be from outside the procuring entity's structure.

25. As regards document A/CN.9/WG.I/WP.79/Add.11, the Working Group, with reference to footnote 2, agreed to add the first sentence of the footnote to paragraph 20, and not to add any additional points raised in the footnote to the text in that paragraph.

26. As regards document A/CN.9/WG.I/WP.79/Add.12, the Working Group agreed to redraft paragraph 3 (where it referred to the practices of the multilateral development banks (MDBs)) along the lines of a similar comment included in paragraph 53 of document A/CN.9/WG.I/WP.79/Add.9, to highlight that this method had historically been used for the procurement of advisory services, and to avoid giving the impression that the MDBs recommended or required the use of this method.

27. As regards document A/CN.9/WG.I/WP.79/Add.13, the Working Group agreed:

(a) (With reference to footnote 2) To replace the word "permitted" with the word "required" in the first sentence of paragraph 12; and to include in that paragraph a discussion of the potential disadvantages and limited benefits of requiring tender securities in electronic reverse auctions (ERAs), including ERAs as complex auctions and those used as a phase in other procurement methods; to add a cross-reference to the general discussion in the commentary to article 17; to add that the combination of participating bidders and the type of market in which ERAs were appropriate themselves offered an element of security to the procuring entity; and to encourage in the commentary the procuring entity to apply other measures to achieve the desired discipline in bidding;

(b) (With reference to footnote 3) To include in paragraph 35 a cross-reference to the commentary on ensuring objectivity in direct solicitation contained in section A of A/CN.9/WG.I/WP.79/Add.9, but not to summarize that commentary in that paragraph, and to ensure consistency where examples of methods for doing so were set out.

28. As regards document A/CN.9/WG.I/WP.79/Add.14, the Working Group agreed:

(a) (With reference to footnote 1) To delete the last sentence in paragraph 8, and to make any necessary consequential amendments to the rest of that paragraph;

(b) (With reference to footnote 2) To delete the text in square brackets in paragraph 9;

(c) (With reference to footnote 3) To delete paragraph 19, and to add a final sentence into paragraph 18 explaining the consequences of suspension and the differences between suspension and termination of the auction;

(d) (With reference to footnote 4) To retain the text of the commentary in paragraph 20 onwards as drafted, without reflecting any of the additional points raised in the footnote.

29. As regards document A/CN.9/WG.I/WP.79/Add.15, the Working Group agreed:

(a) To add in the commentary to article 62 (4)(a)(ii) that there might be exceptional situations in which only one supplier was capable of meeting the needs of the procuring entity, and in such a case, there would be no second-stage competition;

(b) To ensure consistency in drafting paragraph 8 among the various language versions;

(c) To clarify in paragraph 8 (c) the reference to “equivalent”, for example by replacing the existing references to “most advantageous submission, or lowest-priced submission, or equivalent” with a reference to the “successful submission”;

(d) To revise the second sentence of paragraph 30, and to emphasize that the notion of a maximum duration was aimed in particular at avoiding repeated extensions of closed framework agreements and that a maximum duration was to be interpreted to include both the initial duration and any extensions, excluding however extensions that might arise as a result of suspension of the operation of a framework agreement;

(e) To include a discussion in the introductory commentary to framework agreements of how the Model Law’s provisions in chapter VII could operate to mitigate the risks of creating oligopolies; and to include a cross-reference to the discussion in the General remarks section of the Guide on ensuring appropriate coordination between the competition and procurement authorities in enacting States.

30. As regards document A/CN.9/WG.I/WP.79/Add.16, the Working Group agreed:

(a) (With reference to the commentary to article 58) To ensure that the text made it clear that the commentary addressed the first phase of the procurement procedure, i.e. the award of the framework agreement, and not the award of procurement contracts under it, and to ensure that this distinction was respected throughout the commentary to provisions of the Model Law on framework agreements;

(b) (With reference to footnote 1) To delete the first part of the penultimate sentence of paragraph 3, to avoid confusing the rationale for awarding framework agreements (e.g. security of supply) with the rationale for holding dialogue-based procurement methods (the need to handle complex procurement); to include examples provided to the Working Group of awarding framework agreements using dialogue-based approaches, such as for procurement of satellite equipment and specialized communication devices for law enforcement agencies; and to replace the final sentence of paragraph 3 with a cross-reference to the detailed discussion of the issues raised in that sentence located in document A/CN.9/WG.I/WP.79/Add.15;

(c) To delete the second sentence of paragraph 8 and to make consequential changes throughout that paragraph; to replace the words “should” with “may” in the final sentence of the paragraph, to reflect that estimates would not always be available at the outset of the procurement proceedings; and to explain that the policy goal was to ensure the maximum accuracy of the information provided to suppliers, in order to elicit their best offers;

(d) (With reference to footnote 2) To add a comment at the beginning of paragraph 10 to encourage procuring entities at the outset of the procedure to consider whether or not setting a minimum number of parties to the framework agreement was appropriate; in order to balance the need for certainty where a minimum number was imposed with the operational needs of the procuring entity, to revise the final sentence to provide that where the procuring entity envisaged the possibility that a stated minimum number of parties might not be achieved, it should specify in the solicitation document the steps it would then take, which might include the possibility to conclude the agreement with a lower number of suppliers or to cancel the procurement;

(e) (With reference to footnote 3) Not to add any further discussion in paragraph 18, as suggested in the footnote, and to remove the words “minimum or” from the final sentence of that paragraph;

(f) (With reference to footnote 4) Not to add any further discussion in paragraph 35, as suggested in the footnote; to move the discussion of changes other than to the relative weights in the evaluation criteria to the commentary to article 63, which addressed changes during the operation of the framework agreement; as article 63 appeared to confer a greater flexibility to make changes in framework agreements generally than article 59 (1)(d)(iii) did as regards relative weights of evaluation criteria, to address the issues in each article separately.

31. As regards document A/CN.9/WG.I/WP.79/Add.17, the Working Group agreed:

(a) (With reference to footnote 1) To include a discussion of electronic catalogues (e-catalogues) in the Guide commentary to article 60, as suggested in the footnote (the topics to be addressed in that discussion could include whether e-catalogues would operate under open and closed framework agreements, or only under open framework agreements, how the e-catalogues would operate as initial or indicative submissions, who should manage the content of the e-catalogues (a third party service provider, the procuring entity or a supplier), how changes to initial or indicative submissions should be addressed, how the second stage of the procedure would operate, and the duration of the arrangement);

(b) (With reference to footnote 2) To simplify the first sentence of paragraph 5 to refer to all procuring entities that could use a framework agreement, noting that the manner in which the transparency requirements in article 60 (3)(a) were implemented was a matter for the procuring entity to decide, taking the approach that was the most appropriate in the circumstances concerned (e.g. via a website containing relevant names and addresses); where there was a centralized purchasing agency, that agency might be authorized to undertake the procurements concerned in its own name (as a principal), without therefore needing to publish details of its own client entities; where the agency operating as an agent, however, the details would nonetheless be required to be published;

(c) (With reference to footnote 3) To include in paragraph 7 a cross-reference to the commentary on ensuring objectivity in direct solicitation contained in section A of A/CN.9/WG.I/WP.79/Add.9, but not to summarize that commentary in that paragraph, and to ensure consistency where examples of methods for doing so were set out;

(d) In paragraphs 7 and 8, to explain that the Model Law did not require an evaluation of indicative submissions (though an examination was required), but that the procuring entity could engage in such an evaluation if it so desired; to delete the second part of the second sentence in paragraph 8, starting with the words “so that the initial submissions ...”; and to ensure consistency among language versions;

(e) (With reference to footnote 4) Not to add in paragraph 21 a reference to paper-based publication, as raised in the footnote;

(f) To revise the penultimate sentence of paragraph 21 to reflect the requirement of the Model Law that all procuring entities that might use the framework agreement must be listed in the invitation to become a party to the open framework agreement (article 60 (3)(a)), by introducing a cross-reference to the relevant paragraph of the Guide (see paragraph 31 (b) above), while noting that there is no such requirement as regards suppliers parties to the framework agreement; to analyse nevertheless the provisions of article 23 (1) in the context of open framework agreements;

(g) (With reference to footnote 5) To align the commentary in paragraph 26 with the discussion of standstill periods in framework agreements under article 22 (see paragraph 20 (k) above);

(h) In paragraph 36, to replace the words “will commonly be framed” with “may be framed” in the first sentence, and to add the words “where appropriate” after the words “with minimum technical requirements” in that sentence.

32. As regards document A/CN.9/WG.I/WP.79/Add.18 the Working Group agreed:

(a) (With reference to footnote 1) Not to add in paragraphs 29-32 any further discussion of the different approaches to suspension in proceedings before a procuring entity and before an independent body;

(b) To clarify the language in paragraphs 14, 23 and 30, in particular by referring in the end of paragraph 23 to post-contract formation disputes and by aligning the wording in paragraph 30 as regards wasting costs with the relevant wording found in paragraph 32 of document A/CN.9/WG.I/WP.79/Add.18 (“from continuing down a non-compliant path, risking wasting time and probably costs”).

33. As regards document A/CN.9/WG.I/WP.79/Add.19, the Working Group agreed:

(a) (With reference to footnote 1) To describe in the Guide various options available under the Model Law as regards sequencing applications and appeals and explain which option triggers which steps (reference in this regard was made to article XVIII of the revised WTO GPA);

(b) To clarify in the end of paragraph 29, with reference to paragraphs 4, 5 and 7 of article 66, that although the competence of the procuring entity to entertain the application ceased where a subsequent application was filed with an independent body, the procuring entity might be able to continue with corrective action in the procurement proceedings concerned, provided that such action did not contravene any order of the independent body or other provisions of domestic law; and to explain that where an application to an independent body was limited in scope, the precise implications of that submission for the pre-existing application before the procuring entity would be a matter of domestic law;

(c) (With reference to footnote 3) To explain in paragraph 41 that paragraph 2 (c) of article 67 gave an option to an enacting State to allow the independent body to hear a challenge of a decision to cancel the procurement out of time where public interest considerations so justified, and that, in some jurisdictions, this type of challenge was restricted to applications before a court, precisely because the issues raised were likely to concern questions of the public interest; to note that where the enacting State conferred such a right on the independent body, the text in square brackets referring to a decision to cancel the procurement in paragraphs 2 (b)(ii) and 2 (c) of the article would need to be retained;

(d) (With reference to footnote 4) To explain in paragraph 59 that the reason for conferring an option to permit the independent body to hear disputes arising after the procurement contract had entered into force, in paragraphs 9 (c) to (f) of article 67, was to allow enacting States to reflect their legal tradition regarding competence in such matters; as there were many square brackets in this part of the text, to explain the reason for each pair of square brackets (such as that the actions described in the text in square brackets might be reserved for applications before a court in some jurisdictions); and to cross-refer to the explanation in the Guide on the general use of square brackets in the Model Law;

(e) (With reference to footnote 5) To retain paragraph 61 as drafted, with the addition of a statement that issues of quantification were matters of the applicable domestic law, but that regulations might also address issues specific to the procurement context;

(f) (With reference to footnote 6) To note that a “governmental authority” as described in paragraph 65 included entities that were entitled to operate and/or use a framework agreement, as suggested in the footnote, subject to the requirement in article 68 (1) for those entities to have an interest in the challenge proceedings at the relevant time; to include a cross-reference to the commentary on users of framework agreements in chapter VII; and to add that a party to the framework agreement whose interests would or could be affected by the challenge proceedings would most probably be the lead purchasing entity rather than other entities that were parties to the framework agreement at the outset of the procurement proceedings;

(g) To clarify throughout the commentary to the chapter the provisions of the Model Law to which the commentary in the Guide related;

(h) To revise the commentary to the provisions of chapter VIII in the light of changes made at the forty-fourth session of the Commission.

34. The Working Group requested the Secretariat to ensure consistency in the use of terminology throughout the Guide (for example, as regards “consultancy services” and “advisory services”) and replace prescriptive wording in the Guide with a discussion of the main issues arising and policy options to address them.

B. Concluding remarks

35. The Working Group recommended that the Commission adopt the substance of those sections of the Guide discussed above and as set out in document A/CN.9/WG.I/WP.79 and its addenda, with the amendments proposed and recorded in this report. The Working Group noted that the Commission would not further consider the text of the Model Law itself, since that text had been adopted at its forty-fourth session.

36. It was further noted that a chapter of the Guide discussing revisions from the 1994 text would be made available for the forty-fifth session of the Commission (New York, 25 June-6 July 2012). The Secretariat was instructed, in preparing that chapter, to bear in mind that the decision of the Commission and General Assembly resolution adopting the Model Law encouraged enacting States to use the 2011 Model Law, but that some States might choose to make more limited amendments to existing laws, drawing, among other things, on the commentary on the revisions to the 1994 Model Law in that chapter. The Working Group also noted that the Guide would not contain a glossary of terms, but that such a document would be produced by the Secretariat in due course; it was intended that the glossary and any other materials produced to assist in the enactment and use of the Model Law would be reviewed periodically and, should amendments be merited, they would be presented to the Commission for its consideration from time to time.

37. The Working Group heard presentation by a representative of WTO as regards the revised WTO GPA, and a summary of the main principles and provisions addressed in that text.

V. Other business: future work in the area of public procurement

38. The Working Group recalled the discussion at the forty-fourth session of the Commission as regards measures to be taken to ensure regular monitoring of developments in the area of public procurement (A/66/17, paras. 186-187). Developments as regards such issues as sustainable procurement and the use of environmental standards, and rules of origin, were highlighted as having a significant potential implication on the use of the Model Law.

39. The Working Group considered areas and topics for future work in the light of the mandate of the Commission. While it was understood that it was for the

Commission to decide which areas of work and topics required attention by UNCITRAL and to set their relative priority, delegations shared the view that the work on harmonizing the provisions governing the procurement-related aspects of the UNCITRAL instruments on privately financed infrastructure projects⁴ (PFIPs) with the Model Law was necessary. The point was made that during that work, the Working Group might: (i) consolidate the UNCITRAL PFIPs instruments; (ii) identify other topics that needed to be addressed in those instruments (such as natural resource concessions, which were sometimes granted as reimbursement or compensation for private infrastructure development, oversight, promoting domestic dispute resolution measures rather than using international dispute resolution bodies as the first port of call, and defining the public interest for the purposes of such transactions); (iii) recommend to the Commission broadening the scope of the instruments by covering forms of public-private partnerships not currently covered; (iv) recommend to the Commission that UNCITRAL might prepare a model law in that area; and/or (v) recommend to the Commission addressing aspects of public procurement that were not addressed in the Model Law, such as the contract administration phase of procurement, suspension and debarment, rules on corporate compliance and the sustainability and environmental issues mentioned above. In this regard, it was pointed out that the PFIP Legislative Guide contained discussion on a number of important issues that were not reflected in the recommendations of that Guide or in any of the PFIP model legislative provisions.

40. It was considered that the mandate to be given to the Working Group would need to be sufficiently delineated, especially if it were decided that work was needed in the area of public-private partnerships, which was considered to be a broad topic. For example, work on concessions might be considered feasible in the light of their narrower scope as compared with public-private partnerships as a whole, of the widespread use of concessions and because UNCITRAL might be able to benefit from work already undertaken on this subject at the regional level.

41. The possibility of convening a colloquium in the area of public procurement and related areas was highlighted through which topics and issues surrounding each topic for future work by UNCITRAL could be identified and the scope of any such future work clarified.

⁴ Available at the date of this report from www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

B. Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twenty-first session

(A/CN.9/WG.I/WP.79 and Add.1-19)

[Original: English]

This Note introduces a proposal for a draft revised Guide to Enactment of the UNCITRAL Model Law on Public Procurement, and sets out proposed general remarks, comprising an introduction and discussion of enactment policy considerations for the draft revised Guide to Enactment.

I. Proposal for a draft Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

1. The Commission at its forty-fourth session in 2011 adopted the UNCITRAL Model Law on Public Procurement, and requested that a Guide to Enactment to accompany this text be presented to it at its forty-fifth session (A/66/17, paras 180-184).

2. The proposals in this note and its addenda are presented to the Working Group to facilitate the production of such a Guide.

3. Issues to which the Working Group may wish to direct its particular attention are set out in footnotes to the text in these documents, including the following matters:

(a) The question of errors and omissions in tenders and other submissions, which are not addressed expressly in the Model Law. The issues are raised in article 16 (see footnotes 1, 2, 3 and 4 on pages 8-9 of A/CN.9/WG.I/WP.79/Add.5) and in articles 39 and 40 (see footnotes 1 and 3 on pages 5 and 13 of A/CN.9/WG.I/WP.79/Add.8);

(b) Issues relating to tender securities as a general matter under article 17, which are raised in footnotes 6, 7 and 9 on pages 9-11 of A/CN.9/WG.I/WP.79/Add.5;

(c) Issues relating to tender securities in the context of electronic reverse auctions in the introduction to Chapter VI (see footnote 2 on page 4 of A/CN.9/WG.I/WP.79/Add.13) and regarding article 55 (see footnote 2 on page 4 of A/CN.9/WG.I/WP.79/Add.14);

(d) What explanation should be provided in the commentary to article 20(1) as to why an abnormally low submission may be rejected, rather than there being a positive obligation to do so, as raised in footnote 3 on page 3 of A/CN.9/WG.I/WP.79/Add.6;

(e) Issues relating to objectivity in the selection of suppliers in restricted tendering on the second ground under article 34(1) and in the use of direct solicitation in request-for-proposals procurement methods under article 35(2),

also discussed in the introduction to Chapter IV procurement methods (see paragraphs 20, 30 and 59 of A/CN.9/WG.I/WP.79/Add.9);

(f) Whether a procuring entity may award a procurement contract on the basis of a pre-auction examination and evaluation under article 55, as raised in footnote 1 on page 4 of A/CN.9/WG.I/WP.79/Add.14);

(g) Whether framework agreements should be permitted or discouraged within request-for-proposals procurement methods, and similar procurement methods, for example as raised regarding request-for-proposals with dialogue in the introduction to Chapter VII, in footnote 1 on page 2 of A/CN.9/WG.I/WP.79/Add.16;

(h) Whether there should be a discussion of the use of electronic catalogues, for example within open framework agreements under article 60, as raised in footnote 1 on page 2 of A/CN.9/WG.I/WP.79/Add.17;

(i) What explanation should be provided in the Guide regarding why there need be no standstill period in framework agreements without second-stage competition, as raised in footnote 5 on page 9 of A/CN.9/WG.I/WP.79/Add.17;

(j) What explanation should be provided in the introduction to Chapter VIII for the different approaches to the imposition of a suspension in challenge mechanisms (with reference in particular to a request for reconsideration before a procuring entity and a request for review before an independent body), as raised in footnote 1 on page 12 of A/CN.9/WG.I/WP.79/Add.18; and

(k) What explanation should be provided in the commentary to article 67(2)(b)(ii) on the option given to enacting States to confer competence on an independent body to consider challenges to decisions to cancel the procurement or to restrict such matters to challenges brought before a Court, as raised in footnote 3 on page 11 of A/CN.9/WG.I/WP.79/Add.19; and what explanation as to why the provisions allowing post-contract remedies to be granted to the independent body are optional under article 67, as raised in footnote 4 on page 15 of A/CN.9/WG.I/WP.79/Add.19.

II. Guide to Enactment of the UNCITRAL Model Law on Public Procurement

Part I. General remarks¹

A. Introduction

4. This section of the Guide contains general remarks, separated into two parts. The first part discusses the main policy considerations in enacting the provisions and is primarily aimed at policymakers, in that it also focuses on the context of the Model Law, describes its main features and how the Model Law fits into a procurement system. The second part contains general commentary on

¹ Note to the Working Group: the headings and subheadings in the Guide will be revised in conjunction with the relevant departments within the United Nations so as to enhance the understanding of the reader.

implementation and use of the Model Law, and is primarily aimed at regulators and those providing guidance to users (e.g. a public procurement authority). The general remarks are followed by commentary on each Chapter of the Model Law and the articles within each such Chapter.

B. Purpose of the Guide

1. Introduction

5. The United Nations Commission on International Trade Law (UNCITRAL or the Commission) has prepared this Guide to the enactment of its 2011 Model Law on Public Procurement (the Model Law) to provide background and explanatory information on the policy considerations reflected in the Model Law.

6. The information presented in this Guide is intended to explain both the objectives of the Model Law (as set out in its Preamble) and how the provisions in the Model Law are designed to achieve those objectives. The Guide is thus intended to enhance the effectiveness of the Model Law as tool for modernizing and reforming procurement systems, particularly where there is limited familiarity with the type of procurement procedures the Model Law contains.

7. In addition, and in accordance with its general approach of intergovernmental consensus-building, UNCITRAL has drawn on the experiences of countries from around the world in regulating public procurement when drafting the Model Law and this Guide. This approach also serves to ensure that the texts reflect best practice, and that the provisions of the Model Law are universally applicable. Nonetheless, as there are wide variations among States in such matters as size of the State and its domestic economy, legal and administrative tradition, level of economic development and geographical factors, options are provided for in the Model Law to suit local circumstances, and the Guide explains the issues that may be taken into account in deciding how those options may be exercised. The information in this Guide is also intended to assist States in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular local circumstances.

8. Taking into account that the Model Law is a “framework” law and provides only essential principles and procedures (see further section [\[**\]](#) below [\[**hyperlink**\]](#)), this Guide discusses the need for regulations and additional guidance to support legislation based on the Model Law, identifies the main issues that should be addressed therein, and discusses the legal and other infrastructure that will be needed to support the effective implementation of the text.

2. Structure and intended readership of this Guide

9. This Guide is intended as a reference tool for policymakers and legislators, regulators and those providing guidance to users of a procurement system based on the Model Law. The primary focus of these readers will vary: for policymakers and legislators, it may be on whether to engage in procurement reform and, if so, the scope of the reform to be undertaken and which provisions to enact. Regulators and those providing guidance may wish to focus on the sections on implementation and use of the provisions themselves. For this reason, the Guide separates, to the extent

possible, commentary on policy issues and on issues of implementation and use of the Model Law.

10. This Guide is also intended to assist users of the earlier UNCITRAL Model Law on Procurement of Goods, Construction and Services (the 1994 Model Law) in updating their legislation to reflect recent developments in public procurement. It therefore addresses the expanded scope of the Model Law as compared with its 1994 counterpart, and also explains, as necessary, the main recent developments in procurement policies and practice that underlie the revisions made to that 1994 Model Law.

11. The Guide has therefore been structured as follows:

(a) A General Remarks section in two parts: the first, addressing the main policy considerations underpinning the Model Law, its main features and those of the procurement system it envisages, and the second discussing the main issues relating to its effective implementation and use. The second part also includes issues that may also be of interest to policymakers and legislators, as it discusses legal infrastructure to support the Model Law;

(b) Commentary on the objectives of the Model Law set out in its Preamble;

(c) Commentary to each Chapter, comprising:

i. An introduction to the Chapter concerned, setting out the main policy issues and suggested policy approaches to them, and a discussion of implementation and use of the provisions in the Chapter; and

ii. Commentary on each article within each Chapter; and

(d) Commentary on the revisions made to the 1994 Model Law when compiling the (2011) Model Law.

12. The commentary for each procurement method has also been consolidated so that the reader can consider each procurement method as a whole: that is, the detailed commentary on the conditions for use of each method, the relevant solicitation rules and procedures for each method are located together, with appropriate cross-references to general principles.

13. The commentary in the General Section, to the Preamble, and in the introduction to each Chapter can be read sequentially to provide a general statement of the policy considerations addressed in the Model Law. Each Chapter can also be read in full where the reader wishes to consider in more detail the policy issues and implementation and use considerations regarding the topics covered in that Chapter. The commentary on the revisions to the 1994 Model Law does not contain points of general application to users of the 2011 Model Law.

14. This Guide contains extensive cross-references, so that the manner in which the objectives and principles of the Model Law are implemented throughout the text can be followed. The Guide is published in electronic format, on the UNCITRAL website, so that those cross-references can be supported by hyperlinks, allowing easy navigation through the text. Hard copies are also available through United Nations Publications [**reference**].

15. This Guide cannot, and is not intended, to be exhaustive. It makes reference to the work of other international bodies active in procurement reform, so as to assist

readers in considering issues in more detail than can be covered in the Guide. Finally, it is noted that practices and procedures in public procurement will develop and change to adapt to changing economic and other circumstances. For this reason, the Commission may update this Guide from time to time, to reflect new practices and procedures, and experience gained in the implementation and use of the Model Law in practice. The electronic version of this Guide available on the UNCITRAL website should therefore be considered to be the authoritative version.²

C. Introduction to the 2011 UNCITRAL Model Law on Public Procurement³

1. History, purpose and mandate

16. At its twenty-seventh session (New York, 31 May-17 June 1994), UNCITRAL adopted a Model Law on Procurement of Goods, Construction and Services (the 1994 Model Law),⁴ and an accompanying Guide to Enactment.⁵ The decision by UNCITRAL to formulate model legislation on procurement was motivated by a wish to address inadequate or outdated legislation that had been observed in many countries, resulting in inefficiency and ineffectiveness in the procurement process, abuse, and the consequent failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.

17. Inadequate procurement legislation at the national level also creates obstacles to international trade, the promotion of which is a major aspect of the mandate of UNCITRAL, and a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may impose a partial limitation on the extent to which Governments can access the competitive price and quality benefits available through international procurement. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.

18. The 1994 Model Law served as a tool to reform and modernise procurement law in all regions. It proved to be widely used and successful. It formed the basis of procurement law in more than thirty countries across the world, and its general principles have been reflected to a greater or lesser degree in many more.

² Note to the Working Group: precise references to other texts will be inserted in due course.

³ The text of the Model Law is found in annex I to the report of UNCITRAL on the work of its forty-fourth session (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*), and is also available at www.uncitral.org.

⁴ The text of the 1994 Model Law is found in annex I to the report of UNCITRAL on the work of its twenty-seventh session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*), and is also available at www.uncitral.org.

⁵ The first UNCITRAL text on public procurement was the UNCITRAL Model Law on Procurement of Goods and Construction, adopted in 1993 at the twenty-sixth session of the Commission (annex I to the report of UNCITRAL on the work of its twenty-sixth session (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*)). This text addressed the regulation of public procurement in the area of goods and construction but did not contain provisions on non-construction services.

19. At its thirty-seventh session, in 2004, the Commission decided that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those that resulted from the use of electronic public procurement [x-ref to update section and general policy discussions], and the experience gained in the use of the 1994 Model Law as a basis for law reform, without departing from its basic principles. The UNCITRAL Model Law on Public Procurement, adopted by the Commission at its forty-fourth session (Vienna, 27 June-8 July 2011) is the result of UNCITRAL's work to reform the 1994 Model Law.

20. The purpose of the Model Law is two-fold: first, to serve as a model for States for the evaluation and modernization of their procurement laws and practices, and the establishment of procurement legislation where none currently exists. The second purpose is to support the harmonization of procurement regulation internationally, and so to promote international trade. The potential of the Model Law as an instrument to fulfil these purposes will be fully realized to the extent that it is used by all types of States, further highlighting the importance of the fact that the text has not been designed with any particular groups of countries or particular state of development in mind, and that it does not promote the experience in or approach of any one region. In addition, and for economies in transition, the introduction of procurement legislation is part of a process of increasing the market orientation of the economy and, in this regard, the Model Law can serve as a tool to allow for effective coordination of the relationship between the public and private sectors in such economies.

21. The Model Law is primarily intended to be used in designing legislation at the national level. The Commission is aware, however, that other international texts and agreements addressing public procurement — notably the United Nations Convention Against Corruption, the Agreement on Government Procurement of the World Trade Organization, [\[**hyperlinks to these other texts**\]](#) and bilateral or regional free trade agreements — impose obligations that affect national procurement legislation in States that are parties to the texts concerned. Article 3 of the Model Law gives deference to the international obligations of the enacting State at the intergovernmental level. These obligations and the implications for enacting States are discussed in the section [** below](#), and in the commentary to article 3 [\[**hyperlinks**\]](#).

22. The Model Law includes provisions that are suitable for all types of procurement, and can accordingly be adapted to provide appropriate rules and procedures for procurement systems in other contexts, whether at the sub-sovereign level or within publicly-funded organizations. In addition, in developing countries and countries whose economies are in transition, many projects may be funded by multilateral donors or by foreign direct investment. The Model Law includes provisions suitable for procurement in large-scale and complex projects, and so can be used for the procurement aspects of privately-financed or donor-funded projects.

2. Objectives of the Model Law

23. The Model Law is predicated on six main objectives that should underpin legislation on public procurement, which are set out in its Preamble. The objectives are as follows:

- (a) Achieving economy and efficiency;

- (b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;
- (c) Maximizing competition;
- (d) Ensuring fair and equitable treatment;
- (e) Assuring integrity, fairness and public confidence in the procurement process; and
- (f) Promoting transparency.

24. These objectives are, to a large extent, mutually supporting and reinforcing. The procedures and safeguards in the Model Law are designed to promote objectivity in the procurement proceedings which, in turn, facilitate participation, competition, fair treatment and transparency. These notions are the key principles that facilitate achieving the overarching aims of the Model Law: value for money and avoidance of abuse in public procurement. They also underlie article 9(1) of the United Nations Convention against Corruption, which contains provisions on public procurement, and the World Trade Organization's Agreement on Government Procurement, and regional agreements addressing public procurement. [\[**hyperlinks**\]](#). However, the relative emphasis on each of the objectives may vary among public procurement systems, notably as regards the degree of transparency required. The objectives and how they are implemented in the Model Law, including as regards its approach to the appropriate balance between them, are discussed in more detail in the commentary to the Preamble [\[**hyperlink**\]](#).

3. Balancing essential principles and procedures of the Model Law and other regulations, rules and guidance

25. It is intended that States should adapt the Model Law to local circumstances, including their legislative tradition, but without compromising the Model Law's essential principles and procedures. At a minimum, primary legislation on procurement should, therefore, include the following essential principles and procedures:

- (a) That the applicable law, procurement regulations and other relevant information are to be made publicly available (article 5 [\[**hyperlink**\]](#));
- (b) The prior publication of announcements for each procurement procedure (with relevant details) (articles 33-35 [\[**hyperlinks**\]](#)) and ex post facto notice of the award of procurement contracts (article 23 [\[**hyperlink**\]](#));
- (c) Items to be procured are to be described in accordance with article 10 (that is, objectively, and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on a common and objective basis);
- (d) That qualification procedures and permissible criteria to determine which suppliers will be able to participate are set out in the law, and the particular criteria that will determine whether or not suppliers are qualified in a particular procurement procedure are to be advised to all potential suppliers (articles 9 and 18 [\[**hyperlinks**\]](#));

(e) That open tendering is the recommended procurement method and that the rules require the objective justification for the use of any other procurement method (article 28 [\[**hyperlink**\]](#));

(f) That other procurement methods are available to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement and the procurement of complex or specialized items or services). The law should set out conditions for use of these procurement methods (articles 29-31 [\[**hyperlinks**\]](#));

(g) Standard procedures for the conduct of each procurement procedure are prescribed in the law (chapters III-VII [\[**hyperlinks**\]](#));

(h) That communications with suppliers are to be in a form and manner that does not impede access to the procurement (article 7 [\[**hyperlink**\]](#));

(i) A mandatory standstill period between the identification of the winning supplier and the award of the contract, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any procurement contract entering into force (article 21(2) [\[**hyperlink**\]](#)); and

(j) Mandatory challenge and appeal procedures if rules or procedures are breached (chapter VIII [\[**hyperlink**\]](#)).

4. Balancing procurement policy and other public policies

26. The objectives of the Model Law relate to procurement as if it involved an independent system. UNCITRAL notes, however, that procurement policymaking and implementation are not undertaken in isolation, whether at the domestic level, or where international obligations are involved. This section of the Guide considers the impact of the pursuit and implementation of other government policies and objectives through the procurement system, which may have an impact on the performance of the procurement system itself. It also considers the impact of relaxation of the model Law's competition and transparency requirements, either to pursue such policies or as a necessary consequence of including defence and sensitive procurement within the public procurement system.

(a) Socioeconomic policies

27. A significant part of procurement in an enacting State may arise in connection with projects that are part of the process of economic and social development, and procurement may also enhance such development and capacity-building, and/or the procurement system may be chosen as the vehicle to deliver government support to particular groups within the economy. Other objectives may be to support private enterprises from certain sectors of the economy that do not compete as suppliers or contractors in the procurement market, or that are not able to participate freely in the wider economy, so that they become able to compete and participate fully in the markets concerned. Other policies may aim at promoting local capacity development through providing support for SMEs and the use of community participation in procurement. Governments may also seek to place certain types of procurement contracts for strategic reasons. Such policies are usually of a social, economic or environmental nature and may be aimed at a specific sector or general

development; environmental improvements; enhancement of the position of disadvantaged groups; and economic factors.

28. Examples of socioeconomic policies that have been encountered in practice include allowing for, the extent of local content, including manufacture, labour and materials, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the transfer of technology and the development of managerial, scientific and operational skills, the development of SMEs, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, and the improvement of the rights of women, the young and the elderly, and people who belong to indigenous and traditional groups.

29. The essence of such policies, defined in the Model Law as “socioeconomic policies” [\[**hyperlink**\]](#), is that they are implemented through restrictions on competition for a particular procurement, and so the policies involve exceptions to the principle of full and open competition in the Model Law. As the Model Law’s procedures are considered to guarantee optimum allocation of resources and value for money, the pursuit of socioeconomic policies can bring additional costs to procurement and therefore their use should be carefully weighed against the costs that they may involve in both the short and long term. In particular, they may be considered to be appropriate as transitory measures, only for the purposes of granting market access to emergent suppliers, opening the national economy, such as through capacity-building, and should not be used as a form of protectionism. The policies should accommodate a progressive exposure to international competition.

30. In line with the mandate of UNCITRAL to promote international trade, and with the Model Law’s objectives of maximizing participation regardless of nationality and promoting competition, the Model Law provides as a general rule that suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality. This approach follows the principles underlying the WTO GPA and other international and regional texts on procurement.

31. However, article 8(1) of the Model Law permits procurement exceptionally to be limited to domestic suppliers to the extent the procurement regulations or other provisions of law in the enacting State so allow [\[**hyperlink**\]](#). This general rule is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation, and is given effect by a number of procedures designed, for example, to ensure that invitations to participate in a procurement proceeding and invitations to pre-qualify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors.

32. The procuring entity can, however, set minimum standards for qualification and responsiveness under articles 9 and 10 [\[**hyperlinks**\]](#), and can include evaluation criteria under article 11 [\[**hyperlink**\]](#), in order to promote environmental, industrial, social or other government policies. These policies may have the effect of discriminating against foreign suppliers and contractors, either because they are so intended or because they have such an effect (for example, where standards imposed are higher than those applying in other States).

33. In addition, the provisions of article 11 also permit the procuring entity to use the technique referred to as the “margin of preference” in favour of local suppliers

and contractors. By way of this technique, the Model Law provides the enacting State with a mechanism for balancing the objectives of international participation in procurement proceedings and fostering local capacities, without resorting to purely domestic procurement. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition. The margin of preference permits the procuring entity to select a submission from a local supplier as the successful supplier when the difference in price (or price when combined with quality scores) between that submission and the overall lowest-priced or most advantageous submission falls within the range of the margin of preference.

34. The use of all such criteria, including the margin of preference, is, as is explained in the commentary to the relevant articles [\[**hyperlinks**\]](#), subject to two major caveats. Otherwise, there are express prohibitions against discrimination through qualification requirements, or examination or evaluation criteria in articles 9-11: article (9)(6) [\[**hyperlink**\]](#) states that, subject to article 8 [\[**hyperlink**\]](#), “the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable”. The rules on description of the subject-matter of the procurement provide that, also subject to article 8, no description of the subject-matter of a procurement may be used that may restrict participation of suppliers or contractors in or their access to the procurement proceedings, including any restriction on the basis of nationality (article 10(2) [\[**hyperlink**\]](#)).

35. The first caveat is that as the use of such criteria reflecting these policies may be intended to restrict or prevent foreign participation, or they may have such an effect, they may be pursued only to the extent that the international obligations of the enacting State so permit. This notion is given effect in the Model Law through the provisions of article 3, which provide that the Model Law is expressly subject to any international agreements entered into by the enacting State [\[**hyperlink**\]](#). In practice, the provisions of many trade agreements — which include requirements that suppliers in all signatory countries will be treated no less favourably than domestic suppliers, and prohibit offsets and similar measures — mean that some of the options discussed in the previous paragraph will not be available to enacting States that are parties to these trade agreements.

36. The provisions of article 3 also permit the Model Law to take account of cases in which the funds being used for procurement are derived from a bilateral tied-aid arrangement. Such an arrangement may require that procurement should be from the donor country’s suppliers or contractors. Similarly, recognition can be given to restrictions on the basis of nationality that may result, for example, from regional economic integration groupings that accord national treatment to suppliers and contractors from other States members of the regional economic grouping, as well as to restrictions arising from sanctions imposed by the United Nations Security Council.

37. The second caveat is that such criteria may be used under the Model Law only to the extent that the policies concerned are set out in the law of the enacting State, or in the procurement: they cannot be policies of the procuring entity itself. The main provisions concerned are found in Articles 8-11 [\[**hyperlinks**\]](#). They permit

the procuring entity, in limited circumstances, and solely in order to promote the government's socioeconomic policies, to restrict procurement to domestic suppliers (in article 8 [\[**hyperlink**\]](#)), to impose minimum qualification requirements relating to socioeconomic policies (in article 9 [\[**hyperlink**\]](#)), and to define its minimum requirements regarding those policies, which will (among other criteria) determine whether a submission is responsive (in article 10 [\[**hyperlink**\]](#)). In addition, the evaluation criteria can be designed to give credit for compliance with socioeconomic policies beyond any required minimum (in article 11 [\[**hyperlink**\]](#)). Finally, a need to pursue a particular socioeconomic policy can operate to justify the use of single-source procurement under article 30 [\[**hyperlink**\]](#). The commentary to those articles further discusses the manner in which the policies may be implemented [\[**hyperlinks**\]](#). Thus, for example, the Model Law allows sustainability to be promoted through procurement via qualification criteria (article 9 [\[**hyperlink**\]](#), which expressly allows the procuring entity to impose environmental qualifications, and ethical and other standards that could include fair trade requirements).

38. Although the Model Law does not restrict the type of socioeconomic policies that can be pursued through these provisions, it restricts the manner in which they can be applied. In addition to the safeguard that the policies must be set out as explained in the previous paragraph, it applies rigorous transparency requirements to ensure that the manner in which the policies will be applied in the procurement process is clear to all participants. The transparency requirements include that the full terms of participation are to be publicised in the solicitation documents (see the requirements in articles 8-11 [\[**hyperlink**\]](#) and articles 39, 47 and 49 on solicitation documents [\[**hyperlinks**\]](#)), which apply to the use of socioeconomic criteria in exactly the same manner as other criteria in matters of qualification, description and responsiveness assessment, and evaluation.

39. Nonetheless, the impact of such policies on the objectives of the Model Law include that, in restricting competition, they may increase the ultimate price paid; and the cost of monitoring compliance with government policies may add to administrative or transaction costs, which may have a negative effect on efficiency. On the other hand, some such policies may open the procurement market to sectors that have traditionally been excluded from procurement contracts (such as SMEs) and may increase participation and competition, though in the longer term such benefits may not persist if suppliers choose artificially to remain SMEs.

40. There are indications that the results from the use of preference policies (such as the use of evaluation criteria to prefer a defined group) tends to be more positive than for set-aside policies (such as restricting qualification or requiring subcontracting to a defined group, or resorting to domestic participation alone). Total insulation from competition for an extended period of time or beyond the point that suppliers can compete freely can also frustrate the capacity development that such policies are designed to achieve.

41. The Model Law's above restrictions and the stringent transparency requirements are designed to ensure that the impact of the policies can be assessed by suppliers or contractors considering whether to participate in a procurement proceeding. They also enable the costs of the policies concerned to be calculated through comparison with established benchmarks (i.e. to calculate the premium paid for pursuing the policy concerned) and to balance it against the benefits derived.

Enacting States are therefore able to consider whether pursuing socioeconomic policies through procurement is both effective in balancing and implementing the various policy objectives and efficient in operation, and to assess their own performance by comparison with empirical evidence from other States. Other viable alternatives may include targeted technical assistance, simplifying procedures and red tape, ensuring that adequate financial resources are available to all sectors of the economy, requiring procuring entities to pay suppliers regularly and on time. Providing training and other information on the procurement system may address the disincentive to participate where procedures are unknown, uncertain or long and complex, and so enhance the effectiveness of supporting particular groups within the economy.

42. At the domestic level, the general rule requiring international participation and the safeguards described are also designed to ensure transparency and to prevent arbitrary and excessive restriction of foreign participation. In addition, it prevents the procuring entity from discriminating against particular suppliers or categories of suppliers at its own instance. The rule is given effect in practice by a number of procedures designed, for example, to ensure that invitations to participate in a procurement proceeding and invitations to pre-qualify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors. The rule is further supported by provisions prohibiting qualification criteria that discriminate against suppliers or contractors or categories of suppliers or contractors (article (9)(6) [\[**hyperlink**\]](#)), provisions prohibiting the description of the subject-matter of a procurement being used to restrict the participation of suppliers or contractors or access to the procurement proceedings (article 10 (2) [\[**hyperlink**\]](#)), and requirements that, in regulating what evaluation criteria may constitute, prevent discriminatory criteria from being applied (article 11 [\[**hyperlink**\]](#)).

(b) Protecting classified information

43. As noted above [\[**hyperlink**\]](#), the procurement system under the Model Law includes security-related procurement, recognizing that such procurement may require modifications to the Model Law's transparency provisions to accommodate classified information. The Commission has sought to ensure that the modifications do not go beyond what is necessary, through the requirement for case-by-case consideration and other restrictions, so as to prevent such a key principle of the Model Law from being compromised.

44. The Model Law permits such modifications, however, not because the procurement involves defence or other sensitive procurement per se, but because it involves classified information, which is defined in article 2(1) [\[**hyperlink**\]](#) and discussed in the commentary to that definition [\[**hyperlink**\]](#). For this reason, article 35(2)(c) permits direct solicitation in request-for-proposals proceedings, as explained in the commentary to that article below [\[**hyperlink**\]](#). In addition, article 7(3)(b) also permits the procuring entity to make special provision to protect classified information when setting out the means and form of communications in a particular procurement procedure [\[**hyperlink**\]](#), and as regards suppliers and contractors and subcontractors under article 24(4) [\[**hyperlink**\]](#). Nonetheless, certain transparency mechanisms are imposed: the solicitation documents must set out where the law relating to classified information can be found (see, for example,

articles 39(t), 47(4)(f) and other articles regulating the contents of the solicitation documents [\[**hyperlinks**\]](#)).

45. “Classified information” refers to information designated as classified by an enacting State under national law. It is often understood as information to which access is restricted by law or regulation to particular classes of persons. The term, and therefore the flexibility conferred as regards classified information, refers not only to procurement in the sectors where “classified information” is most commonly encountered, such as national security and defence, but also to procurement in any other sector in which protection is conferred (such as designing sensitive construction facilities and certain medical issues). Importantly, and to avoid abuse, the provisions do not confer any discretion on the procuring entity to expand the definition of “classified information”. Classified information should be contrasted with confidential information that is protected under article 24 [\[**hyperlink**\]](#).

46. The authorization granted to procuring entities to take special measures and impose special requirements for the protection of classified information, including granting public disclosure exemptions, applies only to the extent permitted by the procurement regulations or by other provisions of law in the enacting State. The requirement for a case-by-case consideration is applied by article 7 [\[**hyperlink**\]](#), which requires the procuring entity to specify, when first soliciting participation in a procurement procedure involving classified information, if any measures and requirements are needed to protect that information at the requisite level, and what those measures are. If it takes these steps, the procuring entity must provide reasons in the record article 25(1)(v): these safeguards are designed to ensure that the potential significance of the exemptions is appropriately considered, and that the procuring entity (which determines whether sufficient grounds exist to lift normal transparency requirements) can explain and justify its actions.

(c) Sustainable procurement

47. Sustainable procurement is included as a declared objective of some procurement systems. The Commission has noted that there is no agreed definition of sustainable procurement, but that it is generally considered to include on a long-term approach to procurement policy, reflected in the consideration of the full impact of procurement on society and the environment within the enacting State (for example through the promotion of life-cycle costing, disposal costs and environmental impact). In this regard, sustainability in procurement can be considered to a large extent as the application of best practice as envisaged in the Model Law. For this reason, sustainability is not listed as a separate objective in the Preamble, but addressed as an element of processes under the Model Law.

48. The term sustainable procurement can also be used as an umbrella term for pursuit of social, economic and environmental policies through procurement, such as “social” factors: employment conditions, social inclusion, anti-discrimination; “ethical” factors: human rights, child labour, forced labour; and environmental/green procurement. The Model Law’s flexibility in allowing socioeconomic policies to be implemented in this way are discussed in detail in section [** above \[**hyperlink**\]](#).

(d) Community participation in procurement

49. The participation of the local community in the implementation phase of the procurement, such as through public scrutiny of public expenditure, may enhance delivery of the project. Experience has shown that community control can be effective if the community in question has sufficient knowledge of the subject-matter of the project, which is typically the case for small-scale projects. In case of larger and more complex projects, however, the need to ensure that appropriate information is given to the community on the essential elements of the project might not be feasible, and so community participation can be less fruitful.

50. It is generally the case that the authority to carry out projects with community participation is normally derived from rules and regulations governing public expenditure rather than the procurement law per se, and so the concept itself does not feature in the Model Law; it is an issue to be addressed in procurement planning (a topic discussed in Section ** below [\[**hyperlink**\]](#)). In addition, the ability to apply socioeconomic criteria as explained above would allow the involvement of the local community (including through a requirement to employ local labour or materials) to be one of the qualification criteria under article 9 [\[**hyperlink**\]](#), to form part of the evaluation criteria under article 11 [\[**hyperlink**\]](#), or to justify the use of single-source procurement to ensure community participation (under article 30, [\[**hyperlink**\]](#)). An inherent feature of community participation is the imposition of restrictions on the participants in the delivery of the project, and so there is a potential to undermine transparency, to add costs or to reduce competition. The consideration of balancing policy objectives discussed in section ** above [\[**hyperlink**\]](#) will therefore be relevant when addressing the question of community participation in procurement.

5. The potential of electronic procurement (e-procurement) to promote public procurement policy objectives

51. E-procurement means the procurement of goods, works and services through Internet-based information technologies (ICT). Given the rapid pace of technological advance, and as new technologies may emerge, the term e-procurement is used in this Guide to refer to the use of e-communications involving the transfer of information using electronic or similar media and to the recording of information using electronic media. The policy issues arising in the introduction and use of e-procurement are of general application for all emerging information technologies that can be used to record and transfer information and documents, and to conduct procurement procedures.

52. The potential benefits of e-procurement in terms of promoting the achievement of the objectives of the Model Law have been widely noted at the academic and policymaking level.⁶ Financial gains from such benefits can be up to 5 per cent of the value of public procurement, and it is indicated that the potential to reduce corruption and abuse is also significant.

53. In summary, e-procurement can enhance value for money of the procurement system overall and can contribute to better governance in this significant area of government activity, but there are risks and constraints, which may indicate, for

⁶ Note to the Working Group: appropriate cross-references will be included at a later date.

example, a staged approach to implementation. These risks and constraints, and the safeguards and processes that the Model Law envisages be put in place to address them, are discussed in Section ** below [\[**hyperlink**\]](#). The particular circumstances of each enacting State, its technical capacity, its governance capabilities and its capacity in public procurement and financial management as a whole will dictate how they are to be implemented. Additionally, the political will to engage in the significant reforms involved, and to open up public procurement to transparency and scrutiny by suppliers and civil society, are vital if e-procurement is to achieve its potential to enhance procurement system objectives.

6. Scope of the Model Law

(a) Application to all public procurement

54. The Model Law is designed to be applicable to all public procurement within an enacting State: the objectives of the Model Law are best served by the widest possible application of its provisions. Consequently, article 1 [\[**hyperlink**\]](#) of the text provides that the Model Law applies to all public procurement in the enacting State.⁷

55. For the same reason, and unlike in some other systems, there is no general threshold below which the Model Law's provisions do not apply, as explained in the commentary in the introduction to Chapter I [\[**hyperlink**\]](#), though there are some exemptions for low-value procurement as explained in the commentary to Chapter I [\[**hyperlink**\]](#).

56. The Model Law also includes procedures for other circumstances that may be expected to arise in public procurement: standard procurement, urgent and emergency procurement and the procurement of specialized or complex items or services. Each method is tailored to the circumstances for which it is intended to be used, as explained in the commentary to Chapter II, part I and to each procurement method concerned [\[**hyperlinks**\]](#).

57. As explained in section ** on e-procurement below [\[**hyperlink**\]](#), the Model Law applies to procurement conducted in any form, be it traditional paper-based procurement, e-procurement or through other emerging technologies. The same requirements of form and other standards apply to all such procurement.

(b) Defence and security-related procurement

58. Security-related procurement forms a significant sector of the domestic procurement market in many enacting States, including the procurement of arms, ammunition or war materials, procurement essential for national security or for national defence purposes and procurement involving other security-related items, such as might arise in the construction of prison facilities.

59. Traditionally (including in the 1994 Model Law), such procurement was exempted as a whole from legislation and supporting rules governing procurement. The present text brings national defence and national security sectors, where appropriate, into the general ambit of the Model Law, so as to promote a

⁷ Note to the Working Group: a cross-reference to the Chapter on revisions to the 1994 text will be included.

harmonized legal procurement regime across all sectors in enacting States, and to enable all procurement to benefit from the Model Law's provisions. However, the Commission is aware of the need for flexibility in such procurement and to allow for States to comply with relevant international obligations.

60. First, it is acknowledged that the Model Law's extensive transparency obligations might not be compatible with all such procurement: some steps in the procurement process will require modification to accommodate classified information, which by its nature may be sensitive or confidential (as discussed further in Section ** below [\[**hyperlink**\]](#)). The provisions in the Model Law therefore allow for exceptions to transparency mechanisms for the protection of essential security interests, such as the protection of certain parts of the record from disclosure under article 25(4) [\[**hyperlink**\]](#), and in publication obligations, also as explained in section ** on classified information, below.

61. Other issues that are of particular concern in defence procurement include the complexity of some procurement, and the need to ensure security of both information and supply. The Model Law's procedures for each procurement method, in chapters IV and V in particular, allow for these needs to be accommodated, as explained in the commentary to the procurement methods concerned [\[**hyperlinks**\]](#). For example, the Model Law makes two procurement methods — competitive negotiations and single-source procurement — available for defence and sensitive procurement where the procuring entity determines that any other method is not appropriate (as is more fully explained in the commentary to article 30 [\[**hyperlink**\]](#)). Security of supply can also be addressed through the use of framework agreements under Chapter VII [\[**hyperlink**\]](#).

7. International context of the Model Law and promotion of international participation in procurement proceedings

62. A key concern of UNCITRAL is to allow the widest possible use of the Model Law. In this regard, it has sought to enhance its usefulness by harmonizing the text to the extent possible, with other international texts on procurement, so that it can be used by parties to them without major amendment.

63. The United Nations Convention against Corruption (New York, 31 October 2003)⁸ (the Convention against Corruption) addresses the prevention of corruption by setting mandatory minimum standards for procurement in its article 9(1), which requires each State party to take the “necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption”. UNCITRAL has taken the requirements of article 9(1) into account when drafting the Model Law (see the commentary on the Preamble [\[**hyperlink**\]](#)).

⁸ United Nations, *Treaty Series*, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed January 2011).

64. The Agreement on Government Procurement of the World Trade Organization (the WTO GPA)⁹ is designed to open up as much of public procurement as possible to international competition, through national treatment and non-discrimination obligations and by following transparency and competition requirements. There are also regional trade agreements and procurement directives applicable in other economic or political groupings of States. The Commission has also taken these requirements into account in the Model Law.

⁹ Note to the Working Group: the correct reference to the new GPA text will be inserted in due course.

(A/CN.9/WG.I/WP.79/Add.1) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to
accompany the UNCITRAL Model Law on Public Procurement,
submitted to the Working Group on Procurement
at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for General remarks comprising issues of implementation and use for a draft revised Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

Part I. General remarks

...

E. Implementation and use of the Model Law

Elements of a procurement system

1. The Model Law as a “framework” law

1. The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. In this regard, the Model Law is a “framework” law that does not itself set out all the rules and regulations that may be necessary to implement those procedures in an enacting State. Accordingly, legislation based on the Model Law should form part of a coherent and cohesive procurement system that includes regulations, other supporting legal infrastructure, and guidance and other capacity-building tools.

2. Regulations and other laws required to support the Model Law

2. As a first step, the Model Law envisages that enacting States will issue procurement regulations to complete the legislative framework for the procurement system, both to fill in the details of procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State (such as the real value of thresholds for request for quotations, for example, and accommodating technical developments). Article 4 of the Model Law requires and that the entity responsible for issuing procurement regulations be identified in the text of the law itself (as further explained in the commentary to that article [[**hyperlink**](#)]).

3. As regards other legal infrastructure, not only will procurement procedures under the Model Law raise matters of procedure that will be addressed in the procurement regulations, but answers to other legal questions arising will probably be found in other bodies of law (such as administrative, contract, criminal and judicial-procedure law). Procuring entities may need to take account of and apply employment and equality legislation, environmental requirements, and perhaps other requirements. The approach to regulating procurement should also be consistent with the enacting State's legal and administrative tradition, so that the procurement system operates under a cohesive body of law. Enacting States will enhance their procurement efficacy to the extent that the various legal and implementation issues are clearly disseminated and they and their interaction with procurement law understood.

4. Specific considerations relating to the implementation of electronic procurement are discussed in section ** below [\[**hyperlink**\]](#).

3. Additional guidance to support the legal framework

5. Not all issues that will arise in the procurement process are capable of legal resolution such as through regulation: effective implementation and the operational efficacy of the Model Law will be enhanced by the issue of internal rules, guidance notes and manuals. These documents may operate to standardize procedures, to harmonize specifications and conditions of contract and to build capacity.

6. Rules and guidance notes on all aspects of procurement will themselves be further strengthened and supported by standard forms and sample documents. A combination of these measures has proved an effective tool in practice. Manuals and standard documents are used by international and regional organizations and other bodies are active in procurement reform, both in the systems they recommend and in their own internal systems. Resources discussing best practice, samples of standard documents and other guidance can be found at [\[**references, hyperlinks**\]](#).

7. Addressing the procurement system in such a holistic manner will assist in developing the capacity to operate it, an important issue as the Model Law envisages that procurement officials will exercise limited discretion throughout the procurement process, such as in designing qualification, responsiveness and evaluation criteria and in selecting the procurement method (and manner of solicitation in some cases).

8. In addition to the matters that the Model Law requires to be set out in regulations (as discussed in the commentary to article 4, [\[**hyperlink**\]](#)), enacting States are encouraged to support the Model Law with regulations of sufficient scope, and with other supporting rules and/or guidance notes, so as to ensure the effective implementation of the Model Law. Documents discussing the recommended content of such supporting documents are available on the UNCITRAL website.

9. One procedure that is not expressly mentioned in the Model Law, but is an important way of supporting the implementation of its objectives, is the issue of debriefing, as discussed in the commentary to article 22 [\[**hyperlink**\]](#). Debriefing is an informal process whereby the procuring entity provides information, most commonly to an unsuccessful supplier or contractor on the reasons why it was unsuccessful.

4. Institutional and administrative support for the Model Law

10. The Model Law is also based on an assumption that the enacting State has in place, or will put into place, the proper institutional and administrative structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law. However, it should be noted that by enacting the Model Law, a State does not commit itself to any particular administrative structure. The following discussion summarizes the types of support envisaged to support the Model Law.

1. Administrative support

11. At the administrative level, appropriate interaction between good management of public finances and procurement is a feature of good governance, and is also necessary to ensure compliance with the Convention Against Corruption (and in particular, its article 9 [\[**hyperlink**\]](#)). Budgeting requirements or procedures may be found in a variety of sources, and enacting States will wish to ensure that procuring entities are aware of all relevant obligations, such as whether budgetary appropriation is required before a procurement procedure may commence, and whether or not those obligations are part of the procurement system per se.

12. At the macro-economic level, the practical effect of the actions of the government as a buyer can be to consolidate the market and reduce the number of participating suppliers, particularly where the government purchases constitute a significant percentage of the market by volume or value. At the extreme, oligopolies or monopolies could be created or maintained. Procuring entities, taking decisions at the microeconomic level, will generally not be in a position to consider the longer-term macroeconomic impact. For this reason, ensuring reporting and cooperation between agencies responsible for monitoring the public procurement function (such as a public procurement agency as discussed in the following section [\[**hyperlink**\]](#)) and that responsible for competition policy should be ensured. The competition agency may monitor collusion and bid-rigging, and concentration in public procurement and other markets.

13. As discussed in the commentary to article 21 [\[**hyperlink**\]](#), the Model Law provides that seeking to give inducements, or having a conflict of interest or unfair competitive advantage leads to the exclusion of the supplier or contractor concerned from the procurement proceedings at issue. Enacting States, as the commentary also notes, may wish to introduce a system of sanctions, which may involve temporary or permanent exclusion from future procurements (and which may be called an administrative debarment or suspension process in some systems). Coordination of the procedures, including due process safeguards and transparency mechanisms, should be ensured among bodies that can invoke a suspension or debarment, and information on any suppliers or contractors that have been suspended or debarred should be available to all such bodies.

14. Enacting States may also wish to consider whether enforcement authority in competition-related and procurement-related matters is more effectively provided at a centralized rather than a decentralized level.

2. Institutional support

15. At the institutional level, an enacting State may also find it desirable to set up a public procurement agency or other authority or body to assist in the implementation of rules, policies and practices for procurement to which the Model Law applies. The functions of such a body (or bodies) might include, for example:

(a) *Ensuring effective implementation of procurement law and regulations.* This may include the issue of the procurement regulations required by article 4 of the Model Law [\[**hyperlink**\]](#), the code of conduct required under article 26 [\[**hyperlink**\]](#), monitoring implementation of the procurement law and regulations, making recommendations for their improvement, issuing interpretations of those laws, and addressing conflicts of interest and other issues that may give rise to sanctions or enforcement action;

(b) *Rationalization and standardization of procurement and of procurement practices.* This may include coordinating procurement by procuring entities, and preparing standard documents as noted above. This function may be particularly productive where the enacting State seeks to enhance the participation of SMEs in the procurement process;

(c) *Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader government policies.* This may include examining the impact of procurement on the national economy (such as monitoring concentration in particular markets and potential risks to competition, in conjunction with competition bodies as noted above [\[**hyperlink**\]](#)), analysing the costs and benefits of pursuing socioeconomic goals through procurement, rendering advice on the effect of particular procurement on prices and other economic factors[, and verifying that a particular procurement falls within the programmes and policies of the Government];

(d) *Capacity-building.* The body could also be made responsible for training the procurement officers and other civil servants involved in operating the procurement system. A key feature of an effective procurement system based on the Model Law is the establishment of a cadre of procurement officials with a high degree of professionalism, especially at upper levels within procuring entities, where critical decisions are taken. The advantages of considering procurement as a professional, rather than an administrative function, with its officials being on a par with other professionals in the civil service (engineers, lawyers, etc. and the members of tender committees) are well-documented at the regional and international level, both in terms of avoidance of corruption and in achieving economy or value for money [\[**hyperlinks **\]](#).¹ There are various bodies at the international level that specialize in certification and training of procurement officers, information regarding which is available at [\[**hyperlinks**\]](#). Capacity-building programmes should be tailored to specific needs — to reflect existing levels of capacity, development needs, and the acquisition of more in-depth skills over time. Capacity-building is also needed in the private sector, to ensure that suppliers and contractors are familiar with and can participate in the procurement

¹ Note to the Working Group: references will be made to appropriate documents from international organizations including the multilateral development banks, and to regional organizations including the OECD, and others as appropriate.

system, and may be particularly important where the enacting State seeks to enhance the participation of new entrants in the procurement market, including on the part of SMEs and historically disadvantaged groups;

(e) *Assisting and advising procuring entities and procurement officers.* Procurement officers may seek guidance on drafting internal documents for use within a procuring entity, and interpretations of specific aspects of law and regulations, or whether there is expertise elsewhere in the enacting State in the procurement of highly-specialized or complex items or services. Technical or legal advice may already have been provided by the advisers to the Government, or within a particular procuring entity, but procurement officials may seek guidance from the body as to whether their intended actions (for example using an alternative procurement method or recourse to direct solicitation) are in compliance with the legislative framework. As noted below [\[**hyperlink**\]](#), advisers will not be effective as such if they also have an enforcement role;

(f) *Certification.* In some cases, such as high value or complex procurement contracts, the agency might alternatively be empowered to review the procurement proceedings to ensure that they have conformed to the Model Law and to the procurement regulations, before the award is made or the contract enters into force.

16. As regards capacity-building, the use of a prior-approval system in which certain important actions and decisions of procurement officials are subject to ex ante approval mechanisms, which operate to require approval from outside the procuring entity, was a feature of many procurement systems in the past. The advantage of such a prior-approval system is to foster the detection of errors and problems before certain actions and final decisions are taken. In addition, it can provide an added measure of uniformity in a national procurement system and operate as part capacity-building through the justification and consideration of the decisions or actions concerned. However, its use is decreasing. It is no longer encouraged by many donor agencies engaged in procurement reform and capacity-building. The main reason is that its use appears to prevent the longer-term acquisition of decision-making capacity, and can dilute accountability.

17. Accordingly, a requirement for external approval is not envisaged in most circumstances envisaged in the Model Law, particularly given that there are precise conditions for use of its procurement methods. In two-stage tendering and some instances of single-source procurement (for urgent situations) for example, external approval may be particularly inappropriate for this reason (see commentary to those procurement methods [\[**hyperlink**\]](#)). The Model Law does provide an option to include an external approval mechanism in articles 23 and 30, as further explained in the commentaries to those articles [\[**hyperlink**\]](#). One alternative to an external approval mechanism is to exercise oversight over procurement practices only through ex post facto monitoring, including audit and evaluation, an approach that can allow procurement officials to develop decision-making skills, and reporting mechanisms can allow the decisions to be assessed at a macro as well as a micro level.

18. The references in the Model Law to external approval as an option are in the use of request-for-proposals with dialogue and single-source procurement to promote socioeconomic policies under article 30 [\[**hyperlink**\]](#), as explained in the commentary to these procurement methods [\[**hyperlinks**\]](#). In addition, the

entry into force of the procurement contract can also be made subject to prior approval under article 23 [\[**hyperlink**\]](#), as explained in the commentary to that article [\[**hyperlink**\]](#)).

19. Where it decides to enact an approval requirement, the enacting State will need to ensure that the requirement for ex ante approval is set out in the procurement law. It should also designate the agency or other body or bodies responsible for issuing the various approvals, and to delineate the extent of authority conferred in this regard. An approval function may be vested in an agency or authority that is wholly autonomous of the procuring entity (e.g., ministry of finance or of commerce, or public procurement authority) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself, as further discussed in section [** below on institutional structure \(\[**hyperlink**\]\)](#). An approval decision is subject to challenge under Chapter VIII of the Model Law as any other decision in the procurement process.

20. Where procuring entities are independent of the governmental or administrative structure of the State, such as some State owned commercial enterprises, States may find it preferable for any approval, certification or guidance function to be exercised by a body that is part of the governmental or administrative apparatus in order to ensure that the public policies sought to be advanced by the Model Law are given due effect. Most importantly, where approval functions are concerned, the body must be able to exercise its functions impartially and effectively and be sufficiently independent of the persons or department involved in the procurement proceedings. It may be preferable for these functions to be exercised by a committee of persons, rather than by one single person, to avoid the risk of abuse of the power conferred.

21. The procedures for any approval requirement should be clear and transparent, so as to avoid the use of the requirement to hold up the procurement process. In this regard, and in deciding on the level of external approval, if any, the enacting State will wish to take account of such matters as whether there is a large public sector with complex functions, and in a federal state or one in which access to centralized authorities may be difficult, the potential delays of external approval may be significant.

22. Thresholds or guidance for types of procurement in which external approval may be sought can assist in allowing the use of a prior-approval mechanism without jeopardizing capacity acquisition over the longer-term, though mixed systems can lead to diluted accountability if decision-making responsibilities are divided or not clear. Any decision to disallow the use of a particular procurement method, or to reject the award of a contract, should be justified and included in the record of the procurement proceeding concerned as well as in the records of the approving body.

23. A related issue is the question of oversight and enforcement of individual procurement decisions. An oversight function will be effective only to the extent that it is exercised by an entity that is independent of the decision-taker — that is, of the procuring entity or any approving body. An alternative structure for those systems in which the public procurement authority or other body exercises decision-making powers may be for oversight to be undertaken by a national audit body. Similarly, and as regards the enforcement of compliance with the provisions of legislation based on the Model Law, enacting chapter VIII of the Model Law

requires an independent review function (administrative or judicial). as noted above [\[**hyperlink**\]](#), an advisory function will be compromised if procurement officers are reluctant to use it for fear of subsequent enforcement action on the basis of information they provide when seeking advice.

24. The structure of the bodies that exercise administrative, review, oversight and enforcement functions in a particular enacting State, and the precise functions that they will exercise, will depend, among other things, on the governmental, administrative and legal systems in the State, which vary widely from country to country. The system of administrative control over procurement should be structured with the objectives of effectiveness, economy and efficiency in mind, and with controls to ensure the independence of members of the body or bodies from decision-makers in the Government and in procuring entities.. Systems that are excessively costly or burdensome either to the procuring entity or to participants in procurement proceedings, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials who carry out the procurement proceedings could in some cases stifle their ability to act effectively. Enacting States may consider that investment in systems to ensure that procuring entities have sufficient capacity, and that they and procurement officers are adequately trained and resourced, will assist in the effective functioning of the system and in keeping the costs of administrative control proportionate.

5. Implementing the principles of the Model Law to all phases of the procurement cycle: procurement planning and contract management

25. The Model Law includes the essential procedures for the selection of suppliers and contractors for a given procurement contract, consistent with the objectives described in section [** above \[**hyperlink**\]](#), and provides for an effective challenge mechanism if the rules or procedures are broken or not respected. The Model Law does not purport to address the procurement planning, or contract performance or implementation phase. Accordingly, issues such as budgeting, needs assessment, market research and consultations, contract administration, resolution of performance disputes or contract termination are not addressed in its provisions.

1. Nonetheless, the Commission recognizes the importance of these phases of the procurement process for the overall effective functioning of the procurement system. The enacting State will need to ensure that adequate laws and structures are available to deal with these phases of the procurement process: if they are not in place, the aims and objectives of the Model Law may be frustrated.

26. As regards procurement planning, international and regional procurement regimes have moved towards encouraging the publication of information on forthcoming procurement opportunities, and some enacting States may require the publication of such information as part of their administrative law. Some other systems reduce time limits for procurement advertisements and notices where there has been such advance publication. The benefits of this practice accrue generally through improved procurement management, governance and transparency. Specifically, it encourages procurement planning and better discipline in procurement and can reduce instances of, for example, unjustified recourse to methods designed for urgent procurement (if the urgency has arisen through lack of planning) and procurement being split to avoid the application of more stringent rules. The practice can also benefit suppliers and contractors by allowing them to

identify needs, plan the allocation of necessary resources and take other preparatory actions for participation in forthcoming procurements. The Model Law encourages, but does not require, the publication of information on forthcoming procurement opportunities, as explained in the commentary to article 6 [\[**hyperlink**\]](#).

27. The contract management stage, if poorly conducted, can undermine the integrity of the procurement process and compromise the objectives of the Model Law of equitable treatment, competition and avoidance of corruption, for example if variations to the contract significantly increase the final price, if substandard quality is accepted, if late payments are routine, and if disputes interrupt the performance of the contract. Detailed suggestions for contract administration in complex procurement with a private finance component are set out in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) [\[**hyperlink**\]](#): many of the points made in that instrument apply equally to the management of all procurement contracts, particularly where the contract relates to a complex project.

6. Specific issues arising in the implementation and use of e-procurement

28. As noted in Section [** \[**hyperlink**\]](#) above, many of the benefits arising through e-procurement are derived from enhanced transparency. As advertising on Internet portals of procurement opportunities and the publication of procurement rules and procedures allows more relevant information to be made available at an acceptable cost than was the case in the paper-based world (for further detail, see the commentary on articles 5 and 6 below [\[**hyperlinks**\]](#)). E-advertising also enables suppliers to apply to participate in the procedure, and then to give and receive information, and submit tenders and other offers online, yielding better market access as the market is opened up to entrants located far away and that might not otherwise participate, and consequently better participation and competition.

29. ICT tools can enhance administrative efficiency in terms of both time and costs (the use of e-communications allowing paper-related administrative costs and the time needed to send information in paper form to be reduced). E-communications during the procurement process encompasses the submission of tenders and other offers online. Other e-procurement tools include e-reverse auctions, e-catalogues and e-framework agreements (as discussed in the commentary in the introduction to Chapters VI and VII [\[**hyperlinks**\]](#)). These tools and techniques can allow the procedures for purchases to be completed in hours or days rather than weeks or months.

30. Automated processes can also provide additional measures to support integrity, by reducing human interaction in the procurement cycle and the personal contacts between procurement officials and suppliers that can give rise to bribery opportunities. Repeated purchases can be conducted using standard procedures and documents available to all system users through ICT, enhancing uniformity (generating efficiencies and further supporting performance evaluation, particularly where procurement systems are integrated with planning, budgetary and contract administration and payment systems — which themselves may include electronic invoicing and payment).

31. In the light of the above considerations, the general approach to the implementation and use of e-procurement in the Model Law is based on three key

considerations. First, given the potential benefits of e-procurement, and subject to appropriate safeguards, the Model Law facilitates and, where appropriate and to the extent possible, encourages its introduction and use. Secondly, as a consequence of rapid technological advance and of the divergent level of technical sophistication in States, the text is technologically neutral (i.e. it is not based on any particular technology). Thirdly, detailed guidance is needed to support enacting States in introducing and operating an e-procurement system effectively.

32. As regards the facilitation and encouragement of e-procurement, the Model Law provides for the publication of procurement-related information on the Internet, the use of ICT for the communication and exchange of information throughout the procurement process, for the presentation of submissions electronically and for the use of procurement methods facilitated by ICT and the Internet (in particular, electronic reverse auctions, and electronic framework agreements, including electronic catalogues). The detailed considerations arising from specific aspects of e-procurement are discussed in the article-by-article remarks; in articles 5 and 6 on e-publication [\[**hyperlink**\]](#), in article 40 on electronic submissions in [\[**hyperlink**\]](#), in Chapter VI on electronic reverse auctions in [\[**hyperlink**\]](#) and in Chapter VII on electronic framework agreements, including e-catalogues [\[**hyperlink**\]](#).

33. As regards technological neutrality, the Model Law does not recommend any particular technology, but describes the functions of available technologies (see section [** below \[**hyperlink**\]](#)). It has been drafted to present no obstacle to the use of any particular technology. Terms such as “documents”, “written communication” and “documentary evidence” are becoming more commonly used to refer to all information and documents (whether electronic or paper-based) in those countries in which e-government and e-commerce are widespread, but, in others, the assumption may be of a paper-based environment. The Model Law is drafted so that all means of communication, transmission of information and recording of information can be used in procurement procedures carried out under legislation based on the Model Law, and so these terms in the text should not be interpreted to imply a paper-based environment. In addition, the Model Law does not include any references or form requirements that presuppose a paper-based environment (see, further, the commentary to article 7 on communications in procurement and article 40 on the presentation of tenders [\[**hyperlinks**\]](#)).

34. As regards guidance to introduce and operate an e-procurement system effectively, it will be clear from the foregoing that the reforms concerned involve far more than simply digitizing existing practices: if paper communications are simply replaced with e-mails and Internet-based communications, and advertising procurement opportunities on a website, many of the above benefits will not materialize. Further, weaknesses in a traditional procurement system will be transported to its new, digital equivalent. An overhaul of an entire procurement system to introduce e-procurement involves a significant investment, but it should be considered as an opportunity to reform the entire procurement process, to enhance governance standards, and to harness the facilities of ICT for the purpose.

35. As regards the introduction of an e-procurement system, the extent to which individual States can effectively implement and use e-procurement depends on the availability of necessary e-commerce infrastructure and other resources, including measures regarding electronic security, and the adequacy of the applicable law

permitting and regulating e-commerce. The general legal environment in a State (rather than its procurement legislation) may or may not provide adequate support for e-procurement. For example, laws regulating the use of written communications, signatures, what is to be considered an original document and the admissibility of evidence in court might be inadequate to allow e-procurement with sufficient certainty. While these issues may not diminish the desire to use e-procurement, the outcome may be unpredictable and commercial results will not be optimized.

36. An initial consideration in addressing this issue is whether the general regulation of, or permission to use, e-procurement is to be addressed in procurement law or in the general administrative law of an enacting State. As noted in Section ** above [\[**hyperlink**\]](#), the Model Law is not a complete protocol for procurement: procurement planning, contact administration and the general supporting infrastructure for procurement are addressed elsewhere. Even if the Model Law were to provide for a general recognition of electronic documents and communications, it would not cover all documents, information exchange and communications in the procurement cycle, and there may be conflicts with other legal texts on electronic commerce. The solution adopted in the Model Law therefore, is to rely on laws of the enacting States, including general electronic commerce legislation to enable e-procurement, adapting them as necessary for procurement-specific needs. Enacting States will therefore first need to assess whether their general electronic commerce legislation enables e-procurement in their jurisdictions.

37. For this purpose, enacting States may wish to adapt the series of electronic commerce texts that UNCITRAL has issued: the Model Law on Electronic Commerce (1996), the Model Law on Electronic Signatures (2001), and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) [\[**hyperlinks/add publication details for paper version**\]](#).² These texts provide a general recognition of electronic commerce and electronic signatures, and which, if enacted in a State, provide the general legal requirements for the use of e-procurement. They rely on what has been called a “functional equivalent approach” to electronic commerce, which analyses the functions and purposes of traditional requirements for paper-based documents and procedures, and fulfils those requirements using information technologies. This approach has also been followed for procurement-specific applications of e-commerce in the Model Law.

38. Because the approach is functional, it encompasses the notion of technological neutrality (as described above) and avoids the imposition of more stringent standards on e-procurement than have traditionally applied to paper-based procurement. It is important to note that more stringent standards will operate as a disincentive to the use of e-procurement, and/or may elevate the costs of its use, and its potential benefits may be lost or diluted accordingly. Further, there will be risks of paralysis of a system should any technology that it mandates become temporarily unavailable. An additional reason for applying technological neutrality is to avoid the consequences of a natural tendency to over-regulate new techniques or tools in procurement or to follow a prescriptive approach, reflecting a lack of experience

² Available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html.

and confidence in the use of new technologies, which would also make their adoption more difficult than it needs to be.

39. Another implication of this approach is that no definitions of the terms “electronic”, “signature”, “writing”, “means of communication” and “electronic data messages” are included in the Model Law. Definitions of the main terms needed for effective electronic commerce transactions do appear in the UNCITRAL electronic commerce texts described above. For example, article 2 of the UNCITRAL Model Law on Electronic Commerce describes “data message” as “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. [\[**hyperlink**\]](#)” The Model Law itself addresses issues specific to procurement that are not addressed in general e-commerce legislation, such as the need for precise times of receipt for e-tenders, and the importance of preventing access to their contents until the scheduled opening time [\[**cross reference and hyperlinks to article-by-article remarks**\]](#).

40. A second aspect of introducing e-procurement is to remove obstacles to the use of e-procurement. These obstacles may be logistical and/or technological. Although many Governments have moved to conducting at least some of their business online, reliable access to the Internet cannot always be assumed: there may be infrastructure deficiencies, and the relevant technologies may not be universally available, particularly if it involves or uses new technologies and their supporting infrastructures that are not yet used sufficiently widely, or that is beyond the reach of SMEs.

41. Indeed, the use of ICT can impede market access in some circumstances, posing a constraint on full implementation of e-procurement. The problem may be temporary, and can arise directly and generally (for example where the electricity supply or broadband access is unreliable, or where electronic documents have doubtful legal validity), or can be an indirect consequence of e-procurement and limited to certain suppliers, such as SMEs and small suppliers that might not have the resources to purchase suitably fast Internet access or to participate in larger contracts that e-procurement can encourage. The Model Law contains safeguards to address the risks and constraints, which are discussed in paragraphs [\[**\]](#) of the commentary to article 7 [\[**hyperlink**\]](#).

42. As regards the setting-up of procurement systems, a first issue is the structure and financing of the system. Some systems are set up to be self-financing through outsourcing to a third-party agency, which levies charges on suppliers that use them, an approach that has been on the rise as e-procurement systems have been implemented. Outsourcing may be administratively efficient, and particularly so where specialist ICT systems need to be designed, run and administered, but can involve risks. Commentators have observed both decreasing participation and competition where charges are levied, and the potential for institutional conflicts of interest (that is, the agency or body running the system seeks to increase its revenues by encouraging procuring entities to overuse the system [\[**hyperlinks**\]](#)). These risks may be enhanced if designing a system is outsourced, with the main aim of introducing it swiftly and relatively cheaply, to those that will run it. Enacting States will therefore wish to consider the costs and benefits of self-financing systems and outsourcing parts of the procurement system as part of designing a reform programme that includes e-procurement.

43. A related issue is the use by procuring entities of proprietary information technology systems and specialist software for e-procurement. Market access is enhanced if procuring entities allow all potential suppliers to participate without charge. But procuring entities may be under significant pressure to recoup the costs of their e-procurement systems (including the costs of managing them) and the only way they can do so is by charging participants a fee for such use.

44. Consequently, the Model Law does not require procuring entities to allow all potential suppliers to participate in e-procurement opportunities at no charge, but it is strongly recommended that they do so. Enacting States may wish to consider using off-the-shelf or open-source software or other non-proprietary information technology in their e-procurement systems, as long as such systems do not impose unnecessary restrictions or otherwise impede market access. If they are not already required to do so, enacting States may wish to comply with the interoperability requirements of the WTO GPA [\[**hyperlink**\]](#), or of regional trade agreements, many of which have interoperability requirements similar to those of the WTO GPA.

45. As regards the operation of e-procurement systems, public confidence in the security of the information system is necessary if suppliers and contractors are willing to use it. Such public confidence itself requires adequate authentication of suppliers, sufficiently reliable technology, systems that do not compromise tenders or other offers, and adequate security to ensure that confidential information from suppliers remains confidential, is not accessible to competitors and is not used in any inappropriate manner. That these attributes are visible is particularly important where third parties operate the system concerned. At a minimum, the system must verify what information has been transmitted or made available, by whom, to whom, and when (including the duration of the communication), and must be able to reconstitute the sequence of events. It should provide adequate protection against unauthorized actions aimed at disrupting the normal operation of the public procurement process. Transparency to support confidence-building will be enhanced where any protective measures that might affect the rights and obligations of procuring entities and potential suppliers are made generally known to public or at least set out in the solicitation documents.

46. Applying the principles of functional equivalence and technological neutrality discussed above to safeguards is also necessary to manage the requirements for e-procurement. For example, specific safeguards for e-communications or confidentiality in tenders or other offers would inevitably set higher standards of security and for preserving integrity of data than those applicable to paper-based communications (because there are very few, if any, such standards set in the paper-based world), and they may fail to allow for the risks that paper-based communications have always involved.

47. The first safeguard is to ensure the authentication of communications, i.e. ensuring that they are traceable to the supplier or contractor submitting them, which is commonly effected by electronic signature technology and systems that address responsibilities and liabilities in matters of authentication. Relevant rules may either be specific to a procurement system or may be found in the State's general law on electronic systems. The concept of technological neutrality means in practice that procurement systems should not be automatically restricted to any one authentication technology. Some such systems are based on a local certification requirement. Accordingly, and in order to avoid the use of e procurement systems as

instruments to restrict access to the procurement, the system should ensure the recognition of foreign certificates and associated authentication and security requirements, by disregarding the place of origin (as recommended in the UNCITRAL e-commerce texts). In this regard, enacting States will need to consider which communications, such as tenders or other offers, require full authentication, and that other mechanisms for establishing trust between the procuring entity and suppliers may be sufficient for other communications. This approach is not novel: the 1994 Model Law applied different requirements to lesser and more important communications in the procurement process, and the Model Law has preserved this distinction (see article 7 [\[**hyperlink**\]](#)).

48. Another requirement is for integrity, so as to protect the information from alteration, addition or manipulation or, at least, that any alteration, addition or manipulation that takes place can be identified and traced. A related issue is “security”, meaning that time-sensitive documents, such as tenders, cannot be accessed until the scheduled opening time. These issues are discussed in more detail in the guidance on the electronic submission of tenders under article 40 [\[**hyperlink**\]](#), in which they assume the greatest importance. Enacting States may also wish to consider the functional and technical requirements for e-tendering systems by reference to the standards set by a Working Group from the multilateral development banks, which can be found on the Working Group’s website [\[**hyperlink**\]](#).

49. A longer-term, but equally important potential benefit, is that the use of ICT allows a more strategic approach to procurement, harnessing the data that ICT can generate to allow the pursuit of goals and performance to be guided by information and analyses rather than by procedures alone. Benefits through internal transparency, integrity support and efficiency savings can be achieved. Internal transparency and traceability — meaning better records of each procurement process — gives the ability to monitor, evaluate and improve not only individual procurement procedures but overall system performance and trends.

50. UNCITRAL recognizes that a fully-integrated e-procurement system encompassing budgeting and planning, the selection or award process, contract management and payment systems, and linking it with other public financial management systems, will involve a lengthy reform programme, involving different considerations for each stage of the procurement process and for integration with other parts of the overall system. In practice, many e-procurement systems that are introduced have taken years to provide the full benefits envisaged, and the most effective implementation has been often undertaken in a staged manner, which can also assist in amortizing the investment costs. However, significant benefits in terms of enhancing transparency and competition can be obtained in the early stages of the introduction of e-procurement, which generally focus on making more and better information available on the Internet.

F. Structure of the Model Law

51. The Model Law comprises eight Chapters.

52. Chapters I and II contain provisions of general application, and so delineate the main principles and procedures under which the system envisaged by the Model

Law is intended to operate. In Chapter I, they identify how the objectives set out in the Preamble are implemented, by regulating such matters as ensuring that all terms and conditions of any procurement procedure (notably, the rules under which it will operate, what is to be procured, who can participate and how responsive submissions and the winning supplier will be determined) are determined and publicised in advance. They also include institutional and administrative requirements — such as the issue of regulations and the maintenance of documentary records, which are necessary to allow the procurement system overall to function as intended. The commentary in the introduction to Chapter I and that on individual articles provide further detail of the general principles and their implementation [\[**hyperlink**\]](#).

53. The provisions governing a major decision in preparing for the selection/award phase of the procurement cycle — the choice of procurement method — are found in Chapter II, part I. The Model Law contains a variety of procurement methods, reflecting developments in the field and evolving government procurement practice in recent years. The number of procurement methods provided reflects the view of the Commission that the objectives of the Model Law are best served by providing States with a varied menu of options from which to choose in order to address different procurement situations, provided that the conditions for use of the particular method are met. The availability of multiple procurement methods allows States to tailor the procurement procedures according to the subject matter of the procurement and the needs of the procuring entity, and so permits the procuring entity to maximize economy and efficiency in the procurement while promoting competition, as further discussed in the commentary to Chapter II, part I and the procurement methods themselves [\[**hyperlinks**\]](#).

54. Chapter II part II contains provisions regulating the manner of solicitation for each procurement method, designed to ensure that the Model Law's key principle of transparency is followed, as further elaborated in the commentary to that part of the Chapter [\[**hyperlink**\]](#).

55. Chapters III-VII contain the procedures for the procurement methods and techniques under the Model Law. As noted in section [** above \[**hyperlink to discussion of Model Law as a framework law**\]](#), these provisions are not intended to provide an exhaustive set of procedures for each method or technique, but to set out the framework for it, and the critical steps in the process. They are therefore intended to be supplemented by more detailed regulations and guidance, set out in the commentary to each Chapter and (as regards regulations and guidance more generally, in section [** below and in the commentary to article 4 \[**hyperlinks**\]](#)).

56. Chapter VIII sets out a series of procedures that enable procurement decisions in the procurement process to be challenged by potential suppliers and contractors. As the guidance to that Chapter explains [\[**cross-reference and hyperlink**\]](#), there are wide variations among enacting States' administrative and legal traditions so far as appeals against administrative decisions taken by or on behalf of a government are concerned, and flexibility and guidance is provided to allow those traditions to be reflected without compromising the essential principle that an effective forum is given allowing all decisions in the procurement process, including choice of procurement method, to be challenged and, if necessary, appealed.

(A/CN.9/WG.I/WP.79/Add.2) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for the Guide text to accompany the preamble and an introduction to Chapter I of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

Preamble to the Model Law

1. The reason for including in the Model Law a statement of objectives is to provide guidance in the interpretation and application of the Model Law. Such a statement of objectives does not itself create substantive rights or obligations for procuring entities or for suppliers or contractors. It is recommended that, in States in which it is not the practice to include preambles, the statement of objectives should be incorporated in the body of the provisions of the Law.

2. The effective implementation of the objectives can only take effect through cohesive and coherent procedures based on the underlying principles, and where compliance with them is evaluated and, as necessary, enforced. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State will create an environment in which the public is better assured that the government purchaser will spend public funds with responsibility and accountability, and thus will obtain value for money. It will also be the environment in which parties offering to sell to the Government are confident of receiving fair treatment and that abuse is addressed. The six elements of the Preamble are considered separately below.

1. Maximizing economy and efficiency in procurement

3. “Economy” in procurement means an optimal relationship between the price paid and other factors, which include the quality of the subject matter of the procurement, and presupposes that the public purchaser’s needs are in fact met. “Efficiency” in procurement means that relationship between, the transaction costs and administrative time of each procurement and its value are proportionate. “Efficiency” also includes the notion that the costs of the procurement system as a whole are also proportionate to the value of all procurement conducted through that system. These concepts may be referred to differently in other systems (“economy” often being termed “value for money” or “best value”).

4. As regards economy, the Model Law allows the procuring entity the flexibility to determine what will constitute value for money in each procurement and how to conduct the procurement in a way that will achieve it. Specifically, the procuring

entity has a broad discretion to decide what to purchase, and discretion in determining what will be considered responsive to the procuring entity's needs (article 10 [\[**hyperlink**\]](#)), who can participate and on what terms (articles 9, 18 and 49 [\[**hyperlinks**\]](#)) and the criteria that will be applied in selecting the winning submission (article 11 [\[**hyperlink**\]](#)).

5. Article 11 [\[**hyperlink**\]](#) also allows the procuring entity to include in the evaluation criteria that will determine the winning supplier a broad range of elements relating to the subject-matter of the procurement, including price, life-cycle costs and quality considerations. Subject-matter-related criteria may also include disposal (sale or decommissioning) costs. Evaluation criteria can also include socioeconomic criteria, which themselves may include the social and environmental impact of procurement. See, further, section [**](#) in the General Remarks, and the commentary to article 11 [\[**hyperlinks**\]](#), which emphasizes that all evaluation criteria are subject to prior disclosure in the solicitation documents. The procuring entity also has the discretion to decide which relative weights to assign to the elements included in its evaluation criteria, again subject to prior disclosure of those weights.

6. In addition, the Model Law contains a range of procurement methods that have been designed to suit the variety of public procurement. The situations envisaged include normal circumstances not involving special needs, in which open tendering is mandated (see article 28 and Chapter III [\[**hyperlinks**\]](#)); simple and low-value procurement using restricted tendering under articles 29 and 45 [\[**hyperlinks**\]](#), request for quotations under articles 29 and 46, electronic reverse auctions under articles 31 and Chapter VI [\[**hyperlinks**\]](#); and repeated or indefinite procurement under framework agreements in article 32 and Chapter VII [\[**hyperlinks**\]](#). Also provided for are complex procurement under articles 29, 30, 45 and 47-50 [\[**hyperlinks**\]](#), and urgent/emergency procurement under articles 30 and 51-52 [\[**hyperlinks**\]](#). The procuring entity has the discretion to select from the methods available for the circumstances concerned the method that it considers will allow economy or value for money to be maximized. The commentary to articles 27 and 28 [\[**hyperlinks**\]](#) discuss the exercise of this discretion, notably in that where more than one procurement method may be available in the circumstances, the procuring entity must seek to maximize competition in choosing the method to be used.

7. This discretion is circumscribed in that the procuring entity must subsequently follow the prescribed rules and procedures in implementing the decisions taken, so as to avoid abuse and to ensure that the procedures operate as intended to allow value for money to be achieved, and to avoid abuse and corruption, as further explained in section [**](#) above [\[**hyperlinks**\]](#). A key additional feature in this regard is the Model Law's rigorous transparency mechanism that, among other things, allows the oversight of the decisions concerned. The flexibility offered by the Model Law and the use of discretion as outlined above presuppose a certain level of skills and experience on the part of the individuals conducting the procurement concerned. The sections of this Guide discussing choice of procurement method and solicitation under Chapter II [\[**hyperlinks**\]](#) will assist those engaged in designing and implementing the procurement system in deciding whether some elements of flexibility as described above should be

restricted through more detailed regulation and guidance (for example, while capacity-building takes place).

8. As regards efficiency, the Model Law provides flexible procedures to ensure that the administrative time and costs of conducting each procurement are proportionate to the value of that procurement. For example, and as noted in section ** of the General Remarks [\[**hyperlink**\]](#), it provides procedures for low-value or simple procurement and for repeated or indefinite procurement through restricted tendering, request-for-quotations, electronic reverse auctions and framework agreements. These methods are procedurally simpler and may be quicker to operate than other methods, particularly when operated electronically, than open tendering (the default method under the Model Law, as explained in the commentary to articles 27 and 28 [\[**hyperlinks**\]](#)). The benefits of electronic procurement are also discussed in section ** of the General Remarks [\[**hyperlink**\]](#). However, because these alternative methods may be considered less transparent and less competitive in some respects than open tendering, their use is restricted to the circumstances set out in articles 29, 31 and 32 [\[**hyperlinks**\]](#) (and must be justified in the record of the procurement proceedings concerned). Guidance on the use of these methods is found in the commentary to each method [\[**hyperlinks**\]](#)).

9. The Model Law mandates open solicitation as a general rule (the elements of open solicitation, and the reasons for mandating it, are explained in the commentary to Part II of Chapter II [\[**hyperlink**\]](#)). Direct solicitation, which involves inviting a limited number of suppliers to participate, imposes a lesser administrative burden, and is a feature of several procurement methods (restricted tendering, request-for-quotations, competitive negotiations and single-source procurement) by virtue of article 34 [\[**hyperlinks**\]](#). Direct solicitation is also available in request-for-proposals proceedings, but only where restricting solicitation is justified in addition to the use of the method itself (see article 35(2), and the guidance to request-for-proposals proceedings [\[**hyperlinks**\]](#)).

10. The Model Law also provides tools designed to facilitate the oversight of the procurement process, which can also allow efficiency (e.g. the cost-to-value ratio of each procurement) to be assessed. The main such tool is the record of each procurement process required by article 25 [\[**hyperlink**\]](#). Where the records are maintained electronically, evaluating the performance of the procurement system as a whole also becomes possible, as discussed in section ** of the General Remarks [\[**hyperlink**\]](#). The proceedings and results of any debriefing and of any challenges under Chapter VIII [\[**hyperlinks**\]](#), which should and must be included in the record respectively, can support such evaluations.

2. Fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality, and thereby promoting international trade

11. As an instrument designed to support and promote international trade, the default rule under the Model Law is that procurement is “open” to all potential suppliers irrespective of nationality. There are limited circumstances in which international participation can be restricted (directly or indirectly), which are set out in articles 8-11 of the Model Law. The effect of these provisions is that, and as section ** of the General Remarks explains [\[**hyperlink**\]](#), there can be no restrictions on participation based on nationality unless such restrictions have been

designed within the limited constraints available under the Model Law. The relevant provisions are an ability to declare the procurement to be domestic-only (see article 8 [\[**hyperlink**\]](#)), and the ability to include in the qualification requirements, description or evaluation criteria restrictions on overseas participants or disfavour overseas suppliers directly or indirectly (articles 9-11 [\[**hyperlinks**\]](#)). All such restrictions may be included only to the extent that the procurement regulations or other laws in the enacting State so permit. As the above commentary also notes, enacting States will need to take into account any relevant international trade obligations regarding international participation in their procurement, if they wish to implement these restrictions into their domestic legislation.

12. International participation is encouraged through the default requirement for international advertisement in all procurement proceedings, with limited exceptions, so that foreign suppliers can become aware of procurement opportunities. International advertisement and exceptions to the default rule are discussed in the commentary to Part II of Chapter II [\[**hyperlink**\]](#).

13. Broad participation in procurement proceedings is a prerequisite for effective competition (and so supports the attainment of value for money). Consequently, the Model Law's provisions are also based on the notion that the procurement is open to all potential suppliers unless they are found not to be qualified (under articles 9 and 18 [\[**hyperlinks**\]](#)). A key feature of qualification requirements under these articles is that they must be appropriate and relevant in the circumstances of the procurement, so as to prevent the unfair exclusion of suppliers. The other permissible exception to the principle of open participation is where the circumstances of the procurement justify restricting participation (as explained regarding open and direct solicitation in paragraph ** above [\[**hyperlinks**\]](#), and in Part II of Chapter II [\[**hyperlink**\]](#), and, as regards competitive preselection, in the commentary to article 49).

14. The principle of public and unrestricted participation is implemented in the Model Law in that direct solicitation (other than in competitive negotiations and single-source procurement) does not mean that the procuring entity may simply select its favoured suppliers and invite them to participate. The Model Law requires all suppliers in the market concerned to be invited to participate in restricted tendering proceedings under article 34(1)(a) [\[**hyperlink**\]](#) and in request-for-proposals proceedings under article 35(2)(a) [\[**hyperlink**\]](#). Where the procuring entity is granted the discretion to set a limit on the number of participants, in restricted tendering proceedings under article 34(1)(b) [\[**hyperlink**\]](#) and in request-for-proposals proceedings under article 35(2)(b) [\[**hyperlink**\]](#), the number must be set and the participants chosen in a non-discriminatory manner. Finally, in request-for-quotations proceedings under article 34(2) [\[**hyperlink**\]](#), at least three suppliers must be invited to participate. These requirements are discussed in detail in the commentary in the introduction to Chapter IV [\[**hyperlink**\]](#). During the procurement procedure, participating suppliers have a right to present submissions, and for those submissions to be examined and evaluated, as further explained in the commentary to articles 9, 18 and the procedures for each method under Chapters III-VII [\[**hyperlinks**\]](#).

15. The Model Law also encourages the participation of suppliers by requiring the terms of the procurement to be determined and publicised at the outset and, to the

extent feasible, to be objective (see, further, the remaining discussion of the elements of the Preamble, below).

3. Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement

16. Competition in procurement means that all potential suppliers engage in a rigorous contest for the opportunity to sell to the government, or that a sufficient number of suppliers present submissions to ensure that there is such a contest. In this regard, competition is the antithesis of collusion — where suppliers agree not to compete against each other.

17. The choice of procurement method is required to be taken with a view to “maximising competition” in the circumstances of the procurement (article 28 [\[**hyperlink**\]](#)). In practical terms, this requirement means, and as the preceding section explained, permitting broad participation so as to create the conditions in which competition can take place. There are also express requirements to have sufficient participants to ensure effective competition in electronic reverse auctions (article 31(1)(b) [\[**hyperlink**\]](#)), restricted tendering (article 34(1)(b) [\[**hyperlink**\]](#)), competitive negotiations (34(3) [\[**hyperlink**\]](#)) and request for proposals with dialogue (article 49(3)(b) [\[**hyperlink**\]](#)), because, in those methods, the procuring entity can limit the numbers of participating suppliers. In certain circumstances, such as the procurement of highly complex items, however, competition is best assured by limiting the number of participants. This apparently paradoxical situation arises where the costs of participating in the procedure are high — unless the suppliers assess their chances of winning the ultimate contract as reasonable, they will be unwilling to participate at all. These matters and ways of ensuring effective competition in markets with relatively few players are explained in more detail in the commentary to article 47 (request-for-proposals without negotiation [\[**hyperlink**\]](#)) and to the procurement methods in Chapter V [\[**hyperlink**\]](#).

18. Although there are few explicit references to the notion of competition in the text of the Model Law — the promotion of competition is an implicit feature of the text — the above measures create the conditions for effective competition. Suppliers will compete in fact where they are confident that they have all necessary information to allow them to submit their best offers, and where they are confident that their submissions will be objectively assessed. The Model Law’s measures to instil “integrity, fairness and public confidence in the system”, and to require “fair, equal and equitable treatment” (objectivity) and “Transparency” (see the following sections) are therefore examples of mutually supporting obligations.

19. Although some procurement markets will comprise many potential suppliers, procurement of larger and more complex items and services will normally take place in a more limited market with fewer players, often known to each other. Oligopolies can be created where there are repeated procurements or long-term procurements in markets without many potential suppliers. Such market-places involve a higher risk of collusion. Measures in the Model Law to address this risk include broadening the market by advertising internationally, allowing foreign participants to participate, and scaling the Government’s purchases to avoid excessively consolidating or concentrating the market concerned: the benefits of economies of scale can be outweighed by disadvantages of large-scale contracting,

as further explained in the introduction to Chapter VII [\[**hyperlink**\]](#). While procurement laws and regulations can impose obligations to advertise and conduct open procurement on procuring entities, considering the macroeconomic effects of Government purchasing will need to be undertaken at a central level. Enacting States may wish to monitor the extent of real competition in public procurement through both procurement and competition agencies (see, also, section ** of the General Remarks, on institutional support for the Model Law [\[**hyperlink**\]](#)).

4. Providing for the fair, equal and equitable treatment of all suppliers and contractors

20. The concept of fair, equal and equitable treatment of suppliers under the Model Law involves non-discrimination and objectivity in taking procurement decisions that affect them. The Model Law includes several provisions implementing these principles, which are designed to ensure that all participants are aware of the rules governing procurement in the system concerned and have an equal opportunity to enforce them. They include the requirement for open participation in procurement, with limited exceptions, as described in section ** above [\[**hyperlink**\]](#). Open participation is supported by additional requirements in article 9 [\[**hyperlink**\]](#) that qualification criteria are appropriate and relevant to the procurement at hand, and those in article 10 [\[**hyperlink**\]](#) requiring descriptions of what is to be procured to be objective, clear and complete, to use standard terms where possible and to avoid trademarks, etc. Along with the safeguards requiring the evaluation criteria under article 11 [\[**hyperlink**\]](#) to relate to the subject-matter of the procurement, these provisions are aimed at ensuring that suppliers compete on an equal footing. Article 7 [\[**hyperlink**\]](#) on the rules of communication is designed not to allow suppliers to be excluded from the procurement process through discriminatory application of rules on the form or means of communication. The procedures under the Model Law are also designed to ensure equality and fairness. There are rules addressing the clarification of information submitted (article 16 [\[**hyperlink**\]](#)), rules to ensure that requirements for tender securities are objective (article 17 [\[**hyperlink**\]](#)), procedures to identify abnormally low tenders, which cannot otherwise be rejected as such (article 20 [\[**hyperlink**\]](#)), rules stating that late tenders must be rejected (article 40 [\[**hyperlink**\]](#)), and that the award of contract is to be made only on basis of pre-disclosed criteria (articles 11 and 22 [\[**hyperlinks**\]](#), applied in procedural articles in Chapters III-VII [\[**hyperlinks**\]](#)), to either the lowest-priced tender or the most advantageous tender. At that stage, the contract must be awarded to the winning supplier unless that supplier is determined to be unqualified, has submitted an abnormally low tender or the procurement is cancelled (articles 19, 22 and 43 [\[**hyperlink**\]](#)). Finally, all potential suppliers can challenge the procuring entity's decisions under Chapter VIII [\[**hyperlink**\]](#), including a decision to exclude them from the procurement.

5. Promoting the integrity of, and fairness and public confidence in, the procurement process

21. Integrity in procurement involves both the avoidance of corruption and abuse and the notion of personnel involved in procurement applying the rules of the Model Law and, in so doing, acting ethically and fairly, avoiding conflicts of interest. It requires the procurement system to be devoid of institutionalised discrimination or

bias against any particular group, as the rules on participation set out above reflect, and that the application of the Model Law's provisions by the procuring entity does not give results contrary to the its objectives.

22. The Model Law's procedures to ensure objectivity, and fair and equal treatment, are also designed to promote integrity. They are supported by express requirements for a code of conduct to address conflict of interest (article 26 [\[**hyperlink**\]](#), implementing the requirement in the Convention against Corruption for a system to address declarations of interest of personnel in procurement [\[**hyperlink**\]](#)); rules providing for the mandatory exclusion of a supplier where there is an attempt to bribe a procurement official, or where a supplier has an unfair competitive advantage or a conflict of interest (article 21 [\[**hyperlink**\]](#)); provisions ensuring the protection of confidential information (article 24 [\[**hyperlink**\]](#)); the requirement for all decisions in the procurement process to be recorded in the record of the process (article 25 [\[**hyperlink**\]](#)); rules on disclosure of information from the record to participants and (ex post facto) publicly (article 25 [\[**hyperlink**\]](#), subject to confidentiality, and as further discussed in the section on "Transparency" below), the challenge mechanism that is open to all suppliers, with public notifications (in Chapter VIII [\[**hyperlink**\]](#)).

23. In addition, the institutional measures described in section [**](#) of the General Remarks above [\[**hyperlink**\]](#) are designed to ensure the appropriate separation of responsibilities and appropriate conduct on the part of agencies and officials. Applicable requirements of other branches of law in the enacting State should be made clear to procuring entities so as to avoid inconsistent development within the system.

24. Finally, the oversight mechanisms to oversee the discretion inherent in the system (as described in the section on "Economy and efficiency" above) will support integrity, particularly where they are accompanied by public reporting of relevant findings.

25. Integrity may be further enhanced by linking the code of conduct referred to above with applicable general standards of conduct for civil servants and any further provisions addressing integrity and prevention of corruption in other national laws and regulations. Public confidence will also be enhanced where enforcement of the rules is clearly visible, and transgressions appropriately punished.

6. Achieving transparency in the procedures relating to procurement

26. Transparency in procurement involves five main elements: the public disclosure of the rules that apply in the procurement process; the publication of procurement opportunities; the prior determination and publication of what is to be procured and how offers are to be considered; the visible conduct of procurement according to the prescribed rules and procedures; and the existence of a system to monitor that these rules are being followed (and to enforce officials to follow them if necessary).

27. As noted in the section on "Economy and Efficiency" above, the use of discretion under the Model Law involves a balance that allows the procuring entity to identify what to procure and how best to conduct the procurement. Transparency is a tool that allows this exercise of discretion to be monitored and, where necessary, challenged; it is considered a key element of a procurement system that is

designed, in part, to limit the discretion of officials, and to promote accountability for the decisions and actions taken. It is thus a critical support for integrity in procurement and for public confidence in the system, as well as a tool to facilitate the evaluation of the procurement system and individual procurement proceedings against their objectives.

28. Transparency measures therefore feature throughout the Model Law. They include requirements that all legal texts regulating procurement should be made promptly and publicly available (article 5^[**hyperlink**]), non-discriminatory methods of communication (article 7^[**hyperlink**]), the determination of evaluation criteria at the outset of the procurement and their publication in the solicitation documents (article 11^[**hyperlink**]), the wide publication of invitations to participate and all conditions of participation (e.g. in articles 39, 45, 47, 48, 49^[**hyperlink**]), in an appropriate language (article 13^[**hyperlink**]), the publication of the deadline for presentation of submissions (article 14^[**hyperlink**]), the disclosure to all participants of significant further information provided during the procurement to any one participant (article 15^[**hyperlink**]), the public notice of any cancellation of the procurement, the regulated manner of entry into force of the procurement contract, including a “standstill” period (article 22^[**hyperlink**]), and the publication of contract award notices (article 23^[**hyperlink**]). Further, certain information regarding the conduct of a particular procurement must be made publicly available ex post facto, and participants are entitled to further information, all of which must be included in a record of the procurement (article 25^[**hyperlink**]). These provisions can also promote traceability of the procuring entity’s decisions, a key function. For example, a divergence from the rules may be apparent from examining the records of meetings, further underscoring the benefits of electronic data maintenance in procurement, as discussed in Section ** of the General Remarks^[**hyperlink**].

29. The Model Law also contains prescribed and publicly available procedures for each procurement method (in Chapters III-VII^[**hyperlinks**]) including, in tendering proceedings, an opening of tenders in the presence of suppliers or contractors submitting them (article 42^[**hyperlink**]). Transparency also allows compliance with these procedures to be assessed, including through the public opening of tenders, the publication of award notices (article 23^[**hyperlink**]) and internally by examining on the contents of the mandatory record of the procurement under article 25^[**hyperlink**].

CHAPTER I. GENERAL PROVISIONS

A. Introduction

Executive Summary

30. The Commentary to Chapter I of the Model Law discusses the manner in which the Model Law implements the general principles upon which it is based (as to which, see the commentary to the Preamble in Section ** above^[**hyperlink**]).

31. The first parts of the Chapter (articles 1-6) provide the framework for the procurement system envisaged in the Model Law, regulating its scope, general features, and the interaction of the Model Law and an enacting State's international and any federal obligations. It requires the issue of procurement regulations by an body identified in the law (to support the implementation of the Model Law in the enacting State concerned) and it requires that the legal framework (the law, procurement regulations and other legal texts) be published (articles 4 and 5). The final article in the Chapter (article 26) requires the issue and disclosure of a Code of Conduct for procurement officials.

32. The remainder of the Chapter (articles 7-25) sets out the general principles that apply to each procurement procedure carried out under the Model Law. The articles are presented to follow the chronological order of a typical procurement procedure as closely as is feasible in a text that addresses a variety of such procedures. As noted above [cross-reference to final section of General Remarks describing Chapter I [\[**hyperlink**\]](#)], these articles require all terms and conditions of the procedure to be both determined prior to the commencement of the procedure and disclosed at the outset. These terms and conditions include a description of what is to be procured and who can participate, and a statement of how communications during the procurement procedure will be made; they regulate what information is to be communicated and the manner in which responsive submissions and the winning supplier will be determined; they also regulate any exclusion of a supplier on the grounds of corruption, any rejection of abnormally low submissions and any cancellation of the procurement; and how the procurement contract comes into force (articles 7-22). Article 23 requires the award of the contract (with limited exceptions) to be publicised; article 24 addresses the confidentiality of information communicated during the procurement process. Article 25 also links the procurement process with the administrative requirement for a documentary record of the procedure, which allows effective oversight of the procedure and of the performance of the system as a whole. Article 25 also contains provisions requiring the disclosure of many parts of that record to participants and more limited elements to the general public, subject to any necessary confidentiality restrictions.

33. These provisions, taken together, are designed to ensure that the rules under which procurement under a Model Law-based domestic law will take place are clear and available to all participants and to the general public. They are therefore a key element of transparency, and also help to promote public confidence and integrity in the system.

Enactment: Policy considerations

34. The policy considerations arising in connection with each article are discussed in the commentary to each article in the Chapter. In this section, certain policy issues that arise more generally in the Chapter are considered, and the interaction of a procurement law based on the Model Law with other laws in the enacting State concerned.

35. Recalling that the Chapter regulates the general legal framework for the procurement system envisaged under the Model Law, as described in the preceding section, the main objective is to ensure a level and competitive playing field for

each procurement procedure, supporting wide market access and encouraging participation in the process through rigorous requirements for objectivity and transparency. The procedures concerned also facilitate the accountability of procurement officials, by providing a clear statement of the main rules that govern their duties (noting, however, that a major decision in the procurement process — the choice of procurement method and manner of solicitation — is addressed in Chapter II, so that the provisions immediately precede the procedures for each procurement method).

36. The nature of this general legal framework is such that there are fewer options for enacting States than are found in subsequent Chapters of the Model Law. As a result, and in order to ensure that the law is of sufficient breadth and rigour, enacting States are encouraged to enact the Chapter in full, subject to any changes necessary to ensure a coherent body of law in the State concerned, and assuming the issue of procurement regulations required by article 4 ([**hyperlink**](#)).

37. As regards interaction with other domestic law, Article 2 contains minimum definitions that UNCITRAL recommends for the proper functioning of a procurement law. Enacting States may wish to adapt the number and style of definitions to ensure consistency with their general body of law and the State's approach to legal drafting. Guidance on the scope of individual elements of the suggested definitions is set out under the commentary to article 2 below ([**hyperlink**](#)). Where the tradition in an enacting State would indicate a more thorough set of definitions, enacting States may wish to draw upon the Glossary published by UNCITRAL ([**hyperlink**](#)).

38. The Model Law also uses terminology that may not be the norm in all enacting States: for example, the terms relating to types of insolvency in article 9 ([**hyperlink**](#)) may not be those used in their insolvency laws. Here, the Model Law draws on the terminology used in the UNCITRAL texts on insolvency, such as the Legislative Guide on Insolvency Law and the Model Law on Cross-Border Insolvency, which include explanations of the proceedings involved ([**hyperlinks**](#)). The Model Law also presumes that the scope of classified information (referred to in, for example, articles [** \[**hyperlinks**\]](#)) is clear, as further explained in the commentary to article 2 ([**hyperlink**](#)).

39. Certain provisions contained in Chapter I are intended to operate in conjunction with other laws in the enacting State. The Model Law therefore presumes that such laws are in force or will be enacted in the State concerned in conjunction with its procurement law. If this approach is not possible in the enacting State, the procurement law should address the issues concerned. In addition to the assumption of general authority allowing the State to act as a contracting party, the main other laws that are referred to in Chapter I are summarized in the following paragraphs.

40. First, the provisions in article 7 allowing for all means of communication, including electronic (“e-”) communications, in the procurement process assume that the enacting State has effective legislation to allow for e-commerce. As commentary on e-procurement in Section [** above \[**hyperlink**\]](#) and on article 7 below ([**hyperlink**](#)) explain, the UNCITRAL texts on e-commerce provide the necessary legal recognition for e-communications and are a readily available tool to facilitate e-procurement which, as noted the commentary referred to above, has

significant potential to support and enhance the achievement of the objectives of the Model Law.

41. Secondly, the provisions in articles 8-11 that permit the enacting State to use its procurement system to pursue socioeconomic goals, as explained in Section ** of the general commentary above (**hyperlink**) and in the commentary to those articles below (**hyperlinks**), permit only those socioeconomic policy goals that are set out in other laws or the procurement regulations to be accommodated through procurement. Article 11 also cross-refers to a margin of preference that can be applied when evaluating submissions (**hyperlink**), which must similarly be authorized in other laws or the procurement regulations.

42. Thirdly, article 17 on tender securities cross-refers to any law that may require the non-acceptance of a security issued outside the enacting State. More generally, the form and means of issue of tender securities may also be subject to other laws in the enacting State.

43. Fourthly, in some States, the norms applicable to civil servants will require the procuring entity to substantiate decisions taken in the procurement process by reference to the reasons and circumstances and legal justifications. Article 25 on the procurement record (**hyperlink**) lists the decisions concerned (cross-referring to the articles requiring those decisions) and can serve as a checklist to ensure that the appropriate requirements are reflected in relevant domestic enactments as necessary.

44. As regards the domestic implications of international agreements and obligations of an enacting State, Article 3 is designed to allow the procurement law to take due account of those agreements and obligations, as explained in the commentary in Section ** above (**hyperlink**) and to that article below (**hyperlink**).

Issues regarding implementation and use

45. The main requirements for effective implementation and use of the Model Law, in addition to the issue of complementary laws as described in the preceding section, are the issue of regulations to complete the legal framework, and the provision of adequate administrative and institutional support for the Model Law, as explained in Sections ** of the general commentary above (**hyperlinks**).

46. The issue of regulations is discussed in detail in the commentary to article 4 below (**hyperlink**), and Section ** of the general commentary above (**hyperlink**), and Annex ** (**hyperlink**), which highlight (inter alia) the main issues that should be considered for regulation.

47. The administrative support envisaged for the Model Law is discussed in Section ** above. Among other things, it envisages the sharing of information and other coordination between the public procurement agency or other body described in described in Section ** above (**hyperlink**) and other relevant bodies addressing competition and corruption and sanctions for breaches of laws and procedures. Regulations or legal authority may be required to allow for this sharing of information between agencies. The provisions in Chapter I that raise such issues of coordination and information-sharing include Article 21 on exclusions for attempted inducement, conflicts of interest and unfair competitive advantage,

article 24 on confidentiality and article 25 on the requirements for and the disclosure of parts of the procurement record [\[**hyperlinks**\]](#)). Coordination with other bodies may also be appropriate — for example, to ensure that the code of conduct required under article 26 [\[**hyperlink**\]](#) functions appropriately with general rules governing the conduct of civil servants in the enacting State.

48. The discussion of the institutional support for the Model Law in Section [**](#) of the general commentary above [\[**hyperlink **\]](#) notes that such support includes the issue of rules and guidance for the users of the Model Law, to be issued by a public procurement agency or other central body (and to be supported by training).

49. More generally, and as noted in the preceding Section, the definitions in article 2 are not intended to provide an exhaustive list of procurement-related terms. For this reason, UNCITRAL has issued a glossary on its website [\[**hyperlink**\]](#). The public procurement agency or other body may be required to adapt the glossary to local circumstances and ensure its wide dissemination.

50. As noted in Section [**](#) of the general commentary above, the Model Law is intended to be of general application to all public procurement in an enacting State. Consequently, there is no general threshold for the application of the Model Law. However, Chapter I does refer to thresholds below which certain requirements of the Model Law are relaxed. Article 22(3)(b) exempts low-value procurement from the mandatory application of a standstill period [\[**hyperlink**\]](#) and article 23(2) exempts such procurement from the requirement for public notice of the award of the procurement contract award [\[**hyperlink**\]](#). (Chapter II also contains an upper threshold for the use of the request-for-quotations procurement method under article 29(2) [\[**hyperlink**\]](#).)

51. It is not possible for the Model Law to set out a single threshold for low-value procurement that will be appropriate for all enacting States, and the appropriate thresholds for each State may change with inflation and as other economic circumstances also change. The thresholds referred to above are therefore to be set out in the procurement regulations.

52. The duties of the public procurement agency or other body that issues the procurement regulations and other rules or guidance should include a consideration of the appropriate value or values for all such thresholds. The notion of low-value procurement under the Model Law is a versatile one, comprising the thresholds above, and other references to low-value procurement without explicit thresholds, such as the exemption of low-value procurement from international advertisement of the invitation in pre-qualification proceedings under article 18(2) and in open tendering proceedings under article 33(4) (which is based the procuring entity's assessment of likely international interest in the procurement, as explained in the commentary to those articles [\[**hyperlinks**\]](#)). (In addition, one of the grounds justifying the use of direct solicitation and one type of restricted tendering is that the time and cost required to examine and evaluate a large number of submissions would be disproportionate to the value of the subject matter of the procurement, but without any explicit threshold.) The public procurement agency or other body should consider consistency in approach to what is considered "low-value" procurement: whether one threshold should be applied for the required "low-value procurement" thresholds (including the upper limit for the use of request-for-quotations procedures), whether that value should apply to other

designations of “low-value procurement”, or whether circumstances indicate that different thresholds are appropriate.

The nature of a chapter containing the general principles governing a procurement system is such that many issues of implementation and use arise in the context of each such general principle. Regulators and those providing guidance on the administrative and institutional support for the Model Law may wish to consider the above issues in the light of the commentary on the articles governing the main steps in the procurement procedure (articles 7-25 [****hyperlinks****]).

(A/CN.9/WG.I/WP.79/Add.3) (Original: English)**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany articles 1 to the first part of article 7 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT****Article-by-article commentary****Article 1. Scope of application [**hyperlink**](#)**

1. The purpose of article 1 is to delineate the scope of application of the Model Law. The Model Law covers all types of public procurement, as that term is defined in article 2 of the text. The broad variety of procedures available under the Model Law to deal with the different types of situations that may arise in public procurement makes it unnecessary to exclude the application of the Model Law to any sector of the economy of an enacting State. A number of articles throughout the Model Law contain provisions that are intended to accommodate in particular procurement involving sensitive issues, such as procurement involving classified information. (See the commentary to articles [**](#) of the Model Law, and also paragraphs [**](#) of the general remarks for a general discussion of the issues relating to the scope of the Model Law and exemptions from its transparency provisions in these circumstances. [**hyperlinks**](#))

Article 2. Definitions [hyperlink**](#)**

2. The purpose of article 2 is to define at the outset of the Model Law terms used repeatedly in the Model Law, in order to facilitate the reading and understanding of the text. The commentary to this article is supplemented by a Glossary, contained in [\[Annex **\]](#) to the Guide [**hyperlink**](#), which includes descriptions of terms that may not be capable of precise legal definition, but are commonly used as procurement jargon; it also discusses terms that may carry a different meaning under the Model Law as compared to the meanings under other international or regional instruments regulating public procurement.

3. The definition of “electronic reverse auction” (definition (d) [**hyperlink**](#)) encompasses all the main features of a reverse auction, in particular its online character. This broad definition is designed to emphasize that the Model Law does not regulate other types of auctions, even though they may be used in public

procurement practice in some jurisdictions, as UNCITRAL decided not to provide for any other type of auction, as explained in the commentary in the introduction to Chapter VI of the Model Law [\[**hyperlink**\]](#).

4. The reference to “acquisition” in the definition of “procurement” (definition (j) [\[**hyperlink**\]](#)) is intended to encompass purchase, lease and rental or hire purchase, with or without an option to buy. The definition also refers to goods, construction and services, though the Model Law does not require a strict classification of what would constitute goods, construction and services as it does not provide different procurement methods for goods, construction and services. The Model Law uses the term “subject matter of the procurement” to address what is to be procured, also because a strict separation between goods, construction and services is often not possible. Nevertheless, as explained in the commentary to Section I of chapter II of the Model Law [\[**hyperlink**\]](#), some procurement methods under the Model Law may be more appropriate, for example, in the procurement of services than goods and construction. Enacting States may traditionally have used a strict classification of items and general guidance. One example used in an earlier version of the Model Law was that “goods” usually means “objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves”; “construction” means “all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself”. “Services” may then be classified “as any object of procurement other than goods or construction”. If the enacting State wishes to continue with this approach to classification, the public procurement agency or other similar body should ensure that the law is adapted to allow for it, and the classification is available to all potential users of the system.

5. The references in the plural to “contract” and “supplier(s) or contractor(s)” in the definition of “procurement contract” (definition (k) [\[**hyperlink**\]](#)) are intended to encompass, inter alia, split contracts awarded as a result of the same procurement proceedings. For example, article 39 (g) of the Model Law [\[**hyperlink**\]](#) stipulates that suppliers or contractors may be permitted to present tenders for only a portion of the subject matter of the procurement. In such situations, the procurement proceedings will result not in a single contract concluded with a single supplier or contractor but in several contracts concluded with several suppliers or contractors. The wording “at the end of the procurement proceedings” in the same definition is intended to encompass procurement contracts concluded under a framework agreement procedure, but not the awarded framework agreements.

6. The term “classified information” in the definition “procurement involving classified information” (definition (l) [\[**hyperlink**\]](#)) is intended to refer to information that is classified under the relevant national law in an enacting State. The term “classified information” is understood in many jurisdictions as

information to which access is restricted under authority conferred by law to particular classes of persons. The need to deal with this type of information in procurement may arise not only in the sectors where “classified information” is most commonly encountered, such as national security and defence, but also in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector (for example, where sensitive medical research and experiments may be involved). The term is used in the Model Law in the provisions that envisage special measures for protection of this type of information, in particular exceptions from public disclosure and transparency requirements. Because of the risk of abuse of exceptions to these requirements, the Model Law does not confer any discretion on the procuring entity to expand the scope of “classified information” and it is recommended that the issues pertaining to the treatment of “classified information” should be regulated at the level of statutes in order to ensure appropriate scrutiny by the legislature. The definition, where it is used in the Model Law, is supplemented by the requirement in article 24 on the documentary record of procurement proceedings to include in the record the reasons and circumstances on which the procuring entity relied to justify the measures and requirements imposed during the procurement proceedings for protection of classified information.

7. With reference to the definition of “procuring entity” (definition (n) [\[**hyperlink**\]](#)), the Model Law is intended primarily to cover procurement by governmental units and other entities and enterprises within the public sector. Which exactly those entities are will differ from State to State, reflecting differences in the allocation of legislative competence among different levels of government. Accordingly, subparagraph (n)(i), defining the term “procuring entity” [\[**hyperlink**\]](#), presents options as to the levels of government to be covered. Option I brings within the scope of the Model Law all governmental departments, agencies, organs and other units within the enacting State, pertaining to the central government as well as to provincial, local or other governmental subdivisions of the enacting State. This Option would be adopted by non-federal States, and by federal States that could legislate for their subdivisions. Option II would be adopted by States that enact the Model Law only with respect to organs of the national government. In subparagraph (n)(ii), the enacting State may extend the application of the Model Law to certain entities or enterprises that are not considered part of the government [\[**hyperlink**\]](#), if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law. In deciding which, if any, entities to cover, the enacting State may consider factors such as the following:

- (a) Whether the government provides substantial public funds to the entity, provides a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise supports the obligations of the procuring entity under the contract;
- (b) Whether the entity is managed or controlled by the government or whether the government participates in the management or control of the entity;
- (c) Whether the government grants to the entity an exclusive licence, monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides;

(d) Whether the entity is accountable to the government or to the public treasury in respect of the profitability of the entity;

(e) Whether an international agreement or other international obligation of the State applies to procurement engaged in by the entity;

(f) Whether the entity has been created by special legislative action in order to perform activities in the furtherance of a legally-mandated public purpose, and whether the public law applicable to government contracts applies to procurement contracts entered into by the entity.

8. Procurement can be undertaken by groups or consortia of procuring entities, including from various States, and they can collectively be considered as a single “procuring entity”. The definition of “procuring entity”, with particular reference in the definition to a “multiplicity [of departments, agencies, organs and other units or subdivisions]” without indicating an association with any particular State, is therefore intended to accommodate participation by such groups or consortia, including in the transnational procurement context. In some jurisdictions, to ensure political accountability, even when procuring entities band together, one remains the lead procuring entity. In an international consortium, it is usual for a procuring entity from one State to act in its capacity as the lead procuring entity as an agent of procuring entities from other States.¹

9. The definition of “socio-economic policies” (definition (o) [\[**hyperlink**\]](#)) is not intended to be open-ended, but to encompass only those policies set out in the law of the enacting State or in the procurement regulations, and those that are triggered by international regulation such as United Nations Security Council anti-terrorism measures or sanctions regimes. The aim of the provisions is to ensure that socioeconomic policies (a) are not determined on an ad hoc basis by the procuring entity, and (b) are applied across all government purchasing, so that their costs and benefits can be seen. Under authority of the law, there may be one or more organs in an enacting State with the power to promulgate socioeconomic policies in an enacting State. Rules on the application of such policies should impose appropriate constraints on procuring entities, in particular by prohibiting the ad hoc adoption of policies at the discretion of the procuring entity; such policies are open to misuse and abuse, such as through favouritism.

10. At the end of the definition of “socio-economic policies”, the enacting State is given an option to provide an illustrative list of socioeconomic policies applicable in the enacting State. A discussion of the types of policies that have been encountered in practice, and which may be used to form the basis of such a list, is found in Section [** of the general commentary \[**hyperlink**\]](#). It should be noted that such policies evolve over time and even if the list is intended to be exhaustive, it will become outdated. It is therefore recommended that the list should remain illustrative to avoid the need to update the law every time the socioeconomic policies of the enacting State are amended.

11. The definition of “solicitation” (definition (p) [\[**hyperlink**\]](#)) is intended to differentiate “solicitation” from “the invitation to participate in the procurement proceedings”. The latter has a broader scope: it may encompass an invitation to

¹ The Working Group may wish to consider whether the final two sentences should be presented in the Guide.

pre-qualify (under article 18) or an invitation to preselection (under article 49). The meaning of “solicitation” in each procurement method is different: in tendering, solicitation involves the invitation to submit tenders (in open and two-stage tendering, the invitation is public, while in restricted tendering the invitation is addressed to a limited group); in request for proposals proceedings, solicitation involves an invitation to present proposals (which may be public or addressed to a limited group); in competitive negotiations, solicitation involves an invitation to a limited group to take part in negotiations; in request for quotations, solicitation involves addressing the request to a limited group but a minimum of three must be invited; in electronic reverse auctions used as a stand-alone procurement method, where initial bids are requested for assessment of responsiveness or evaluation, solicitation starts with an invitation to present initial bids (the invitation is public, as in open tendering); in simpler electronic reverse auctions used as a stand-alone procurement method, not involving assessment or evaluation of initial bids, solicitation takes place after the opening of the auction, when those participating in the auction are requested to bid; in single-source procurement, solicitation involves a request to present either a quotation or proposal, addressed to one supplier or contractor. The notions of “open” and “direct” solicitation are explained in the Glossary in Annex [** \[**hyperlink**\]](#) and in the commentary to Section II of Chapter II [** \[**hyperlink**\]](#).

12. The definition of a “solicitation document” (definition (q) [** \[**hyperlink**\]](#)) is generic and encompasses essential features of the documents soliciting participation in any procurement method. These documents are issued by the procuring entity and set out the terms and conditions of the given procurement. In some procurement methods, the term “solicitation documents” is used; in others, alternative terminology appears. For example, in the provisions of the Model Law regulating request for proposals proceedings, the reference is to a “request for proposals”, which contains the solicitation information. Regardless of the term used in each procurement method in the Model Law, the solicitation documents also encompass any amendments to the documents originally issued. Such amendments may be made in accordance with articles 14 and 15 of the Model Law; in two-stage tendering, additionally under the provisions of article 48 (4); and in request for proposals with dialogue proceedings, in accordance with article 49.

13. Although the Model Law refers to “tender security” (definition (u) [** \[**hyperlink**\]](#)), this reference does not imply that this type of security may be requested only in tendering proceedings. The definition does not intend to imply either that multiple tender securities can be requested by the procuring entity in any single procurement proceedings that involve presentation of revised proposals or bids. As the commentary to article 17 addressing on tender securities explains, the article does not itself prohibit multiple tender securities. However, it explains why UNCITRAL discourages multiple tender securities in any given procurement [** \[**hyperlink**\]](#).

14. The expression “other provisions of law of this State”, as used in article 2 and in other provisions of the Model Law [** \[**hyperlinks**\]](#), refers not only to statutes, but also to implementing regulations as well as to the treaty obligations of the enacting State. In some States, a general reference to “law” would suffice to indicate that all of the above-mentioned sources of law were being referred to. In others, a

more detailed reference to the various sources of law is warranted in order to make it clear that reference is made not merely to statutes.

**Article 3. International obligations of this State relating to
procurement (and intergovernmental agreements
within (this State)) [\[**hyperlink**\]](#)**

15. The purpose of the article is to explain the effect of international treaties on national implementation of the Model Law. An enacting State may be subject to international agreements or obligations with respect to procurement. For example, a number of States are parties to the [\[WTO Agreement on Government Procurement \[\\[**hyperlink**\\]\]\(#\)](#)], and the members of the European Union are bound by regulations on procurement applicable throughout the geographic region. Similarly, the members of regional economic groupings in other parts of the world may be subject to procurement directives applied by their regional groupings. In addition, many international lending institutions and national development funding agencies have established guidelines or rules governing procurement with funds provided by them. In their loan or funding agreements with those institutions and agencies, borrowing or recipient countries undertake that proceedings for procurement with those funds will conform to their respective guidelines or rules. The purpose of subparagraphs (a) and (b) is to provide that the requirements of the international agreement, or other international obligation at the intergovernmental level, are to be applied; but in all other respects the procurement is to be governed by the Model Law. The article thus establishes a general prevalence of international treaties over the provisions of the Model Law on the understanding, however, that more stringent requirements may be applicable under international treaties but international commitments should not be used as a pretext to avoid the safeguards of the Model Law.

16. The texts in parenthesis in this article are relevant to, and intended for consideration by, federal States. Subparagraph (c) permits a federal State enacting the Model Law to give precedence over the Model Law to intergovernmental agreements concerning matters covered by the Model Law concluded between the national Government and one or more subdivisions of the State, or between any two or more such subdivisions. Such a clause might be used in enacting States in which the national Government does not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law.

17. The provisions of the article need to be adapted to constitutional requirements of the enacting State. For example, reference in subparagraph (b) to “agreements entered into by this State” may need to be amended to clarify that agreements entered meant agreements that are not only signed but also ratified by the legislature, in order for them to be binding in an enacting State.

18. The enacting State need not enact the provisions of the article if they conflict with its constitutional law.

Article 4. Procurement regulations [\[**hyperlink**\]](#)

19. The purpose of article 4 is to highlight the need for procurement regulations to fulfil the objectives and to implement provisions of the Model Law. As noted in paragraphs [**](#) of the general remarks [\[**hyperlink**\]](#), the Model Law is a “framework law”, setting out basic legal rules governing procurement that are intended to be supplemented by regulations promulgated by the appropriate organ or authority of the enacting State. The “framework law” approach enables an enacting State to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances within the overall framework established by the Law. Thus, various provisions of the Model Law expressly indicate that they should be supplemented by procurement regulations (see below [**](#) [\[**hyperlink**\]](#) for a list of such provisions). Furthermore, the enacting State may decide to supplement other provisions of the Model Law even though they do not expressly refer to the procurement regulations. In both cases, the procurement regulations should not contradict the Model Law or undermine the effectiveness of its provisions.

20. Reference to the “procurement regulations” should be interpreted in accordance with the legal traditions of the enacting State; the notion may encompass any tool used in the enacting State to implement its statutes. Those legal traditions may also delineate issues that are more commonly addressed through guidance. For a discussion on importance of taking a holistic approach in regulations, guidance and other implementing texts to ensure that the system envisaged under the Model Law works in practice, see Section [**](#) of the general commentary and the Introduction to this Chapter [**](#) above [\[**hyperlinks**\]](#), and Annex [**](#), which provides a list of items in the Model Law that are intended to be supplemented through regulations and/or guidance [\[**hyperlink**\]](#).

21. The main examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: the manner of publication of various types of information (articles 5, 6, 19 and 23 [\[**hyperlinks**\]](#)); measures to secure authenticity, integrity and confidentiality of information communicated during the procurement proceedings (article 7 (5) [\[**hyperlink**\]](#)); grounds for limiting participation in procurement (article 8); calculation of margins of preference and application of socioeconomic criteria in evaluation of submissions (article 11 [\[**hyperlink**\]](#)); estimation of the value of the procurement (article 12 [\[**hyperlink**\]](#)); code of conduct (article 26 [\[**hyperlink**\]](#)); and limitation of the quantity of procurement carried out in cases of urgency using a competitive negotiations or single-source procurement method (that is, the quantity is limited to that required to deal with the urgent circumstances) (see the commentary to the relevant provisions of article 30 (4) and (5) in paragraphs ... below [\[**hyperlink**\]](#)).

22. In addition to the use of regulations as a matter of best practice, failure to issue procurement regulations as envisaged in the Model Law may deprive the procuring entity of authority to take the particular actions in question. These cases include: limitation of participation in procurement proceedings (article 8 [\[**hyperlink**\]](#)); authority and procedures for application of a margin of preference in favour of national suppliers or contractors (article 11 [\[**hyperlink**\]](#)); and use of the request-for-quotations method of procurement, since that method may be used only

for procurement whose value is below threshold levels set out in the procurement regulations (article 29 (2) [\[**hyperlink**\]](#)).

Article 5. Publication of legal texts [\[hyperlink**\]](#)**

23. The purpose of article 5 is to ensure the transparency of all rules and regulations applicable to procurement in an enacting State. Any interested person should know which rules and regulations apply to procurement at any given time and where they can be found if necessary.

24. Paragraph (1) of this article is intended to promote transparency in the laws, regulations and other legal texts of general application relating to procurement by requiring that those legal texts be promptly made accessible and systematically maintained. As the texts are intended to be of “general application”, they do not include internal documents that may apply to certain procuring entities or groups thereof. Inclusion of this provision is considered to be particularly important in States in which such a requirement is not found in existing administrative law. It may also be considered useful even where such a requirement exists, as a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers or contractors on the requirement for adequate public disclosure of legal texts referred to in the paragraph.

25. In many countries, there exist official publications in which legal texts referred to in this paragraph are and can be routinely published. Otherwise, the texts should be promptly made accessible to the public, including foreign suppliers or contractors, in another appropriate medium and in a manner that will ensure the required level of outreach of relevant information to intended recipients and the public at large. In order to ensure easy and prompt public access to the relevant legal texts, an enacting State may wish to specify the manner and medium of publication in procurement regulations or refer in those regulations to legal sources that address publicity of statutes, regulations and other public acts. This approach would also provide certainty to the public at large as regards the source of the relevant information, which is especially important in the light of the proliferation of media and sources of information as the use of traditional paper-based means of publishing information has declined. Transparency in practice may be considerably impeded if abundant information is available from many sources, whose authenticity and authority may not be certain.

26. The enacting State should envisage the provision of relevant information in a centralized manner at a common place (the “official gazette” or equivalent) and should establish rules to define the relationship of that single centralized medium with other media where such information may appear. Information posted in a single centralized medium should be authentic and authoritative and have primacy over information that may appear in other media. Regulations may explicitly prohibit publication in different media before information is published in the centralized medium, and require that the same information published in different media must contain the same data. The centralized medium should be readily and widely accessible. Ideally, no fees should be charged for access to laws, regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, because this will be against objectives of the

Model Law to foster and encourage competition, to promote the integrity of and public confidence in the procurement process and to achieve transparency in the procurement procedures.

27. Regulations or other supporting guidance should also spell out the meaning of the requirements for documents promptly to be made “accessible” and “systematically maintained” in the paragraph. The requirement for prompt public access includes timely posting and updating of all relevant and essential information in a manner easy to use and understand by the average user. The importance of this requirement to enhance the effectiveness of laws, regulations and other legal texts of general application should be highlighted: the usual requirement in constitutional law is that such texts enter into force only a certain number of days after their publication in the officially designated public source of information.

28. The term “accessible”, as in article 7 of the Model Law [\[**hyperlink**\]](#) where the same term is used means that the information must be capable of being accessed and read without reference to another source of information (i.e. without having to request access). It implies proactive actions from designated State authorities (such as publication in official media) to ensure that the intended information reaches the public. (It does not include the requirement in article 7 requiring information to be in a form that can be used for subsequent reference.) The requirement for systematic maintenance means that the designated State authority must ensure that the information is in fact up-to-date and so reliable: the manner in which this obligation is discharged should be itself documented so that compliance can be monitored.

29. Paragraph (2) of the article deals with a distinct category of legal texts — judicial decisions and administrative rulings with precedent value, which do not fall within the scope of paragraph (1). The opening phrase in paragraph (1) is included to make it clear that the texts covered by paragraph (2), unlike the texts referred to in paragraph (1), generally enter into force usually from the moment of their promulgation by the court or other issuing body. Special rules on access to them by the public may apply: for example, the public may need to request a copy of a judicial decision from the court concerned. The term “available” is therefore used to allow for indirect (i.e. requested) access as well as direct access where it is possible. Once access is given to the texts concerned, the information then must still be readable and capable of interpretation and retention (those are the elements of “accessibility” discussed in the preceding paragraphs). Although the requirement for systematic maintenance does not apply to the texts covered by paragraph (2), enacting States are encouraged to ensure the accuracy of published texts within the bounds of reasonable flexibility.²

30. Depending on legal traditions and the procurement practices by various procuring entities in an enacting State, interpretative texts of legal value and importance to suppliers and contractors may already be covered by either paragraph (1) or (2) of the article: such matters may include interpretations of the items discussed in the introduction to Chapter I above ([\[**hyperlink**\]](#)) and of items in the Glossary. The enacting State may wish to consider making amendments to the article to ensure that they are covered. In addition, taking into account that

² The Working Group may wish to focus on whether the distinction between “accessible” and “available” will be sufficiently clear for the reader, or whether examples, such as “access through such means as a Court website” (“for available”) might improve clarity.

non-paper means of publishing information reduce the costs, time and administrative burden of publishing and maintaining information, it may be considered to be best practice to publish other texts of relevance and practical use and importance to suppliers and contractors, in order to achieve transparency and predictability, and to foster and encourage suppliers and contractors to compete.

31. These additional legal texts may include, for example, procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect the general rights and obligations of suppliers and contractors. The Model Law, while not explicitly addressing the publication of these texts, does not preclude an enacting State from expanding the list of texts covered by article 5 according to its domestic context. If such an option is exercised, an enacting State should consider which additional texts are to be made public and which conditions of publication should apply to them. Enacting States may in this regard assess costs and efforts to fulfil such conditions in proportion to benefits that potential recipients are expected to derive from published information. In the paper-based environment, costs may be disproportionately high if, for example, it would be required that information of marginal or occasional interest to suppliers or contractors is to be made promptly accessible to the public and systematically maintained. In the non-paper environment, although costs of publishing information may become insignificant, costs of maintaining such information, so as to ensure easy public access to the relevant and accurate information, may still be high.

32. Laws and regulations of the enacting State shall regulate which State organs are responsible for fulfilling the obligations under this article. In accordance with a number of provisions of the Model Law (such as article 39 (t) [\[**hyperlink**\]](#)), the procuring entity will be required to include in the solicitation documents references to laws, regulations and other legal texts directly pertinent to the procurement proceedings.

Article 6. Information on possible forthcoming procurement [\[hyperlink**\]](#)**

33. The purpose of the article is to highlight the importance of proper procurement planning. The article recommends the publication of information on future procurement, which may contribute to transparency throughout the procurement process and eliminate any advantageous position of suppliers or contractors that might otherwise gain access to procurement planning phases in a non-transparent way.

34. Article 6 does not require the publication of such information — the provisions are permissive. Flexibility is needed because information and needs may change with circumstances; not only may the procuring entity's time and costs be wasted, but suppliers or contractors may also incur unnecessary costs. Making available abundant, irrelevant or misleading information, rather than carefully planned, useful and relevant information, may compromise the purpose of issuing this type of information. The procuring entity should assess whether such publication is appropriate and would further transparency in particular in the light of the requirements of the United Nations Convention against Corruption (its article 9,

which addresses public procurement). Similarly, the publication of procurement plans for the forthcoming months is also encouraged, subject to these caveats.

35. Paragraph (1) of the article enables and is intended to encourage the publication of information on forthcoming procurement opportunities and procurement plans. The reference in paragraph (1) is made to long-term general plans rather than information about short-term procurement opportunities or any particular forthcoming procurement opportunity (the latter is subject of paragraph (2) of the article). The enacting State may consider it appropriate to highlight the benefits of publishing such information for strategic and operational planning. For example, publication of such information may discipline procuring entities in procurement planning, and diminish cases of “ad hoc” and “emergency” procurements and, consequently, recourses to less competitive methods of procurement. It may also enhance competition as it would enable more suppliers and contractors to learn about procurement opportunities, assess their interest in participation and plan their participation in advance accordingly. Publication of such information may also have a positive impact in the broader governance context, in particular in opening up procurement to general public review and civil society and local community participation.

36. Enacting States may provide incentives for publication of such information, as is done in some jurisdictions, such as a possibility of shortening a period for presenting submissions in pre-advertised procurements. The enacting States may also refer to cases when publication of such information would in particular be desirable, such as when complex construction procurements are expected or when procurement value exceeds a certain threshold. They may also recommend the desirable content of information to be published and other conditions for publication, such as a time frame that such publication should cover, which may be a half-year or a year or other period.

37. Paragraph (2), unlike paragraph (1), refers to an advance notice of a particular forthcoming procurement opportunity. In practice, such advance notices may be useful, for example, to investigate whether the market could respond to the procuring entity’s needs before any procurement procedure is initiated. This type of market investigation may prove useful in rapidly evolving markets (such as in the information technology sector) to see whether there are recent or envisaged innovative solutions. Responses to the advance notice might reveal that it would not be feasible or desirable to carry out the procurement as planned by the procuring entity. On the basis of the data collected, the procuring entity may take a more informed decision as regards the most appropriate procurement method to be used in the forthcoming procurement. This advance notice should not be confused with a notice seeking expressions of interest that is usually published in conjunction with the request for proposals proceedings (the latter is further discussed in ...).

38. The optional publication referred to in paragraphs (1) and (2) is not intended to form part of any particular procurement proceeding. Publication under paragraph (1) is a step in a long or medium-term plan while publication under paragraph (2) may shortly precede the procurement proceedings. As stated in paragraph (3) of the article, when published either under paragraph (1) or (2), the publicised information does not bind the procuring entity in any way, including as regards future solicitations. Suppliers or contractors are not entitled to any remedy

if the procurement as pre-publicised does not take place at all, or takes place on terms different from those pre-publicised.

39. The article is of general application: the procuring entity is encouraged to publish the information referred to in paragraphs (1) and (2) regardless of the type and method of procurement envisaged. Enacting States and procuring entities should be aware, however, that publication of this information is not advisable in all cases. Imposing a requirement to publish this type of information is likely to be burdensome; it may also interfere in the budgeting process and the procuring entity's necessary flexibility to handle its procurement needs. The publication of such information may also inadvertently facilitate collusion and lobbying. The position under the Model Law is therefore, as reflected in the article, that the procuring entity should have the discretion to decide on a case-by-case basis on whether such information should be published, but it is considered that the default position should be to publish, unless there are considerations indicating to the contrary.

40. The enacting State may wish to stipulate, in the procurement regulations, the place and means of publishing information referred to in the article. In regulating this issue, it may wish to take into account the commentary to article 5, which raises considerations relevant to article 6. Consistency in regulation of issues related to publication of all types of procurement-related information under the Model Law should be ensured (see in this context also commentary to articles 18, 19, 23 and 33-35 below [\[**hyperlinks**\]](#)).

Article 7. Communications in procurement [\[hyperlink**\]](#)**

41. The purpose of article 7 is to seek to provide certainty as regards (i) the form of information generated and communicated in the course of procurement proceedings under the Model Law, (ii) the means to be used to communicate such information, (iii) the means of satisfying all requirements for information to be in writing or for a signature, and of holding any meeting of suppliers or contractors (collectively referred to as “form and means of communication”), and (iv) requirements and measures taken to protect classified information in procurement involving such information.

42. As regards the form and means of communication, the position under the Model Law is that, in relation to the procuring entity's interaction with suppliers and contractors and the public at large, the paramount objective should be to seek to encourage the participation of suppliers and contractors in procurement proceedings, without obstructing the evolution of technology and processes. The provisions contained in the article therefore do not depend on or presuppose the use of any particular technology. They set a legal regime that is open to technological developments. While they should be interpreted broadly, dealing with all communications in the course of procurement proceedings covered by the Model Law, the provisions are not intended to regulate communications that may be subject to regulation by other branches of law, such as tender securities.

43. Paragraph (1) of the article requires that information is to be in a form that provides a record of the content of the information and is accessible so as to be usable for subsequent reference. The use of the word “accessible” in the paragraph

is meant to imply that the reader has direct access to the information concerned, which should also be readable and capable of interpretation and retention. The word “usable” in the article is intended to cover both human use and automatic processing. These provisions aim at providing, on the one hand, sufficient flexibility in the use of various forms of information as technology evolves and, on the other, sufficient safeguards that information in whatever form it is generated and communicated will be reliably usable, traceable and verifiable. Adequate reliability, traceability and verification are essential for the normal operation of the procurement process, for effective control and audit and in review proceedings. The wording found in the article is compatible with form requirements found in UNCITRAL texts regulating electronic commerce, such as article 9 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts [\[**hyperlink**\]](#). Like these latter documents, the Model Law does not confer permanence on one particular form of information, nor does it interfere with the operation of rules of law that may require a specific form. For the purposes of the Model Law, as long as a record of the content of the information is provided and information is accessible so as to be usable for subsequent reference, any form of information may be used. To ensure transparency and predictability, any specific requirements as to the form acceptable to the procuring entity have to be specified by the procuring entity at the beginning of the procurement proceedings, in accordance with paragraph 3 (a) of the article.

44. Paragraph (2) of the article contains an exception to the general form requirement contained in paragraph (1) of the article. It permits certain types of information to be communicated on a preliminary basis in a form that does not leave a record of the content of the information, for example if information is communicated orally by telephone or in a personal meeting, in order to allow the procuring entity and suppliers and contractors to avoid unnecessary delays. The paragraph enumerates, by cross-reference to the relevant provisions of the Model Law, the instances when this exception may be used. They involve communication of information to any single supplier or contractor participating in the procurement proceedings (for example, when the procuring entity asks suppliers or contractors for clarifications of their tenders). However, the use of the exception is conditional: immediately after information is so communicated, confirmation of the communication must be given to its recipient in the form prescribed in paragraph (1) of the article (i.e., that provides a record of the content of the information and that is accessible and usable). This requirement is essential to ensure transparency, integrity and the fair and equitable treatment of all suppliers and contractors in procurement proceedings. However, practical difficulties may exist in verifying and enforcing compliance with this requirement. Therefore, the enacting State may wish to limit the scope of the exception as it is drafted in paragraph (2), so as to provide only for those situations that are strictly necessary in the light of prevailing business practice in the State concerned. Overuse of this exception might create a risk of abuse, including corruption and favouritism.

45. Consistent with the general approach of the Model Law that the procuring entity is responsible for the design of the procurement proceedings, paragraph (3) of the article gives the right to the procuring entity to insist on the use of a particular form and means of communications or combination thereof in the course of the procurement, without having to justify its choice. No such right is given to suppliers or contractors but, in accordance with chapter VIII of the Model Law

[**hyperlink**], they may challenge the procuring entity's decision in this respect. The exercise of this right by the procuring entity is subject to a number of conditions that aim at ensuring that procuring entities do not use technology and processes for discriminatory or otherwise exclusionary purposes, such as to prevent access by some suppliers and contractors to the procurement or create barriers for access.

46. To ensure predictability and proper review, control and audit, paragraph (3) of the article requires the procuring entity to specify, when first soliciting the participation of suppliers or contractors in the procurement proceedings, all requirements of form and the means of communications for a given procurement. These requirements may be changed by issuing an addendum to the originally published information, in accordance with article 15 of the Model Law. The procuring entity has to make it clear whether one or more than one form and means of communication can be used and, in the latter case, which form and means is/are to be used at which stage of the procurement proceedings and with respect to which types of information or classes of information or actions. For example, special arrangements may be justifiable for submission of complex technical drawings or samples or for a proper back-up when a risk exists that data may be lost if submitted only by one form or means. The procuring entity may, at the outset of a given procurement, envisage that a change in the form requirements and/or means of communications may be required. This situation might arise, for example, in procurement processes that will extend over a relatively lengthy period, such as procurement of highly complex items or procurement involving framework agreements. In such a case, the procuring entity, apart from reserving the possibility to amend form requirements or the means of communication when first soliciting the participation of suppliers or contractors in the procurement proceedings, will be required to ensure that the safeguards contained in article 7 (4) are complied with in any amended form and/or means of communications stipulated, and that all concerned are promptly notified about the change. Although theoretically possible, the use of several means of communication, or advising that the means may freely change during the procurement, will almost inevitably have negative implications both for the efficiency of the procurement procedure and the validity of the information regarding the means of communication, and therefore procuring entities should envisage the use of only those means of communication and changes to them that are both justifiable and anticipated to be appropriate for the procurement concerned.

47. To make the right of access to procurement proceedings under the Model Law a meaningful right, paragraph (4) of the article requires that the means specified in accordance with paragraph (3) of the article must be in common use by suppliers or contractors in the relevant context. As regards the means to be used to hold meetings, it in addition requires ensuring that suppliers or contractors can fully and contemporaneously participate in the meeting. "Fully and contemporaneously" in this context means that suppliers and contractors participating in the meeting have the possibility, in real time, to follow all proceedings of the meeting and to interact with other participants when necessary. The "requirement to means of communication in common use by suppliers or contractors" found in paragraph (4) of the article implies efficient and affordable connectivity and interoperability (i.e., capability effectively to operate together) so that to ensure unrestricted access to procurement. In other words, each and every potential supplier or contractor

should be able to participate, with simple and commonly used equipment and basic technical know-how, in the procurement proceedings in question. This however should not be construed as implying that procuring entities' information systems have to be interoperable with those of each single supplier or contractor. If, however, the means chosen by the procuring entity implies using information systems that are not generally available, easy to install (if need be) and reasonably easy to use and/or the costs of which are unreasonably high for the use envisaged, the means cannot be deemed to satisfy the requirement that they be "commonly used" in the context of a procurement procedure under paragraph (4) of the article. (The term "information system" or the "system" in this context is intended to address the entire range of technical means used for communications. Depending on the factual situation, it could refer to a communications network, applications and standards, and in other instances to technologies, equipment, mailboxes or tools.)

48. The paragraph does not purport to ensure readily available access to public procurement in general but rather to a specific procurement. The procuring entity has to decide, on a case-by-case basis, which means of communication might be appropriate in which type of procurement. For example, the level of penetration of certain technologies, applications and associated means of communication may vary from sector to sector of a given economy. In addition, the procuring entity has to take into account such factors as the intended geographic coverage of the procurement and coverage and capacity of the country's information system infrastructure, the number of formalities and procedures needed to be fulfilled for communications to take place, the level of complexity of those formalities and procedures, the expected information technology literacy of potential suppliers or contractors, and the costs and time involved. In cases where no limitation is imposed on participation in procurement proceedings on the basis of nationality, the procuring entity has also to assess the impact of specified means on access to procurement by foreign suppliers or contractors. Any relevant requirements of international agreements would also have to be taken into account. A pragmatic approach, focusing on its obligation not to restrict access to the procurement in question by potential suppliers and contractors, will help the procuring entity to determine if the chosen means is indeed "commonly used" in the context of a specific procurement and thus whether it satisfies the requirement of the paragraph.

(A/CN.9/WG.I/WP.79/Add.4) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for the Guide text to accompany articles 7 to 11 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

...

Chapter I

Part II. Article-by-article commentary (*continued*)

...

Article 7. Communications in procurement [\[hyperlink**\]](#)
(*continued*)**

1. In a time of rapid technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible or usable (whether for technical reasons, reasons of cost or otherwise). The procuring entity must seek to avoid situations when the use of any particular means of communication in procurement proceedings could result in discrimination among suppliers or contractors. For example, the exclusive choice of one means could benefit some suppliers or contractors who are more accustomed to use it to the detriment of others. Measures should be designed to prevent any possible discriminatory effect (e.g., by providing training or longer time limits for suppliers to become accustomed to new systems). The enacting State may consider that the old processes, such as paper-based ones, need to be retained initially when new processes are introduced, which can then be phased out, to allow a take-up of new processes.

2. The provisions of the Model Law do not distinguish between proprietary or non-proprietary information systems that may be used by procuring entities. As long as they are interoperable with those in common use, their use would comply with the conditions of paragraph (4). The enacting State may however wish to ensure that procuring entities should carefully consider to what extent proprietary systems, devised uniquely for the use by the procuring entity, may contain technical solutions different and incompatible with those in common use. Such systems may require suppliers or contractors to adopt or convert their data into a certain format. This can

render access of potential suppliers and contractors, especially smaller companies, to procurement impossible or discourage their participation because of additional difficulties or increased costs. Effectively, suppliers or contractors not using the same information systems as the procuring entity would be excluded, with the risk of discrimination among suppliers and contractors, and higher risks of improprieties. The use of the systems that would have a significantly negative effect on participation of suppliers and contractors in procurement would be incompatible with the objectives, and article 7 (4), of the Model Law.

3. On the other hand, the recourse to off-the-shelf information systems, being readily available to the public, easy to install and reasonably easy to use and providing maximal choice, may foster and encourage participation by suppliers or contractors in the procurement process and reduce risks of discrimination among suppliers and contractors.¹ They are also more user-friendly for the public sector itself as they allow public purchasers to utilize information systems proven in day-to-day use in the commercial market, to harmonize their systems with a wider net of potential trading partners and to eliminate proprietary lock-in to particular third-party information system providers, which may involve inflexible licences or royalties. They are also easily adaptable to user profiles, which may be important for example in order to adapt systems to local languages or to accommodate multilingual solutions, and scalable through all government agencies' information systems at low cost. This latter consideration may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies.

4. The Model Law does not address the issue of charges for accessing and using the procuring entity's information systems. This issue is left to the enacting State to decide taking into account local circumstances. These circumstances may evolve over time with the effect on the enacting State's policy as regards charging fees. The enacting State should carefully assess the implications of charging fees for suppliers and contractors to access the procurement, in order to preserve the objectives of the Model Law, such as those of fostering and encouraging participation of suppliers and contractors in procurement proceedings, and promoting competition. Ideally, no fees should be charged for access to, and use of, the procuring entity's information systems. If charged, they should be transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings.

5. The objective of paragraph (5) of the article (which requires appropriate measures to secure the authenticity, integrity and confidentiality of information) is to enhance the confidence of suppliers and contractors in reliability of procurement proceedings, including in relation to the treatment of commercial information. Confidence will be contingent upon users perceiving appropriate assurances of security of the information system used, of preserving authenticity and integrity of information transmitted through it, and of other factors, each of which is the subject of various regulations and technical solutions. Other aspects and relevant branches of law are relevant, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality,

¹ Some commentators have questioned the validity of this statement: the Working Group is requested to advise further.

intellectual property and copyright. The Model Law and procurement regulations that may be enacted in accordance with article 4 of the Model Law are therefore only a narrow part of the relevant legislative framework. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good governance framework dealing with personnel, management and administration issues in the procuring entity and the public sector as a whole.

6. Legal and technical solutions aimed at securing the authenticity, integrity and confidentiality may vary in accordance with prevailing circumstances and contexts. In designing them, consideration should be given both to their efficacy and to any possible discriminatory or anti-competitive effect, including in the cross-border context. The enacting State has to ensure at a minimum that the systems are set up in a way that leaves trails for independent scrutiny and audit and in particular verifies what information has been transmitted or made available, by whom, to whom, and when, including the duration of the communication, and that the system can reconstitute the sequence of events. The system should provide adequate protection against unauthorized actions aimed at disrupting normal operation of public procurement process. Technologies to mitigate the risk of human and other disruptions must be in place. So as to enhance confidence and transparency in the procurement process, any protective measures that might affect the rights and obligations of potential suppliers and contractors should be specified to suppliers and contractors at the outset of procurement proceedings or should be made generally known to public. The system has to guarantee to suppliers and contractors the integrity and security of the data that they submit to the procuring entity, the confidentiality of information that should be treated as confidential and that information that they submit will not be used in any inappropriate manner. A further issue in relation to confidence is that of systems' ownership and support. Any involvement of third parties needs to be carefully addressed to ensure that the arrangements concerned do not undermine the confidence of suppliers and contractors and the public at large in procurement proceedings. (Further aspects relevant to the provisions of article 7 on the form and means of communication are discussed in the commentary to articles 40 and 42 of this Guide [\[**hyperlink**\]](#).)

7. In addition to imposing requirements on the form and means of communication, the article deals with measures and requirements that the procuring entity may impose in procurement involving classified information to ensure the protection of such information at the requisite level. Provisions to that effect are found in paragraph (3)(b). For example, it is common in procurement containing classified information, to include the classified information in an appendix to the solicitation documents, which is not made public. If such measure or any other exception to transparency requirements of the Model Law or any other measure for protection of classified information is taken, it is to be disclosed at the outset of the procurement in accordance with paragraph (3) of the article. (For the definition of "procuring involving classified information" and the commentary thereto, see article 2(1) [\[**hyperlink**\]](#).)

8. The requirements or measures referred to in paragraph (3)(b) are to be differentiated from the requirements and measures referred to in paragraph (5) of the article. While the latter referred to general requirements and measures applicable to any procurement, regardless of whether classified information is involved, paragraph (3)(b) refers to technical requirements and measures addressed to

suppliers or contractors to ensure the integrity of classified information, such as encryption requirements. They would allow the procuring entity to stipulate, for example, the level of the officer tasked with receiving the information concerned. These requirements and measures would be authorized by the procurement regulations or other provisions of law of the enacting States only in procurement involving classified information and only with respect to that type of information, not any other information that the procuring entity may choose to protect at its own discretion.

Article 8. Participation by suppliers or contractors **[**hyperlink**]**

9. The purposes of article 8 are to specify the grounds upon which the procuring entity may restrict the participation of certain categories of suppliers or contractors in procurement proceedings (paragraphs (1) and (2)) and to provide procedural safeguards when any such restriction is imposed (paragraphs (3) to (5)). Any such restriction of participation of suppliers or contractors in procurement proceedings restricts trade and may violate commitments by States under relevant international instruments, such as the WTO Agreement on Government Procurement **[**hyperlink**]**.

10. Both paragraphs (1) and (2) stipulate that the grounds for restricting the participation of suppliers and contractors in procurement proceedings are limited to those found in procurement regulations or other provisions of law of the enacting State. Whereas paragraph (1) refers to a restriction on the ground of nationality, paragraph (2) is open-ended as regards the nature of the grounds that may be found in the procurement regulations or other provisions of law of the enacting State. Although socioeconomic policies of an enacting State may involve restrictions on the grounds set out in either of the paragraphs, the provisions are not themselves limited to socioeconomic issues: other issues of concern to the State, such as safety and security, may justify these restrictions.

11. Paragraph (1) does not mean “domestic procurement” only in the sense that domestic suppliers or contractors alone, however they may be defined in the enacting State, are permitted to participate in the procurement proceedings (noting that domestic procurement removes the obligation of international solicitation under article 32). International procurement under paragraph (1) may involve the exclusion of only certain nationalities, for example in order to fulfil the enacting State’s obligations under international public law to avoid dealings with persons of a foreign State that is subject to international sanctions.

12. Paragraph (2) is intended to cover situations where restriction of participation in procurement proceedings is undertaken wholly or partly for other reasons, such as to implement set-aside programmes for SMEs or entities from disadvantaged areas). The paragraph may cover, as paragraph (1) does, domestic procurement (e.g. procurement with participation of only suppliers or contractors coming from

disadvantaged areas within the same State) or international procurement limited to certain groups of suppliers or contractors (e.g. persons with disabilities).²

13. When any of the grounds in the procurement regulations or other provisions of law is invoked by the procuring entity as a justification for restricting participation in procurement proceedings, paragraph (3) requires the procuring entity to make declaration to such effect at the outset of the procurement proceedings. This declaration is to be published in the same place and manner in which the original information about the procurement proceedings, such as the invitation to participate in the procurement proceedings (e.g. invitation to pre-qualification or to tender) or the notice of the procurement under article 33, is published, and simultaneously with such information. To ensure fair and equitable treatment of suppliers or contractors, the declaration cannot be later altered.

14. Where the procuring entity uses domestic procurement, it also may invoke other exemptions in its solicitation documents, including an exemption from the requirement to indicate information about currency and languages, which may no longer be pertinent (see, further, the commentary to the articles on solicitation documents, such as article 39 [\[**hyperlink**\]](#)).

15. Paragraph (4) and (5) contain other procedural safeguards. Under paragraph (4), the procuring entity will be required to put on the record the reasons and circumstances on which it relied to justify its decision, indicating in particular the legal source where the ground invoked to restrict participation is found. The same information is required to be provided to any member of the public upon request under paragraph (5) of the article. Such a decision is an example of the type for which the procuring entity is required to substantiate the reasons and circumstances with legal justifications, as discussed in the introduction to this Chapter above [\[**hyperlink**\]](#) and in the commentary to article 25 on the procurement record below [\[**hyperlink**\]](#).

Article 9. Qualifications of suppliers and contractors **[\[**hyperlink**\]](#)**

16. The purposes of the article are: to set out an exhaustive list of criteria that the procuring entity may use in the assessment of qualifications of suppliers or contractors at any stage of the procurement proceedings (paragraph (2)); to regulate other requirements and procedures that it may impose for this assessment (paragraphs (3) to (7)); and to list the grounds for disqualification (paragraph (8)). The provisions aim at restricting the ability of procuring entities to formulate excessively demanding qualification criteria or requirements and through their

² The suggestion in the Working Group was that the Guide should highlight that the article deals with measures of a clearly discriminatory nature, authorized in the procurement regulations and other provisions of law of the enacting State, but some measures may be taken in practice that produce, albeit inadvertently, an equally discriminatory effect on suppliers or contractors, domestically and/or internationally (for example, stipulating the use of the language spoken only by the ruling minority in a State, or imposing technical requirements that reflect standards applied only in one domestic region or in one country in a geographical area) (see A/CN.9/WG.I/WP.75/Add.1, footnote 47). The location of such statement in the Guide is to be considered.

application, reducing the pool of participants for the purpose, among other things, of limiting their own workload.

17. The article is also intended to prevent the qualification procedure from being misused to restrict market access through the use of hidden barriers to the market (whether at the domestic or international level). Requirements for particular licences, obscure diploma requirements, certificates requiring in-person attendance or adequate past experience may be legitimate for a given procurement, or may be an indication of an attempt to distort participation in favour of a particular supplier or contractor or group of suppliers or contractors. The provisions are therefore permissive in scope, and the risk of misuse is mitigated through the transparency provisions of paragraph (2), which enable the relevance of particular requirements to be evaluated. Of particular concern would be unnecessary requirements that discriminate directly or indirectly against overseas suppliers, used as a non-transparent manner of limiting their participation (where, for example, the permitted restriction under article 8 is not explicitly invoked, as further discussed in the commentary to paragraphs (2)(e) and (6), below).

18. As stated in paragraph (1) of the article, the provisions of the article may be applied at any stage of the procurement proceedings. Assessment of qualifications may take place: (i) at the outset of the procurement through pre-qualification in accordance with article 18 [\[**hyperlink**\]](#) or preselection in accordance with article 49(3); (ii) during the examination of submissions (see for example, that the grounds for rejection of a tender in article 43(3)(a) include that the supplier is unqualified); (iii) at any other time in the procurement proceedings when pre-qualified suppliers or contractors are requested to demonstrate again their qualifications (see paragraph (8)(d) of this article and the commentary in paragraph ... below); and/or (iv) at the end of the procurement proceedings when the qualifications of only the winning supplier or contractor are assessed (see article 57(2) [\[**hyperlink**\]](#)) or when that supplier or contractor is requested to demonstrate again its qualifications (article 43(6) [\[**hyperlink**\]](#)).

19. The assessment of qualifications at the outset of the procurement through pre-qualification or preselection, while appropriate in some procurement, may have the effect of limiting competition and should therefore be used by the procuring entity only when necessary: the Model Law promotes open competition unless there is a reason to limit participation. The provisions of the Model Law in chapter VIII [\[**hyperlink**\]](#) allow challenges to decisions on disqualification made early in the procurement proceedings, but only where the challenge is submitted before the deadline for presenting submissions. This limited time frame, supported by stricter provisions on suspension of the procurement proceedings, ensures that the procurement proceedings will not be disrupted at later stages for reasons not related to those stages.

20. Paragraph (2) lists the qualification criteria that can be used in the process. The criteria must be relevant and appropriate in the light of the subject matter of the procurement. It is not necessary to apply all the criteria listed in paragraph (2); the procuring entity should use only those that are appropriate for the purposes of the specific procurement. The criteria to be used must be specified by the procuring entity in any pre-qualification or preselection documents, and in the solicitation documents; in addition to enabling the relevance of the criteria to be evaluated, such

early disclosure allows a challenge to them to be made before the procurement is concluded.

21. The requirement in paragraph (2)(a) that suppliers or contractors must possess the “necessary equipment and other physical facilities” is not intended to restrict the participation of SMEs in public procurement. Often such enterprises would not themselves possess the required equipment and facilities; they can ensure nevertheless through their subcontractors or partners that the equipment and facilities are available for the implementation of the procurement contract.

22. The reference in paragraph (2)(b) to “other standards” is intended to indicate that the procuring entity should be entitled to satisfy itself, for example, that suppliers or contractors have all the required insurances, and to impose security clearances or consider environmental aspects where necessary. Since environmental standards in particular may have the effect of excluding foreign suppliers (where regional environmental standards vary), the enacting State may wish to issue rules and/or guidance on the use of environmental standards to ensure that procuring entities may apply such standards without risk of disruptive challenge procedures. These standards relate to the standards and processes followed by suppliers or contractors generally, rather than to the environmental characteristics of the subject matter of the procurement (which are addressed in the commentary to articles 10 and 11 below [\[**hyperlinks**\]](#)).

23. Paragraph (2)(e) should be implemented bearing its potentially discriminatory effect on foreign suppliers or contractors without any permanent presence (either through a branch, representative office or subsidiary) in the enacting State in mind. Foreign suppliers would generally not have any obligation to pay taxes or social security contributions in the enacting State; article 8 prohibits the procuring entity from imposing requirements other than those permitted in the procurement regulations or other provisions of law of the enacting State that would have the effect of deterring participation in the procurement proceedings by foreign suppliers or contractors.

24. Paragraph (2)(f) refers to the disqualification of suppliers and contractors pursuant to administrative suspension or debarment proceedings. Such administrative proceedings — in which alleged wrongdoers should be accorded due process rights such as an opportunity to refute the charges — are commonly used to suspend or debar suppliers and contractors found guilty of wrongdoing such as issuing false or misleading accounting statements or committing fraud. It may be noted that the Model Law leaves it to the enacting State to determine the period of time for which a criminal offence of the type referred to in paragraph (2)(f) should disqualify a supplier or contractor from being considered for a procurement contract. For general commentary on debarment proceedings, see Section [**](#) of the general commentary above [\[**hyperlink**\]](#).

25. Paragraph (3) allows the procuring entity to demand from suppliers or contractors appropriate documentary evidence or other information to prove their satisfaction of the qualification criteria specified by the procuring entity in any pre-qualification or preselection documents and in the solicitation documents. Such documentary evidence may comprise audited annual reports (to demonstrate financial resources), inventories of equipment and other physical facilities, licences to engage in certain types of activities and certificates of compliance with

applicable standards and confirming legal standing. Depending on the subject matter of the procurement and the stage of the procurement proceedings at which qualification criteria are assessed, a self-declaration from suppliers or contractors may or may not be sufficient. For example, it may be sufficient to rely on this type of declaration at the opening of simple stand-alone electronic reverse auctions as long as it is envisaged that a proper verification of the winning supplier's compliance with the applicable qualification criteria will take place after the auction. Requirements imposed as regards the documentary evidence or other information must apply equally to all suppliers or contractors and must be objectively justifiable in the light of the subject matter of the procurement (see paragraphs (4) and (6) of the article).

26. Paragraph (4) requires all criteria and requirements as regards assessment of qualifications of suppliers or contractors to be set out in any pre-qualification or preselection document and in the solicitation documents. In some jurisdictions, standard qualification requirements are found in procurement regulations, and the pre-qualification/preselection/solicitation documents may simply cross-refer to those regulations. For reasons of transparency and equal treatment, the Model Law requires all requirements to be set out in the relevant documents; however, the requirements of paragraph (4) may be satisfied where the documents refer to the qualification requirements in legal sources that are transparent and readily available (such as by using hyperlinks).

27. Paragraph (6) prohibits any measures that may have a discriminatory effect in the assessment of qualifications or that are not objectively justified, unless they are expressly authorized under the law of the enacting State. Despite these prohibitions in the Model Law, some practical measures, such as a choice of the language, although objectively justifiable, may lead to discrimination against or among suppliers or contractors or against categories thereof.

28. In order to facilitate participation by foreign suppliers and contractors, paragraph (7) bars the imposition of any requirement for the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than by the supplier or contractor presenting the successful submission. Those requirements must be provided for in the laws of the enacting State relating to the legalization of documents of the type in question. The article does not require that all documents provided by the winning supplier or contractor are to be legalized. Rather, it recognizes that States have laws concerning the legalization of documents and establishes the principle that no additional formalities specific to procurement proceedings should be imposed.

29. Paragraphs (8)(a)-(c) address the consequences where suppliers or contractors submit information that is false, constitutes a misrepresentation, or that is inaccurate or incomplete. Subparagraph (a) requires the disqualification of a supplier for the submission of false information or for misrepresentation. Subparagraph (b) permits the procuring entity to disqualify a supplier or contractor where its qualification information was "materially inaccurate or materially incomplete".³ Subparagraph (c) allows the procuring entity to disqualify a supplier for

³ The Commission requested an explanation of the term materiality in the Guide and conformity among all languages.

non-material inaccuracies or incompleteness only where the supplier, when so requested, does not remedy the inaccuracy or incompleteness.

30. The purpose of paragraphs 8(a)-(c) is to safeguard both the interests of suppliers and contractors in receiving fair treatment and the interest of the procuring entity in entering into procurement contracts only with qualified suppliers and contractors, while conferring an element of flexibility as regards insignificant inaccuracies.⁴

31. The purpose of paragraph (8)(d) is to provide for reconfirmation, at a later stage of the procurement proceedings, such as at the time of examination of submissions, of the qualifications of suppliers or contractors that have been pre-qualified. It is intended to permit the procuring entity to ascertain whether the qualification information submitted by a supplier or a contractor at the time of pre-qualification, or if qualification is considered separately early in the procedure, remains valid and accurate, again with the procedural safeguards described in the preceding paragraph. In most procurement (with the exception perhaps of complex and time-consuming multistage procurement), the application of these provisions should be limited to the supplier or contractor presenting the successful submission as envisaged in articles 43(6) and (7) and 57 (2) of the Model Law.

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement [\[hyperlink**\]](#)**

32. The purpose of article 10 is to emphasize the importance of the principle of clarity, sufficient precision, completeness and objectivity in the description of the subject matter of procurement in any pre-qualification or preselection documents and in the solicitation documents. Descriptions with those characteristics encourage participation by suppliers and contractors in procurement proceedings, enable suppliers and contractors to formulate and present submissions that meet the needs of the procuring entity, and enable suppliers and contractors to forecast the risks and costs of their participation in procurement proceedings and of the performance of the contracts or framework agreement to be concluded, and thus to offer their most advantageous prices and other terms and conditions. Furthermore, properly prepared descriptions of the subject matter of procurement enable tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method. They also contribute to transparency and reduce possibilities of erroneous, arbitrary or abusive actions or decisions by the procuring entity. In addition, the application of the rule that the description of the subject matter should be set out so as not to favour particular contractors or suppliers will make it more likely that the procurement needs of the procuring entity may be met by a greater number of suppliers or contractors, thereby facilitating the use of as competitive a method of procurement as is feasible under the circumstances (and in particular helping to limit abusive use of single-source procurement).

⁴ The Working Group may wish to consider how to address the obvious risks of corruption here, by linking the concepts of “materiality” and “misrepresentation” to some objective standard.

33. Together with the procedural requirement to publish the description in the solicitation documents under article 39(d) (or the equivalent for other open methods) [\[**hyperlinks**\]](#), these provisions ensure transparency, objectivity and participation. The first two paragraphs ensure access to the procurement, by prohibiting discriminatory treatment; the remainder of the article seeks to ensure that all suppliers or contractors understand the requirements in the same way.

34. The minimum requirements referred to in paragraph (1) are intended also to allow for the use of two procurement methods under Chapter V of the Model Law: two-stage tendering and request for proposals with dialogue proceedings (under articles 30(1)(a) and 30(2)(a) [\[**hyperlinks**\]](#)). The use of these methods is predicated on the impossibility of drafting a “detailed” description of the subject-matter of the procurement as required by subparagraph (b), in the case of two-stage tendering at the outset of the procedure, and in the case of request-for-proposals with dialogue generally. (For a more detailed consideration of this topic, see the commentary to those procurement methods below, [\[**hyperlinks**\]](#).)⁵

35. Paragraphs (3)-(5), however, do not impose absolute obligations. Paragraph (3) sets out a possible range of elements that can constitute the description, and paragraph (4) requires objectivity to the extent practicable, and allows the procuring entity the flexibility of using technical, quality and performance characteristics as the circumstances warrant: the description can be based on what the subject-matter is made up of (input-based) or what it should do (output-based). Where descriptions are input-based, the risk of using brand names or trademarks that will limit access to the procurement is more likely to arise. Hence paragraph (4) continues that such use is permitted only where no other sufficiently precise or intelligible description can be used and then only if the solicitation specifies the salient features of the subject matter being sought, and states specifically that the brand name item “or equivalent” may be offered. The procurement regulations or guidance from the public procurement agency or other body may usefully discuss the extent of the procuring entity’s discretion to use brand names in such circumstances, given the potential breadth of this provision. In this regard, the interaction between paragraphs (4) and (5) should be considered; where there is a generally used industry standard (which may be reflected in standardized trade terms), permitting the use of a brand name or a trademark instead of a very long and technical description may improve suppliers’ understanding of the procuring entity’s needs. However, in such cases, monitoring of the procuring entity’s willingness to accept equivalents will be a necessary safeguard, and guidance on how suppliers are to demonstrate equivalence, and objectivity in this regard, will be required.

36. The reference in paragraph (4) to the relevant technical and quality characteristics or the performance characteristics may also cover characteristics

⁵ The Working Group may wish to consider how this requirement works in practice in the context of framework agreements. Guidance can also be provided in Chapter VII, with a cross-reference here.

relevant to environment protection or other socioeconomic policies of the enacting State.⁶

37. In some jurisdictions, practices that require including in any pre-qualification or pre-selection documents and in the solicitation documents a reference source for technical terms used (such as the European Common Procurement Vocabulary **UN** equivalent **[**hyperlinks**]**)** have proved to be useful, supporting the requirement in paragraph (5) for standardized trade terms.

Article 11. Rules concerning evaluation criteria and procedures **[**hyperlink**]**

38. The purpose of the article is to set out the requirements governing the formulation, disclosure and application by the procuring entity of evaluation criteria. The main rules as reflected in paragraphs (1) and (6) of the article are that, with the exceptions related to socio-economic criteria listed in paragraph (3) of the article, all evaluation criteria applied by the procuring entity must relate to the subject matter of the procurement (see paragraph (1)). This requirement is intended to ensure objectivity in the process, and to avoid the misuse of the procedure through invoking criteria intended to favour a particular supplier or contractor or group of suppliers or contractors. The provisions are permissive (they do not set out an exhaustive list of criteria),⁷ to allow the procuring entity the flexibility to design the criteria to suit the circumstances of the given procurement. As was described above regarding qualification criteria, the transparency mechanisms that accompany the substantive requirement — that only those evaluation criteria and procedures that are set out in the solicitation documents may be applied in evaluating submissions and determining the successful submission — are designed to allow the objectivity of the process to be evaluated and, where necessary, challenged.⁸

39. The principle in paragraph (1) that evaluation criteria must relate to the subject matter of the procurement is a cornerstone to ensure best value for money and to curb abuse. This principle also assists in differentiating criteria that are to be applied under paragraph (2) of the article from the exceptional criteria that may be applied only in accordance with paragraph (3) of the article, as explained in paragraph ... below.

⁶ In the Working Group, the suggestion was made that the accompanying Guide text should elaborate on the way the socioeconomic factors can be taken into account in setting out the description of the subject matter of the procurement and the terms and conditions of the procurement contract or a framework agreement. The provision of guidance to the Secretariat is requested on the scope of the commentary which might include, for example, a consideration of the use of appropriate and relevant requirements by reference to national standards, to avoid an ad hoc and potential misuse of flexibility in this regard; to the interaction of socioeconomic requirements as they may be applied in articles 9, 10 and 11, and the use of transparency mechanisms to ensure objectivity in the process. See, also, the guidance to articles 9 and 11.

⁷ The section of the Guide that will explain revisions made to the 1994 text will need to reflect the departure from the approach to provide for the exhaustive list of evaluation criteria in the Model Law (see article 34 (4) of the 1994 Model Law).

⁸ The Working Group may wish consider whether this paragraph should be expanded, in particular by providing examples.

40. Paragraph (2) sets out an illustrative list of evaluation criteria on the understanding that not all evaluation criteria listed would be applicable in all situations and it would not be possible to provide for an exhaustive list of evaluation criteria for all types of procurement, regardless of how broadly they are drafted. The procuring entity can apply evaluation criteria even if they do not fall under the broad categories listed in paragraph (2) as long as the evaluation criteria meet the requirement set out in paragraph (1) of the article — they must relate to the subject matter of the procurement. The enacting State may wish to provide further rules and/or guidance to assist procuring entities in designing appropriate and relevant evaluation criteria.

41. Depending on the circumstances of the given procurement, evaluation criteria may vary from the very straightforward, such as price and closely related criteria (“near-price criteria”, for example, quantities, warranty period or time of delivery) to very complex (including socio-economic considerations, such as characteristics of the subject matter of the procurement that relate to environmental protection). Although ascertaining the successful (responsive) submission on the basis of the price alone provides the greatest objectivity and predictability, in some proceedings the procuring entity cannot select a successful submission purely on the basis of the price factor, or so doing may not be the appropriate course. Accordingly, the Model Law enables the procuring entity to select the “most advantageous submission”, i.e., one that is selected on the basis of criteria in addition to price. Paragraph (2)(b) and (c) provides illustrations for such additional criteria. (Other permissible criteria that do not relate to the subject matter of the procurement are to be found in paragraph (3), as further discussed in paragraph ... below.)⁹

42. The criteria set out in paragraph (2)(c) (the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel involved in providing the subject matter of the procurement) would be applicable only in request for proposals proceedings. This is because request for proposals proceedings have traditionally been used for procurement of “intellectual type of services” (such as architectural, legal, medical, engineering) where experience, reliability and professional and managerial competence of persons delivering the service is of the essence. It is important to note that these criteria are evaluation criteria and not qualification criteria — while the same types of characteristics may be described as both qualification and evaluation criteria, qualification criteria represent minimum standards. The evaluation criteria describe the advantages that the procuring entity will assess on a competitive basis in awarding the contract.

43. Requiring in paragraph (4) that the non-price criteria must, to the extent practicable, be objective, quantifiable and expressed in monetary terms is aimed at enabling submissions to be evaluated objectively and compared on a common basis. This reduces the scope for arbitrary decisions. The wording “to the extent practicable” has been included in recognition that in some procurement proceedings, such as in the request for proposals with dialogue proceedings (article 49 of the

⁹ The Working Group is requested to consider whether the latter part of this paragraph should be revised to allow for a more balanced discussion of quality and price factors. As currently presented, it retains more of the flavour of the “lowest evaluated tender” than the “most advantageous submission”.

Model Law), expressing all non-price evaluation criteria in monetary terms would not be practicable or appropriate. The enacting State may wish to spell out in the procurement regulations and/or guidance by the public procurement agency or other body how factors are to be quantified in monetary terms where to do so is practicable.

44. A special group of evaluation criteria comprise those set out in paragraph (3). Through them the enacting State pursues its socioeconomic policies (see the relevant definition in article 2(n) of the Model Law, the commentary to that article and Section ** of the general commentary above [**hyperlinks**]). Paragraph (3) encompasses two situations: when the procurement regulations or other provisions of law of the enacting State provide for the discretionary power to consider the relevant criteria and when such sources require the procuring entity to do so. These criteria are of general application and are unlikely to be permitted as evaluation criteria under paragraph (2) in that they will ordinarily not relate to the subject matter of the procurement. Examples may include the manner in which the procuring entity may dispose of by-products of a manufacturing process, may offset carbon emissions from the production of the goods or services at issue, on the extent to which particular groups of society will be employed or be engaged as sub-contractors, and so on. By contrast, the environmental requirements for the production of the subject-matter of the procurement relates to that subject-matter, and can therefore be included as an evaluation criterion under paragraph (2): no authorization under the procurement regulations or other laws is required. The guidance issued by the public procurement agency or other body should direct procuring entities to other relevant laws and rules, so that they are aware of any mandatory socio-economic criteria to be applied and of the extent of their discretion in other socio-economic criteria.

45. The socio-economic criteria are therefore listed separately from the criteria set out in paragraph (2). They will be less objective and more discretionary than those referred to in paragraph (2) (although some of them, such as a margin of preference referred to in paragraph (3)(b), may be quantifiable and expressed in monetary terms as required under paragraph (4) of the article). For these reasons, these criteria should be treated as exceptional, as recognized by the requirement that their application be subject to a distinct requirement — that they must be authorized or required for application under the procurement regulations or other provisions of law of the enacting State.

46. In addition, in the case of margins of preference, the procurement regulations must provide for a method of their calculation. That method of calculation may envisage applying a margin of preference to price or the quality factors alone or to the overall ranking of the submission when applicable; the enacting State will wish to decide how to balance quality considerations and the pursuit of socio-economic policies. The procurement regulations should set out rules concerning the calculation and application of a margin of preference could also establish criteria for identifying a “domestic” supplier or contractor and for qualifying goods as “domestically produced” (e.g., that they contain a minimum domestic content or value added) and fix the amount of the margin of preference, which might be different for different subject-matter of procurement (goods, construction and

services).¹⁰ As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the submission prices of all submissions import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting submission prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less.¹¹

47. The use of the criteria of the type envisaged in paragraph (3)(a) and margins of preference referred to in paragraph (3)(b) in evaluating submissions should be considered exceptional given their potential impact on competition and economy in procurement, and reduce confidence in the procurement process (see, further, the discussion in Section ** of the general commentary above [\[**hyperlink**\]](#)). Caution is advisable in providing a broad list of non-price criteria in paragraph (3)(a) or circumstances in which a margin of preference referred in paragraph (3)(b) may be applied, in view of the risk that such other criteria may pose to the objectives of good procurement practice. In specifying such criteria references to broad categories, such as environmental considerations, should be avoided. For example, as already envisaged in paragraph (2)(b) of the article, some environmental considerations, such as the level of carbon emissions of the subject matter of procurement (e.g. cars), are linked to the subject matter of the procurement and the procuring entity could therefore consider them under paragraph (2)(b) even though such considerations may not be specifically authorized or required to be taken into account under procurement regulations or other provisions of law of the enacting State. When however they are not so linked, they could still be considered but under the conditions of paragraph (3) of the article. The procurement regulations or other rules or guidance from the public procurement agency or similar body should not only provide for the criteria but also regulate or guide how the criteria under paragraph (3) should be applied in individual procurements to ensure that they are applied in an objective and transparent manner.

48. As with any other evaluation criteria, the use of any criteria in accordance with paragraph (3)(a) or the margin of preference in accordance with paragraph (3)(b) and the manner of their application are required to be pre-disclosed in the solicitation documents under paragraphs (5) and (6) of the article. In addition, the use of any socio-economic criterion or margins of preference is to be reflected in the record of the procurement proceedings together with the manner in which they were applied (see article 25(1)(i) and (t)). These transparency provisions are essential to allow the appropriate use of the flexibility conferred in these articles to be evaluated; another benefit is that the overall costs of pursuing socio-economic considerations can potentially be compared with their benefits. (See paragraph ... of Part I of the Guide concerning the reasons for using a margin of preference as a technique for achieving national economic objectives while still preserving

¹⁰ The Working Group may wish to consider whether references to other texts with similar notions, such as the WTO GPA on offsets, might assist in understanding the scope of these matters.

¹¹ Further discussion is to be added on: (i) how a margin of preference is generally applied in practice, and the merits and demerits of the possible alternative approaches; and the link between the provisions on margins of preference in subparagraph (b) and those on socioeconomic policies in subparagraph (a), and in particular their possible cumulative effect (A/CN.9/713, para. 131). The provision of guidance to the Secretariat is requested.

competition. See further paragraphs ... of Part I of the Guide on restrictions imposed by some international and regional treaties on States parties to such treaties as regards application of socio-economic criteria in the procurement proceedings, in particular with the aim to accord preferential treatment.)

49. Paragraph (5) sets out information about the evaluation criteria and procedures that must be specified, at a minimum, in the solicitation documents. This minimum information comprises: (i) the basis for selecting the successful submission (the lowest priced submission (where the award is to the lowest priced submission) or the most advantageous submission (where price in combination with other criteria are to be evaluated in selecting the successful submission)); (ii) the evaluation criteria themselves; and (iii) the manner of application of each criterion, including a relative weight given to each criterion, or where that is not possible or relevant (such as in request for proposals with dialogue proceedings under article 49 where it is often not possible to establish the relative weight of evaluation criteria at the outset of the procurement), descending order of importance of the evaluation criteria. This provision is intended to ensure full transparency, so that suppliers or contractors will be able to see how their submissions will be evaluated. A basket of non-price criteria will normally include some quantifiable and objective criteria (such as maintenance costs) and some subjective elements (for example, the relative value that the procuring entity places on speedy delivery or green production lines), amalgamated into an overall quality ranking. Thus for procurement not involving negotiations, the procuring entity has to disclose both how the non-price basket factors will weigh, and how the basket will weigh against price. The importance of setting out the appropriate level of detail of the evaluation criteria is reiterated by the corresponding provisions in the articles regulating the contents of solicitation documents in the context of each procurement method (see articles 39, 47 and 49).

(A/CN.9/WG.I/WP.79/Add.5) (Original: English)**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany articles 12 to 19 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

...

Part II. Article-by-article commentary

...

**Article 12. Rules concerning estimation of the value of procurement
[**hyperlink**]**

1. The purpose of the article is to prevent the procuring entity from manipulating the estimated value of procurement by artificially reducing its value, for example to limit competition and use low-value exemptions under the Model Law. Such exemptions include from the required standstill period (article 22(3)(b)), individual public notice of award (article 23) and international advertisement of the invitation to participate (articles 18(2) and 33(4)). In addition, under some provisions of the Model Law, the value may have a direct impact on the selection of a method of procurement: restricted tendering as opposed to open tendering is available where the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement (see article 29(1)(b)); request-for-quotations under article 29(2) is available for certain low-value procurement. In all such cases, the method selected by the procuring entity for estimation of the value of procurement will determine the extent of its obligations under the Model Law. Without provisions to avoid manipulation, the procuring entity might choose to divide the procurement for abusive purposes.

2. To avoid subjectivity in the calculation of the value of procurement and anti-competitive and non-transparent behaviour, paragraph (1) sets out the basic principle that neither division of the procurement can take place nor any valuation method can be used for the purpose of limiting competition or avoiding obligations under the Law. The prohibition is therefore directed at both (i) any division of a procurement contract that is not justified by objective considerations, and (ii) any valuation method that artificially reduces the value of procurement.

3. Paragraph (2) requires the inclusion in the estimated value of the maximum total value of the procurement contract over its entire duration whether awarded to

one or more suppliers or contractors, and all forms of remuneration (including premiums, fees, commissions and interest receivable) to be taken into account. In framework agreements, the estimated value is the maximum total value of all procurement contracts envisaged under the framework agreement. In procurement with option clauses, the estimated value is the estimated maximum total value of the procurement, including optional purchases.

4. Estimates are to be used primarily for internal purposes. The procuring entity should exercise caution in revealing them to potential suppliers or contractors because if the estimate is higher than market prices, suppliers or contractors might price submissions as close to the estimated value of the procurement as possible and so competition is compromised; if the estimate is below market prices, good suppliers may choose not to compete, and quality and competition may be compromised. A blanket prohibition against revealing such estimates to suppliers or contractors may, however, be unjustifiable: providing an estimated value of a framework agreement may be necessary to allow suppliers or contractors to stock the subject-matter concerned and to ensure security of supply.

Article 13. Rules concerning the language of documents [\[hyperlink**\]](#)**

5. The purpose of the article is to establish certainty as regards the language of documents and communication in procurement proceedings in the enacting State. This provision is especially valuable for foreign suppliers or contractors so that, by reading the procurement law of the enacting State, they can determine the costs (translation and interpretation) required to participate in procurement proceedings in that State. The overriding aim is to facilitate access to the procurement and the participation of suppliers regardless of nationality, through the use of appropriate language or languages in the context of the procurement concerned.

6. Paragraph (1) provides a general rule that documents issued by the procuring entity in the procurement proceedings are to be in the official language(s) of the enacting State. An enacting State whose official language is not the one customarily used in international trade has the option to require, by retaining in the article the words in the second set of brackets, that the documents in addition be issued as a general rule in a language customarily used in international trade. As is discussed in the commentary to article 18(2) on pre-qualification proceedings, and to article 33(2) (on the requirements for solicitation documents in open tendering) and the equivalent for other open procurement methods [\[**hyperlinks**\]](#), the wording in the square brackets may effectively imply the use of the English language, and paper-based advertising, and so is optional. On the other hand, this wording is more closely aligned with the requirements of the multilateral development banks. Enacting States will therefore wish to consider their use of such donor financing, the general requirement for effective international publication, and the approach of technological neutrality under the Model Law when considering the wording of language requirements for articles 13, 18 and 33 (and other articles addressing the solicitation documents).

7. In States in which solicitation documents are issued in more than one language, it would be advisable to include in the procurement law, or in the procurement regulations, a rule to the effect that a supplier or contractor should be able to base its rights and obligations on either language version. The procuring

entity might also be called upon to make it clear in the solicitation documents that both or all language versions are of equal weight.

8. The basic rule, as reflected in paragraph (2) of the article, is that the language of documents presented by suppliers or contractors in any given procurement must correspond to the language or any of the languages of the procuring entity's documents. However, the provisions do not exclude situations where the documents issued by the procuring entity may permit presenting the documents in another language.

Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions [\[hyperlink**\]](#)**

9. The purpose of the article is to ensure certainty as regards the manner, place and deadline for the submission of the main documents in the procurement process. Significant legal consequences may arise out of non-compliance by suppliers or contractors with the procuring entity's requirements (such as the obligation to return a submission presented late or that otherwise does not comply with the submission requirements (see for example article 40(3) [\[**hyperlink**\]](#)). Paragraph (1) therefore provides important safeguards to ensure that the rules on the manner, place and deadline for submission of documents to the procuring entity apply equally to all suppliers or contractors, and that they are specified at the outset of the procurement proceedings (in the pre-qualification, pre-selection or solicitation documents, as applicable). If such information is changed subsequently, all such changes must be brought to the attention of suppliers or contractors to which the relevant documents were originally provided. If those documents were provided to an unknown group of suppliers or contractors (e.g. through a download from a website), information on the changes made must at a minimum appear in the same place at which they could be downloaded.

10. An important element in fostering participation and competition is granting to suppliers and contractors a sufficient period of time to prepare their applications or submissions. Paragraph (2) recognizes that the length of that period of time may vary from case to case, depending upon a variety of factors such as the complexity of the procurement, the extent of sub-contracting anticipated, and the time needed for transmitting applications or submissions. Thus, it is left up to the procuring entity to fix the deadline by which applications or submissions must be presented, taking into account the circumstances of the given procurement. An enacting State may wish to establish in the procurement regulations minimum periods of time that the procuring entity must allow (particularly where its international commitments may so require). These minimum periods should be established in the light of each procurement method, the means of communication used and whether the procurement is domestic or international. Such a period must be sufficiently long in international and complex procurement to allow suppliers or contractors reasonable time to prepare their submissions.

11. In order to promote competition and fairness, paragraph (3) requires the procuring entity to extend the deadline in certain circumstances: first, where clarifications or modifications, or minutes of a meeting of suppliers or contractors are provided shortly before the submission deadline, so that it is necessary to extend the deadline in order to allow suppliers or contractors to take the relevant

information into account in their applications or submissions; and secondly, in the cases stipulated in article 15(3) [\[**hyperlink**\]](#): that is, where any change that would render the original information materially inaccurate is made. Further publication of the revised information is also required, as explained in the commentary to that provision [\[**hyperlink**\]](#). Changes as regards the manner, place and deadline for submission of documents will always constitute material changes, which would oblige the procuring entity to extend the originally specified deadline. The assumption is also that any changes made to the solicitation, pre-qualification or pre-selection documents under this article would also be material and therefore covered by article 15(3) [\[**hyperlink**\]](#).

12. Paragraph (4) permits, but does not compel, the procuring entity to extend the deadline for presenting submissions in other cases, i.e., when one or more suppliers or contractors is or are unable to present their submissions on time due to any circumstances beyond their control. This is designed to protect the level of competition when a potentially important element of that competition would otherwise be precluded from participation. However, given the risks of abuse in the exercise of this discretion, the regulations or rules or guidance from the public procurement agency or similar body should address what “circumstances beyond [the supplier’s or contractor’s] control” may involve, how it should be demonstrated, and the default response from the procuring entity.

13. The Model Law does not address the issue of potential liability of a procuring entity should its automatic systems fail. Failures in automatic systems inevitably occur; where a failure occurs, the procuring entity will have to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting submissions is necessary. Paragraphs (3) and (4) of the article give sufficient flexibility to procuring entities to extend the deadlines in such cases. Alternatively, the procuring entity may determine that a failure in the system will prevent it from proceeding with the procurement and the proceedings will therefore need to be cancelled. The procurement regulations or other rules and guidance may provide further details on failures in electronic systems and the allocation of risks. Failures occurring due to reckless or intentional actions by the procuring entity, as well as decisions it takes to address consequences of system failure, including on extensions of deadlines, could give rise to a challenge under chapter VIII of the Model Law.

Article 15. Clarifications and modifications of solicitation documents [\[**hyperlink**\]](#)

14. The purpose of article 15 is to establish efficient, fair and effective procedures for clarification and modification of the solicitation documents. The right of the procuring entity to modify the solicitation documents is important to ensure that the procuring entity’s needs will be met, but should be balanced against ensuring that all terms and conditions of the procurement are determined and disclosed at the outset of the procedure. Article 15 therefore provides that questions and responding clarifications, and modifications, must be communicated by the procuring entity to all suppliers or contractors to which the procuring entity has provided the solicitation documents. Permit them to have access to clarifications upon request would be inadequate: they would have no way of discovering that a clarification had

been made. If, however, the solicitation documents were provided to an unidentified group of suppliers or contractors (e.g. through the download of documents from a publicly-available website), the clarifications and modification must at a minimum appear where downloads were offered. The procuring entity is also obliged to inform individual suppliers or contractors of all clarifications and modifications to the extent that the identities of the suppliers or contractors are known to the procuring entity.

15. The rules are also meant to ensure that the procuring entity responds to a timely request from suppliers or contractors in time for the clarification to be taken into account. Prompt communication of clarifications and modifications also enables suppliers or contractors, for example under article 40(3) [\[**hyperlink**\]](#), to modify or withdraw their tenders prior to the deadline for presenting submissions, unless there is no right to do so in the solicitation documents. Similarly, minutes of meetings of suppliers or contractors convened by the procuring entity must be communicated to them promptly, so that they too can be taken into account in the preparation of submissions.

16. Paragraph (3) deals with the situations in which, as a result of clarifications and modifications, the originally published information becomes materially inaccurate. The provisions oblige the procuring entity in such cases promptly to publish the amended information in the same place where the original information appeared. This requirement is in addition to that in paragraph (2) to notify the changes individually to each supplier or contractor to which the original set of solicitation documents was provided, where applicable. The provisions of paragraph (3) also reiterate the obligation on the procuring entity in such cases to extend the deadline for presentation of submissions (see article 14(3), and the commentary thereto [\[**hyperlinks**\]](#)).

17. This situation should be differentiated from a material change in the procurement. For example, as stated in the commentary to article 14, changes as regards the manner, place and the deadline for presenting submissions would always make the original information materially inaccurate without necessarily causing a material change in the procurement. However, if as a result of such changes, the pool of potential suppliers or contractors is affected (for example, as a result of changing the manner of presenting submissions from paper to electronic in societies where electronic means of communication are not widespread), it may be concluded that a “material change” has taken place. In such a case, the measures envisaged in paragraph (3) of the article would not be sufficient — the procuring entity would be required to cancel the procurement and commence new procurement proceedings. A “material change” is also highly likely to arise when, as a result of clarifications and modifications of the original solicitation documents, the subject-matter of the procurement has changed so significantly that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the procuring entity.

18. Although, in paragraph (4), a reference is made to “requests submitted at the meeting”, nothing under the Model Law prevents the procuring entity from also reflecting during a meeting of suppliers or contractors any requests for clarification of the solicitation documents submitted to it before the meeting, and its responses thereto. The obligation to preserve the anonymity of the source of the request will also apply to such requests.

Article 16. Clarification of qualification information and of submissions**[**hyperlink**]**

19. The purpose of article 16 is to allow for uncertainties in qualification information and/or submissions to be resolved. An uncertainty may involve an error in the information submitted that could be corrected. If it is uncorrected and the qualification information or submission is accepted, significant contract performance problems could result. Secondly, the procedures allow for fairer treatment of suppliers and contractors that make minor technical errors. Thirdly, where the procedures lead to an error being corrected, they may allow the best qualified supplier or contractor to participate in the procurement, and the best submission to be accepted. Fourthly, the procedures can avoid the otherwise unnecessary disqualification of a supplier or rejection of a submission, or the unnecessary cancellation of the procurement. Fifthly, they can avoid a re-tendering or other repeat procedure, which could allow suppliers or contractors to revise prices upwards in the knowledge of the prices submitted earlier, and avoid collusive behaviour that repeat procedures facilitate. Finally, the procedures can avoid the issues that can arise if submissions contain errors that mean that the procurement contract may be void or voidable.

20. Paragraph (1) of the article permits the procuring entity to seek clarification of qualification information or submissions presented. It should also be noted that the purpose of the clarification request is to assist in the ascertainment of qualifications and the examination and evaluation of submissions, and not to allow for improvements in the information previously submitted to be made. Enacting States may wish to provide in regulations or rules or guidance that the manner of seeking such clarifications should be akin to the procedures for investigating abnormally low tenders under article 20 **[**hyperlink**]**, and that the provisions of article 7 on communications **[**hyperlink**]** require, in effect, the use of a written procedure. These procedural safeguards, together with the requirement to document it in the record of the procurement as required by paragraph (6), will assist in ensuring a fair and transparent process. It is also important given that any decision resulting from the process will be amenable to challenge under Chapter VIII of the Model Law **[**hyperlink**]**.

21. The regulations or other rules or guidance should also address the consequences that may flow from the information received in response to such a request, taking into account the matters raised in paragraphs (...) below. They should emphasize, as previously noted, that the clarification procedure is not designed as a corrections procedure — and that suppliers and contractors have no right to present corrections. What may happen as a result of a clarification procedure is that whether a supplier or contractor is qualified and whether a submission is responsive may be clarified. Alternatively, an error may be discovered, which can pose some difficulty for the procuring entity and the supplier. Under the provisions of paragraphs (2) and (3) of this article combined with the provisions of article 43(1)(b) in open tendering proceedings **[**hyperlink**]**, minor deviations or errors, or arithmetical errors, but no others, can be corrected.¹ Where such other errors are discovered, and where they render the supplier or contractor

¹ The Working Group is requested to advise on the correct interpretation.

unqualified or the submission unresponsive, the supplier will be disqualified or the submission rejected, as the case may be.²

22. Paragraph (2) of the article requires the procuring entity to correct any “purely arithmetical errors” that are discovered during the examination of submissions, without invoking the clarification procedure under paragraph (1). This provision should be read, in the case of tendering proceedings, together with those of paragraph 43(2)(b) [\[**hyperlink**\]](#), which state that the procuring entity shall reject a tender if the supplier or contractor submitting it does not accept the correction. As the supplier can accept the correction, withdraw the tender, or allow the tender to be rejected, these provisions, taken together, confer a power upon the procuring entity to permit a correction. Enacting States in such a case should provide regulations or other rules that both regulate the discretion so conferred and address what should happen to a tender security in such circumstances.

23. Additional regulations or other rules and guidance will be required to define or describe an “arithmetical error”. While it may be reasonably clear that adding up columns of figures incorrectly so that the total in the final tender price is incorrect is an arithmetical error, the misplacement of a decimal is less clear, as is the situation in which part of the tender price is quoted in or draws on an incorrect currency when it is clear from the document that a different currency is intended. As there may be more than one way of correcting the arithmetical error (is one element in a column of figures to be treated as incorrect, or the total?), rules and guidance will be needed to address and limit the discretion in fact conferred on the procuring entity.

24. A consequential issue is that the scope of any duty of the procuring entity to check for and identify errors should also be clarified. First, rules or guidance should address whether there is any duty, and its extent, to be more active than to note any errors that are clear on the face of the submission.

25. These issues require additional rules and guidance both to allow the procuring entity’s decisions to be monitored and evaluated against objective standards, and also to avoid the risk of abuse that may arise in the circumstances. Errors may be deliberately included by suppliers or contractors so that (once submission prices are known), there may be an opportunity to “correct” them. A safeguard in this context is the requirement to correct any errors discovered, without reference to the supplier or contractor concerned. However, where the procuring entity has to contact that supplier or contractor in order to correct the error, i.e. availing itself of the facility conferred by paragraph (1), the opportunity for abuse nonetheless arises, perhaps involving both parties. Finally, there may also be issues of culpability or liability if either party was negligent in making or failing to spot errors that come to light during the contract administration period. Any such liability will generally arise under other laws in the enacting State, requiring coordination between the public procurement agency or similar body issuing procurement guidance and other bodies that may address such liability.

26. Paragraph (3) of the article limits the corrections that can be made as a result of both the clarification procedure and of the discovery of an arithmetical error. In

² The Working Group is requested to consider what should happen if the errors do not make the submission unresponsive.

the case of open tendering, the paragraph should be read together with the provisions of article 43(1)(b) [\[**hyperlink**\]](#) that allow the procuring entity to treat tenders as responsive after any “minor deviations” have been taken into account (see, further, the commentary to that article [\[**hyperlink**\]](#)). Paragraph (3) prohibits corrections or other changes of substance to qualification information and to submissions. Further regulation or rules and guidance will be required to set out the meaning of “substantive” in these circumstances, in addition to the explanation in the paragraph that any changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive are prohibited, particularly as regards changes in price. While price changes as a result of the clarifications procedure are prohibited under paragraph (4) of the article, arithmetical errors may be both substantive and imply a change in price.³

27. Paragraph (4) provides an important safeguard against abuse in the clarifications procedure, by prohibiting negotiations in the clarifications process and any changes in price.⁴ Paragraph (5), however, states that these restrictions do not apply to interactive procurement methods under articles 49-52 [\[**hyperlinks**\]](#), as the clarification process will take place during the dialogue or discussions, other than as regards best and final offers.⁵

Article 17. Tender securities⁶ [\[hyperlink**\]](#)**

28. The purpose of the article is to set out requirements as regards tender securities as defined in article 2(u) [\[**hyperlink**\]](#), in particular as to their acceptability by the procuring entity, the conditions that must be present for the procuring entity to be able to claim the amount of the tender security, and the conditions under which the procuring entity must return or procure the return of the security document. As stated in the commentary to the definition of “tender security” in article 2, the Model Law refers to “tender security” as the commonly-used term in the relevant context, without implying that this type of security may be requested only in tendering proceedings. The definition also excludes from the scope of the term any security that the procuring entity may require for performance of the procurement contract (under article 39(k) [\[**hyperlink**\]](#), for example). The latter may be required to be provided by the supplier or contractor that enters into the procurement contract while the requirement to provide a tender security, when it is imposed by the procuring entity, applies to all suppliers or contractors presenting submissions (see paragraph (1) of the article).

29. The procuring entity may suffer losses if suppliers or contractors withdraw their submissions or if a procurement contract with the supplier or contractor whose submission had been accepted is not concluded due to fault on the part of that supplier or contractor (e.g., the costs of new procurement proceedings and losses

³ The Working Group is requested to advise on this point, and whether minor deviations that would lead to price changes are to be treated as substantive.

⁴ See previous paragraph and footnote thereto.

⁵ The Working Group is requested to consider, by reference to the language of 16(5) and 49(12), whether this statement is accurate.

⁶ The provision of guidance to the Secretariat is requested on whether practice in some jurisdictions as regards the use of securities issued in electronic form will affect the content of the commentary to this article as set out below.

due to delays in procurement). Article 17 authorizes the procuring entity to require suppliers or contractors participating in the procurement proceedings to post a tender security so as to cover such potential losses and to discourage them from defaulting.

30. Procuring entities need not require a tender security in all procurement proceedings. Tender securities are usually important when the procurement is of high-value goods or construction. In the procurement of low value items, though it may be of importance to require a tender security in some cases, the risks of delivery or performance faced by the procuring entity and its potential losses are generally low, and the cost of providing a tender security — which will normally be reflected in the contract price — will be less justified. Requesting the provision of securities in the context of framework agreements, because of the nature of the latter, should be regarded as an exceptional measure.⁷ Although practices might continue to evolve, at the time of preparing this Guide, little experience on the use of tender securities in electronic reverse auctions has been accumulated and existing practices were highly diverse. It might be problematic to obtain a security in the context of electronic reverse auctions, as banks generally require a fixed price for the security documents. There also may be procurement methods in which tender securities are inappropriate, for example in request-for-proposals with dialogue proceedings, as tender securities would not provide a workable solution to the issue of ensuring sufficient participation in dialogue or binding suppliers or contractors as regards their evolving proposals during the dialogue phase (to be contrasted with the best and final offer stage of the procedure). (See the relevant discussion in the commentary to the relevant provisions of article 48 [\[**hyperlink**\]](#).) Even if in both cases referred to above (electronic reverse auctions and request-for-proposals with dialogue proceedings), tender securities were requested, subsequent tender securities cannot be requested by the procuring entity in any single procurement proceeding that involves presentation of revised proposals or bids, given the prohibition against demanding multiple tender securities as the commentary to the definition of “tender security” in article 2 explains [\[**hyperlink**\]](#).

31. Safeguards have been included to ensure that a tender-security requirement is imposed fairly and for the intended purpose alone: that is, to secure the obligation of suppliers or contractors to enter into a procurement contract on the basis of the submissions they have presented, and to post a security for performance of the procurement contract if required to do so.

32. Paragraph (1)(c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were restricted to providing securities issued by institutions in the enacting State. However, the language in subparagraphs (i) and (ii) provides flexibility on this point: first, for procuring entities in States in which acceptance of tender securities not issued in the enacting State would be a violation of law; and secondly, in domestic procurement where the procuring entity stipulated in the solicitation

⁷ The Working Group is requested to consider whether it would be practically possible to obtain a tender security unless the potential obligation to compete under the framework agreement is defined. Similar considerations arise in the context of ERAs and pre-BAFO stages of request for proposals with dialogue proceedings.

documents in accordance with paragraph (1)(b) that a tender security must be issued by an issuer in the enacting State.

33. The reference to confirmation of the tender security in paragraph (1)(d) is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad. The reference, however, is not intended to encourage such a practice, in particular since the requirement of local confirmation could constitute an obstacle to participation by foreign suppliers and contractors in procurement proceedings (e.g., difficulties in obtaining the local confirmation prior to the deadline for presenting submissions and added costs for foreign suppliers and contractors).

34. Paragraph (2) has been included in order to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security. While the retention by the beneficiary of a guarantee instrument beyond the expiry date of the guarantee should not be regarded as extending the validity period of the guarantee, the requirement that the security be returned is of particular importance in the case of a security in the form of a deposit of cash or in some other similar form. The clarification is also useful since there remain some national laws in which, contrary to what is generally expected, a demand for payment is timely even though made after the expiry of the security, as long as the contingency covered by the security occurred prior to the expiry. As in article 41(3) [\[**hyperlink**\]](#), paragraph (2)(d) of this article reflects that the procuring entity may avail itself, by way of a stipulation in the solicitation documents, of an exception to the general rule that withdrawal or modification of a tender prior to the deadline for presenting submissions is not subject to forfeiture of the tender security.⁸

35. In the light of the cost of providing a tender security, which will normally be reflected in the contract price, the use of alternatives to a tender security should be considered and encouraged where appropriate. In some jurisdictions, a bid securing declaration is used in lieu of tender securities. Under this type of declaration, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for contingencies that normally are secured by a tender security. (Sanctions do not generally include debarment, as debarment should not be concerned with commercial failures (see the relevant commentary to article 9 above [\[**hyperlink**\]](#).) These alternatives aim at promoting more competition in procurement, by increasing participation in particular of SMEs that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a tender security.⁹

⁸ The Working Group may wish to consider whether there is a need to add discussion of possible extensions of the period of effectiveness of tender securities in the commentary to this article, in addition to the commentary to article 41 (i.e. where the period of validity of the tenders is itself extended).

⁹ The need for further discussion on the potentially onerous nature of securities is to be considered, in the light of the following issues raised earlier in the Working Group's deliberations: the further negative effects of requiring suppliers or contractors to present tender securities, issues of mutual recognition and the right of the procuring entity to reject securities in certain cases.

Article 18. Pre-qualification proceedings [\[hyperlink**\]](#)**

36. The purpose of the article is to set out the required procedures for pre-qualification proceedings. Pre-qualification proceedings are intended to identify, at an early stage, those suppliers or contractors that are suitably qualified to perform the contract. Such a procedure may be particularly useful for the purchase of complex or high-value goods, construction or services, and may even be advisable for purchases that are of a relatively low value but of a highly specialized nature. The reason in each case is that the evaluation of submissions in those cases is much more complicated, costly and time-consuming than for other procurement. Competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the submission may be high, if the competitive field is too large and where they run the risk of having to compete with submissions presented by unqualified suppliers or contractors. The use of pre-qualification proceedings may narrow down the number of submissions that the procuring entity will evaluate to those from qualified suppliers or contractors. It is thus a tool to facilitate the effective procurement of relatively complex subject matter.

37. Pre-qualification under paragraph (1) of the article is optional and may be used regardless of the method of procurement used.¹⁰ Because of an additional step and delays in the procurement caused by pre-qualification and because some suppliers or contractors may be reluctant to participate in procurement involving pre-qualification, given the expense of so doing, pre-qualification should be used only when strictly necessary, in situations described in the immediately preceding paragraph.

38. The pre-qualification procedures set out in article 18 are made subject to a number of important safeguards. These safeguards include the limitations in article 9 [\[**hyperlink**\]](#) (in particular on the assessment of qualifications, applicable equally to pre-qualification procedures) and the procedures found in paragraphs (2) to (10) of this article. This set of procedural safeguards is included to ensure that pre-qualification procedures are conducted using objective terms and conditions that are fully disclosed to participating suppliers or contractors; they are also designed to ensure a minimum level of transparency and to facilitate the exercise by a supplier or contractor that has not been pre-qualified of its right to challenge its disqualification.

39. The first safeguard is that procedures for inviting participation in pre-qualification procedures follow those for open solicitation. Paragraph (2) therefore requires the publication of the invitation to pre-qualify. The publication in which this invitation is to be advertised is set out in the procurement regulations, rather than in the Model Law, in common with the provisions in articles 33(1) and 34(5) [\[**hyperlinks**\]](#) on the publication of the invitation to tender or prior notice of the procurement, as the case may be. Although such publication is likely in many enacting States to be required in the official Gazette, the reason for this more flexible approach allow for procedures in enacting States to change. As the official Gazette has traditionally been a paper publication, the approach also follows the

¹⁰ During expert consultations, it was queried whether the use of pre-qualification should be discouraged in open tendering. The Working Group is requested to consider whether any additional comment on the issue should be included here.

Model Law's principle of technological neutrality (i.e. avoids favouring a paper-based environment). See, further, the discussion of ensuring effective access to information published regarding procurement in the commentary to the above articles, and article 5 on publication of legal texts [\[**hyperlinks**\]](#).

40. The default rule also requires international publication in a manner that will ensure that suppliers from overseas will have proper access to the invitation, unless (as in the case of an invitation to tender under article 33(4) [\[**hyperlink**\]](#)), the procuring entity decides that suppliers or contractors from outside the State concerned are unlikely to wish to participate in the light of the low value of the procurement concerned. The commentary in the introduction to Chapter I [\[**hyperlink**\]](#) considers the general issues arising in the setting of low-value thresholds under the Model Law, urging consistency in the designation of low-value procurement (whether there is an explicit threshold or not). The concept of low-value procurement in this case should not be interpreted as conferring upon enacting States complete flexibility to set the appropriate threshold sufficiently high to exclude the bulk of its procurement from requirement of international publication. The procurement regulations or guidance from the public procurement agency or similar body should therefore provide further detail of how to interpret "low-value" in this case. In addition, it should be emphasized that low value alone is not a justification for excluding international participation of suppliers per se (by contrast with domestic procurement set out in article 8 [\[**hyperlink**\]](#)), so that international suppliers can participate in a procurement that has not been advertised internationally if they so choose; for example, if they respond to a domestic advertisement or one on the Internet.

41. Enacting States may also wish to encourage procuring entities to assess, first, whether international participation is a likelihood in the circumstances of each given procurement assuming that there is international publication and whether or not it is low value: this may involve considering geographic factors, and whether the supply base from abroad is limited or non-existent, which may be the case for example for indigenous crafts. Secondly, they should consider what additional steps international participation might indicate. In this regard, the Model Law recognizes that in such cases of low-value procurement the procuring entity may or may not have an economic interest in precluding the participation of foreign suppliers and contractors: a blanket exclusion of foreign suppliers and contractors might unnecessarily deprive it of the possibility of obtaining a better price. On the other hand, international participation may involve translation costs, additional time periods to accommodate translation of the advertisement or responses from foreign suppliers, and might require the procuring entity to consider tenders or other offers in more than one language. The procuring entity will wish to assess the costs and benefits of international participation, where its restriction is permitted, on a case-by-case basis.

42. The term "address" found in paragraph (3)(a) is intended to refer to the physical registered location as well as any other pertinent contact details

(telephone numbers, e-mail address, etc. as appropriate). See, further, the description of the term “address” in the Glossary in Annex [**\[**hyperlink**\]](#).¹¹

43. While the provisions of the article allow for charges for the pre-qualification documents, development costs (including consultancy fees and advertising costs) are not to be recovered through those provisions. It is understood, as stated in paragraph (4) of the article, that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate). In addition, enacting States should note that best practice is not to charge for the provision of such documents.¹²

44. The reference to the “place” found in paragraph (5)(d) [**\[**hyperlink**\]](#) includes not the physical location but rather an official publication, portal, etc. where authoritative and up-to-date texts of laws and regulations of the enacting State are made available to the public. The issues raised in the commentary to article 5 [**\[**hyperlinks**\]](#), on ensuring appropriate access to up-to-date legal texts are therefore also relevant in the context of this paragraph.

45. The references to “promptly” in paragraphs (9) and (10) should be interpreted to mean that the notification required must be given to suppliers and contractors prior to solicitation. This is an essential safeguard to ensure that there can be an effective review of decisions made by the procuring entity in the pre-qualification proceedings. For the same reason, article 10 requires the procuring entity to notify each supplier or contractor that has not been pre-qualified of the reasons therefor.

46. The provisions of the article on disclosure of information to suppliers or contractors or the public are subject to article 24 on confidentiality [**\[**hyperlink**\]](#) (which contains limited exceptions to public disclosure).

47. Pre-qualification should be differentiated from pre-selection, envisaged under the Model Law only in the context of request-for-proposals with dialogue proceedings under article 49 [**\[**hyperlink**\]](#). In pre-qualification, all pre-qualified suppliers or contractors may present submissions. In the case of pre-selection, the maximum number of pre-qualified suppliers or contractors that will be permitted to present submissions is set at the outset of the procurement proceedings, and the maximum number of participants is made known in the invitation to pre-selection. The identification of qualified suppliers or contractors in pre-qualification proceedings is on the basis of whether applicants pass or fail pre-established qualification criteria, while pre-selection involves additional, generally competitive, selection procedures when the established maximum of suppliers or contractors would be exceeded (e.g. the pre-selection may involve, after a pass/fail examination, a ranking against the qualification criteria and the selection of the best qualified up to the established maximum). This measure is taken even though the drafting of rigorous pre-qualification requirements may in fact limit the number of pre-qualified suppliers or contractors.

¹¹ The general commentary on “addresses” in the Glossary will note that the term should be interpreted consistently throughout the Model Law whether reference is to the address of the procuring entity or the address of a supplier or contractor.

¹² The last sentence reflects the view of some commentators, as a statement of principle, but some consider that this is not a practical proposition.

Article 19. Cancellation of the procurement [\[hyperlink**\]](#)**

48. The purpose of article 19 is to enable the procuring entity to cancel the procurement. It has the unconditional right to do so prior to the acceptance of the successful submission. After that point, it may do so only if the supplier or contractor whose submission was accepted fails to sign the procurement contract as required or fails to provide any required contract performance security (see paragraph (1) of article 19 and article 22(8) and the commentary thereto, outlining the other options available in such circumstances [\[**hyperlinks**\]](#)).

49. Inclusion of this provision is important because a procuring entity may need to cancel the procurement for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the procurement proceedings, where the procuring entity's need for the subject matter of procurement ceases, or where the procurement can no longer take place due to a change in Government policy or a withdrawal of funding or because all the submissions have turned out to be unresponsive, or the proposed prices substantially exceeded the available budget. The provisions of the article thus recognize that the public interest may be best served by allowing the procuring entity to cancel undesirable procurement rather than requiring it to proceed.

50. In the light of the unconditional right given to the procuring entity to cancel the procurement up to acceptance of the successful submission, the article provides for safeguards against any abuse of this right. The first safeguard is contained in the notification requirements in paragraph (2), which are designed to foster transparency and accountability and effective review. Under that paragraph, the decision on cancellation together with reasons therefor should be promptly communicated to all suppliers or contractors that presented submissions so that they could challenge the decision on cancellation if they wish to do so. Although the provisions do not require the procuring entity to provide a justification for its decision (on the understanding that, as a general rule, the procuring entity should be free to abandon procurement proceedings on economic, social or political grounds which it need not justify), the procuring entity must provide a short statement of the reasons for that decision, in a manner that must be sufficient to enable a meaningful review of the decision.¹³ The procuring entity need not but is not prevented from providing justifications when it decides that it would be appropriate to do so (for instance, when it wishes to demonstrate that the decision was neither irresponsible nor as a result of dilatory conduct). It may also decide to engage in debriefing (as to which, see Section [**](#) of the general commentary and the introduction to Chapter VII [\[**hyperlinks**\]](#)).

51. An additional safeguard is in the requirement for the procuring entity to cause a notice of its decision on cancellation to be published in the same place and manner in which the original information about procurement was published. This measure is important to enable the oversight by the public of the procuring entity's practices in the enacting State.

52. Some provisions in paragraphs (1) and (2) of the article are designed for treating submissions presented but not yet opened by the procuring entity (for

¹³ The Working Group may wish to consider whether an example illustrating the differences between reasons and justifications should be added.

example, when the decision on cancellation is made before the deadline for presenting tenders). After the decision on cancellation is taken, any unopened submission must remain unopened and returned to suppliers or contractors presenting them. This requirement avoids the risk that information supplied by suppliers or contractors in their submissions will be used improperly, for example by revealing it to competitors. This provision is also aimed at preventing abuse of discretion to cancel the procurements for improper or illegal reasons, such as after the desired information about market conditions was obtained or after the procuring entity learned that a favoured supplier or contractor will not win.

53. In many jurisdictions, decisions to cancel the procurement would not normally be amenable to review, in particular by administrative bodies, unless abusive practices were involved. The Model Law however does not exempt any decision or action taken by the procuring entity in the procurement proceedings from challenge or appeal proceedings under chapter VIII (although a cautious approach has been taken in the drafting of article 67 [\[**hyperlink**\]](#) to reflect that in some jurisdictions the administrative body would not have jurisdiction over this type of claim). What the Model Law purports to do in paragraph (3) of this article is to limit the liability of the procuring entity for its decision to cancel the procurement to exceptional circumstances. Under paragraph (3), the liability is limited towards suppliers or contractors having presented submissions to any situation in which the cancellation was a consequence of irresponsible or dilatory conduct on the part of the procuring entity.

54. Under Chapter VIII of the Model Law [\[**hyperlink**\]](#), the right to challenge the decision of the procuring entity to cancel the procurement proceedings may be exercised but whether liability on the part of the procuring entity would arise would depend on the factual circumstances of each case. Paragraph (3) is considered important in this respect because it provides protection to the procuring entity from unjustifiable protests and, at the same time, safeguards against an unjustifiable cancellation of the procurement proceedings by the procuring entity. It is however recognized that, despite the limitations of liability under paragraph (3), the procuring entity may face liability for cancelling the procurement under other branches of law. In particular, although suppliers or contractors present their submissions at their own risk, and bear the related expenses, cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened even in circumstances not covered by paragraph (3).

55. Administrative law in some countries may restrict the exercise of the right to cancel the procurement, e.g., by prohibiting actions constituting an abuse of discretion or a violation of fundamental principles of justice. Administrative law in some other countries may, on the contrary, provide for an unconditional right to cancel the procurement at any stage of the procurement proceedings, even when the successful submission was accepted, regardless of the provisions of the Model Law. Law may also provide for other remedies against abusive administrative decisions taken by public officials. The enacting State may need therefore to align the provisions of the article with the relevant provisions of its other applicable law. The Glossary in Annex [** \[**hyperlink**\]](#) provides examples of the type of conduct intended to be caught by this provision, and the public procurement agency or other similar body may wish to issue more detailed guidance to procuring entities on the

scope of their discretion and potential liability both under the procurement law and any other laws in the enacting State that may confer liability for administrative acts.

56. The cancellation of the procurement by the procuring entity under this article should be differentiated from termination of the procurement proceedings as a consequence of challenge proceedings under article 67(9)(g) of the Model Law [\[**hyperlink**\]](#). The consequences of both are the same — no further actions and decisions are taken by the procuring entity in the context of the cancelled or terminated procurement after the cancellation or termination becomes effective.

(A/CN.9/WG.I/WP.79/Add.6) (Original: English)**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany articles 20 to 26 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

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Part II. Article-by-article commentary

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Article 20. Rejection of abnormally low submissions

1. The purpose of the article is to enable the procuring entity to reject a submission whose price is abnormally low and gives rise to concerns as to the ability of the supplier or contractor concerned to perform the procurement contract. The article applies to any procurement proceedings under the Model Law.
2. The article provides safeguards to protect the interests of both parties. On the one hand, it enables the procuring entity to address possible abnormally low submissions before a procurement contract has been concluded, avoiding the risk that the contract cannot be performed, or performed at the price submitted, and additional costs, delays and disruption to the project.
3. On the other hand, the procuring entity cannot automatically reject a submission simply on the basis that the submission price appears to be abnormally low: such a right would introduce the possibility of abuse, as submissions could be rejected without justification, or on the basis of a purely subjective assessment. Such a risk could be acute in international procurement, where an abnormally low price in one country might be perfectly normal in another. In addition, some prices may seem to be abnormally low if they are below cost; however, selling old stock below cost, or engaging in below cost pricing to keep a workforce occupied, subject to applicable competition regulations, might be legitimate.¹
4. For these reasons, the article allows the rejection of an abnormally low submission only when the procuring entity has taken steps to substantiate its performance concerns. This ability, however, is without prejudice to any other applicable law that may require the procuring entity to reject the submission, for

¹ The Working Group may wish to consider deleting the final sentence, in order not to compromise international competition.

example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations or collusion) are involved.

5. Accordingly, paragraph 1 of the article specifies the steps that the procuring entity has to take before an abnormally low submission may be rejected, to ensure due process is followed and to ensure that the rights of the supplier or contractor concerned are preserved.

6. First, a written request for clarification must be made to the supplier or contractor concerned seeking details of constituent elements of the submission that the procuring entity considers may justify the price submitted. Those details may include: information, samples, etc. proving the quality of the subject-matter offered; the methods and economics of any relevant manufacturing process; the technical solutions chosen and/or any exceptionally favourable conditions available to the supplier or contractor for the execution contract. The submitted price is therefore always analysed in the context of other constituent elements of the submission concerned.²

7. The enacting State may choose to regulate which type of information the procuring entity may require for this price justification procedure. It should be noted in this context that the assessment is whether the price is realistic (by reference to the constituent elements of the submission, such as those discussed in the preceding paragraph), and using such factors as pre-procurement estimates, market prices or prices of previous contracts, where available. It might not be appropriate to request information about the underlying costs that will have been used by suppliers and contractors to determine the price itself. Since cost assessment can be cumbersome and complicated, and is also not possible in all cases, the ability of the procuring entities to assess prices on the basis of cost may be limited. In some jurisdictions, procuring entities may be barred by law from demanding information relating to cost structure, because of risks that such information could be misused.

8. Secondly, the procuring entity should take account of the response supplied by the supplier or contractor in the price assessment. If a supplier or contractor refuses to provide information requested by the procuring entity, the refusal will not give an automatic right to the procuring entity to reject the abnormally low submission; it is one element to take into consideration when considering whether a submission is abnormally low.

9. Only after the steps outlined in paragraph 1 have been fulfilled may the procuring entity reject the abnormally low submission.³ The article does not oblige the procuring entity to reject an abnormally low submission. The regulations or guidance from the public procurement agency or similar body should, however, circumscribe the discretion to accept or reject such submissions both in order to ensure consistency and good practice, and in order to avoid abuse.

² The provision of guidance to the Secretariat is requested on consistency between this and the immediately following paragraph as regards cost assessment.

³ The Working Group is requested to provide guidance on why this is not an obligation but an option: is it a measure intended to frustrate collusion, as per the discretion to cancel the procurement or accept the second-best submission under article 22.

10. Thirdly, and if after the price justification procedure the procuring entity continues to hold concerns about the ability of the supplier or contractor to perform the contract, it must record those concerns and its reasons for holding them in the record of the procurement (see paragraph 2). This provision is included to ensure that any decision to reject the abnormally low submission is made on an objective basis, and before that step is taken, all information relevant to the decision is properly recorded for the sake of accountability, transparency and objectivity in the process.

11. The decision on the rejection of the abnormally low submission must be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned, under paragraph (2) of the article. This decision may be challenged in accordance with chapter VIII of the Model Law [\[**hyperlink**\]](#).

12. Enacting States should be aware that, apart from the measures envisaged in this article, other measures can effectively prevent the performance risks resulting from abnormally low submissions. Thoroughly assessing suppliers or contractors' qualifications and examining and evaluating their submissions can play a particularly important role in this context. These steps in turn depend on the proper formulation of qualification requirements and the precise drafting of the description of the subject-matter of the procurement. Procuring entities should be aware of the need to compile accurate and comprehensive information about suppliers or contractors' qualifications, including information about their past performance, and to pay due attention in evaluation to all aspects of submissions, not only to price (such as to maintenance and replacement costs). These steps can effectively identify performance risks.

13. Additional measures may include: (i) promotion of awareness of the adverse effects of abnormally low submissions; (ii) provision of training, adequate resources and information to procurement officers, including reference or market prices; and (iii) allowing for sufficient time for each stage of the procurement process. To deter the submission of abnormally low submissions and promote responsible behaviour on the part of suppliers and contractors, it may be desirable for procuring entities to specify in the solicitation documents that submissions may be rejected if they are abnormally low and raise performance concerns.

Article 21. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest

14. The purpose of the article is to provide an exhaustive list of grounds for the mandatory exclusion of a supplier or contractor from the procurement proceedings for reasons not linked to qualification or to the content of a submission. The article does not use the term "corruption" itself but refers to examples of corrupt behaviour (inducement, unfair competitive advantage and conflicts of interest). These examples are commonly cited examples of corrupt behaviour, and the article is therefore an important anti-corruption measure.

15. The article is intended to be consistent with international standards and to outlaw any corrupt practices regardless of their form and how they were defined. Such standards may be found in international instruments, such as the United

Nations Convention against Corruption, or documents issued by international organizations, such as the Organization on Economic Cooperation and Development (OECD) and multilateral development banks [\[**hyperlinks**\]](#). They may evolve over time. In the light of article 3 of the Model Law [\[**hyperlink**\]](#) that gives prominence to international commitments of enacting States, enacting States are encouraged to consider international standards against corrupt practices applicable at the time of the enactment of the Model Law. Some of them may be binding on the enacting State if it is a party to the international instruments concerned.⁴

16. Although the procedures and safeguards in the Model Law are designed to promote transparency and objectivity and thereby to reduce corruption, a procurement law alone cannot be expected to eradicate corrupt practices in public procurement in the enacting State. Procuring entities should also not be expected to deal with all issues of such corruption. The enacting State should therefore have in place generally an effective system of sanctions against corruption by Government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process, aimed at enhancing governance throughout the system.⁵

17. The term “inducement” in the title of the article can be generally described as any attempt by suppliers or contractors improperly to influence the procuring entity. What would constitute an unfair competitive advantage or a conflict of interest for the purpose of applying paragraph (1)(b) is left to determination by the enacting State. The provisions address conflicts of interest only on the side of the supplier or contractor; those on the side of the procuring entity are subject to separate regulation, such as under article 26 on the code of conduct for procuring officials [\[**hyperlink**\]](#). To avoid an unfair competitive advantage and conflicts of interests, the applicable standards of the enacting State should, for example, prohibit consultants involved in drafting the solicitation documents from participating in the procurement proceedings where those documents are used. They should also regulate participation of subsidiaries in the same procurement proceedings. Some aspects of these concepts may be regulated in other branches of law of the enacting State, such as anti-monopoly legislation.

18. “An unfair competitive advantage” could arise from a conflict of interest (for example, where the same lawyer represented both sides in the case). However, this would not necessarily always be the case and an unfair competitive advantage might arise under unrelated circumstances.⁶

19. The provisions of the article are without prejudice to any other sanctions that may be applied to the supplier or contractor, such as exclusion or debarment (as to

⁴ The Commission requested that the Guide discuss why there was no de minimis threshold, with reference to national provisions and practices, and should indicate that even small items could constitute inducements in some circumstances. The guidance of the Working Group is sought to fulfil the Commission’s request.

⁵ In the Working Group, a suggestion was made that the Guide should reflect that, in the context of public procurement, it may be impossible to establish the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action. The provision of guidance to the Secretariat is requested on desirability of including this or other statements in the Guide in an attempt to describe relevant examples.

⁶ The Commission suggested the use of examples to explain an unfair competitive advantage: the Working Group is requested to provide such examples.

which, see the commentary in Section ** of the general commentary [**hyperlinks**]). However, sanctions — including criminal convictions — are not prerequisites for the exclusion of the supplier or contractor under this article.

20. To guard against any abusive application of article 21 [**hyperlink**], the decision on exclusion and reasons are to be reflected in the record of procurement proceedings and to be promptly communicated to the alleged wrongdoer to enable a challenge.⁷ The procurement regulations or rules or guidance should assist in assessing whether or not a factual basis for exclusion has arisen. For further discussion of these issues, see also the commentary to article 26 on codes of conduct [**hyperlink**].

21. The implementation of the article is also subject to other anti-corruption law in an enacting State, to avoid unnecessary confusion, inconsistencies and incorrect perceptions about its anti-corruption policies. Here, information-sharing and coordination between government agencies should be encouraged and facilitated, as discussed in the commentary in the introduction to Chapter I [**hyperlink**].

Article 22. Acceptance of the successful submission and entry into force of the procurement contract [hyperlink**]**

22. The purpose of article 22 is to set out detailed rules for: (i) the acceptance of the successful submission; (ii) a safeguard in the form of a standstill period to enable suppliers or contractors to file a challenge before the contract or framework agreement enters into force; and (iii) the entry into force of the procurement contract. The article is supplemented by transparency requirements in the Model Law regarding information to be provided to suppliers and contractors at the outset of the procurement proceedings, such as the manner of entry into force of the procurement contract (see, for example, article 39(v) [**hyperlink**], which requires the solicitation documents to provide information about the application and duration of the standstill period). Article 39(w) also requires [**hyperlink**] the solicitation documents to specify any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force which, in accordance with this article, may include the execution of a written procurement contract and approval by another authority.

23. Paragraph (1) provides that the successful submission, as a general rule, is to be accepted by the procuring entity, meaning that the procurement contract or framework agreement must be awarded to the supplier or contractor presenting that successful submission (referred to as the winning supplier), reflecting the terms and conditions of the submission. (There is no single definition of the successful submission. The articles regulating the procedures for each procurement method define the term in the context of each procurement method [**hyperlinks**].) The exceptions to the general rule set out in paragraph (1) are listed in subparagraphs (a) to (d) (disqualification of the winning supplier, cancellation of the procurement,

⁷ The suggestion was made in the Working Group that the Guide should explain that risks of unjustified rejection might be mitigated by encouraging a dialogue between the procuring entity and an affected supplier or contractor to discuss potential conflicts of interest, drawing on the provisions of article 19 regulating procedures for investigating abnormally low submissions. The provision of relevant guidance to the Secretariat is requested in the light of possible abusive practices and results that such dialogue may facilitate to avoid the application of this article.

rejection of the successful submission on the ground that it is abnormally low in accordance with article 20 [\[**hyperlink**\]](#), or exclusion of the winning supplier on the grounds of inducement from its side, unfair competitive advantage or conflict of interest in accordance with article 21 [\[**hyperlink**\]](#)).

24. The ground for not accepting the successful submission set out in subparagraph (a) (disqualification) should be understood in the light of the provisions in article 9 (1) [\[**hyperlink**\]](#) that allow the qualifications of suppliers or contractors to be assessed at any stage of the procurement proceedings, article 9(8)(d) allowing the procuring entity to require any pre-qualified supplier or contractor to demonstrate its qualifications again [\[**hyperlink**\]](#), and articles 43(6) and (7) and 57(2) that specifically regulate the assessment of the qualifications of the winning supplier [\[**hyperlinks**\]](#).

25. It is understood that the list of exceptions in paragraph (1)(a) to (d) is not exhaustive: it refers only to the grounds that may be invoked by the procuring entity. Additional grounds may appear as a result of challenge and appeal proceedings, for example when the independent body, under article 67 [\[**hyperlink**\]](#), orders the termination of the procurement proceedings, requires the procuring entity to reconsider its decision, or otherwise requires further steps. These grounds should also not be confused with the grounds that justify the award of the procurement contract to the next successful submission under article 22(8) [\[**hyperlink**\]](#): the latter grounds would appear after the successful submission was accepted, and not at the stage when the procuring entity decides whether the successful submission should be accepted.

26. Paragraph (2) regulates the application of the standstill period, defined in article (2)(r) as “the period starting from the dispatch of a notice as required by article 22(2) of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law [\[**hyperlink**\]](#), the decision so notified”. The primary purpose of the standstill period is therefore to avoid the need for an annulment of a contract or framework agreement that has entered into force.

27. The notification of the standstill period is served on all suppliers or contractors that presented submissions, including the winning supplier. (This notification should not be confused with the notice of acceptance of the successful submission addressed only to the winning supplier under paragraph (4) of the article.) The information notified under paragraph (2) includes that listed in its subparagraphs (a) to (c). The provisions of article 24 on confidentiality [\[**hyperlink**\]](#) will indicate if any information about the successful submission under subparagraph (b) should be withheld for confidentiality reasons. Although the need to preserve confidentiality of commercially sensitive information may arise in setting out the characteristics and relative advantages of the successful submission, it is essential for suppliers or contractors participating in the procurement to receive sufficient information about the evaluation process to make meaningful use of the standstill period.

28. Because the standstill period starts running from the time of dispatch of the notification, to ensure transparency, integrity, and the fair and equitable treatment of all suppliers and contractors in procurement proceedings, the provisions require prompt and simultaneous dispatch of an individual notification to each supplier or

contractor concerned. Putting a notice on a website, for example, would be insufficient.

29. The provisions do not include any requirement for the procuring entity to notify (or debrief) unsuccessful suppliers or contractors about the grounds upon which they were unsuccessful. However, debriefing upon the request of a supplier or contractor represents best practice and should be encouraged by the enacting State. (On debriefing, see the discussion at the end of the commentary to this article.)

30. The provisions of paragraph (2) also require the procuring entity to specify the duration of the standstill period in the notification, which will have been set out in the solicitation documents. Providing this information in the notification under paragraph (2) is important not only as a reminder but also for precision — since the standstill period runs from the notice of the dispatch, the notification will specify the starting and ending dates of the standstill period reflecting the entire duration of the standstill period indicated in the solicitation documents.

31. Certainty for suppliers and contractors on the one hand and the procuring entity on the other hand as to the beginning and end of the standstill period is critical for ensuring both that the suppliers and contractors can take such action as is warranted and that the procuring entity can award the contract without risking an upset. The date of dispatch creates the highest level of certainty and is specified in the Model Law as the starting point for the standstill period. The same approach is taken as regards other types of notifications served under this article (see paragraphs ... below). Paragraph (9) of the article explains the meaning of the “dispatch.”

32. The Model Law leaves it to the procuring entity to determine the exact duration of the standstill period on a procurement-by-procurement basis, depending on the circumstances of the given procurement, in particular the means of communication used and whether procurement is domestic or international. To ensure equality of treatment, the additional time may need to be allowed for example for a notification sent by traditional mail to reach overseas suppliers or contractors.

33. The discretion of the procuring entity to fix the duration of the standstill period is not unlimited. It is subject to the minimum to be established by the enacting State in the procurement regulations. A number of general considerations should be taken into account in establishing this minimum duration, including the impact that the duration of the standstill period would have on the overall objectives of the Model Law. Although the impact of a lengthy standstill period on costs would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate, the period should be sufficiently long to enable any challenge to the proceedings to be filed. Enacting States may wish to set more than one standstill period for different types of procurement, reflecting the complexity of assessing whether or not the applicable rules and procedures have been followed, but should note that excessively long periods of time may be inappropriate in the context of electronic reverse auctions and open framework agreements, which presuppose speedy awards and in which the number and complexity of issues that can be challenged are limited. On the other hand, the situation in an infrastructure procurement may require a longer period of consideration.

34. The length of the standstill period may appropriately be reflected in working or calendar days, depending on the length and likely intervention of non-working days. It should be borne in mind that the primary aim of the standstill period is to allow suppliers or contractors sufficient time to decide whether to challenge the procuring entity's intended decision to accept the successful submission. The standstill period is, therefore, expected to be as short as the circumstances allow, so as not to interfere unduly with the procurement itself. If a challenge is submitted, the provisions in chapter VIII of the Model Law [\[**hyperlink**\]](#) would address any suspension of the procurement procedure and other appropriate remedies.

35. Paragraph (3) sets out exemptions from the application of the standstill period. The first refers to contracts awarded under framework agreements without second-stage competition.⁸ (In the conclusion of a framework agreement itself, and in all contracts awarded under any framework agreement involving second-stage competition the standstill period will apply.)

36. The second exemption applies to low-value procurement. As discussed in the commentary in the Introduction to Chapter I [\[**hyperlink**\]](#), the enacting State should consider aligning the low-value threshold in the procurement regulations under paragraph (3)(b) with other thresholds, such as those justifying an exemption from public notices (under article 23(2)) and the use of request-for-quotations proceedings (under article 29(2) [\[**hyperlinks**\]](#)).

37. The third exemption is urgent public interest considerations, the nature of which are discussed in the commentary to article 65(3) on justifications for lifting the prohibition against bringing the procurement contract into force [\[**hyperlink**\]](#).

38. The purpose of paragraph (4) is to specify when the notice of acceptance of the successful submission is to be sent to the winning supplier or contractor. There may be various scenarios. First, where a standstill period was applied and no challenge or appeal is outstanding, the notice is dispatched by the procuring entity promptly upon the expiry of the standstill period. Secondly, where a standstill period was applied and a challenge or appeal is outstanding, the procuring entity is prohibited from dispatching the notice of acceptance (under article 65 of the Model Law [\[**hyperlink**\]](#)) until it receives notification from appropriate authorities ordering or authorizing it to do so. Thirdly, if no standstill period was applied, the procuring entity must dispatch the notice of acceptance promptly after it has identified the successful submission, unless it receives an order not to do so from a court or another authorized authority.

39. The Model Law provides for different methods of entry into force of the procurement contract, recognizing that enacting States may differ as to the preferred method and that, even within a single enacting State, different entry-into-force methods may be employed in different circumstances.

40. Under one method (set out in paragraph (5)), and absent a contrary indication in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the winning supplier. The rationale behind

⁸ The provision of guidance to the Secretariat is requested as regards reasons for this exemption. The records of the Working Group's deliberations (see A/CN.9/687, para. 96) are not conclusive on this point. To be considered also in the context of the guidance to Chapter VII.

linking entry into force of the procurement contract to dispatch rather than to receipt of the notice of acceptance is that the procuring entity has to give notice of acceptance while the submission is in force so as to bind the supplier or contractor to perform the contract. Under the “receipt” approach, if the notice were properly transmitted, but the transmission was delayed, lost or misdirected through no fault of the procuring entity, and the period of effectiveness of the submission expires, the procuring entity would lose its right to bind the supplier or contractor. Under the “dispatch” approach, in the event of a delay, loss or misdirection of the notice, the supplier or contractor might not learn before the expiration of the validity period of its submission that the submission had been accepted; but in most cases that consequence would be less severe than the loss of the right of the procuring entity to bind the supplier or contractor.

41. A second method (set out in paragraph (6)) ties the entry into force of the procurement contract to the signature by the winning supplier of a written procurement contract conforming to the submission. This is possible only if the solicitation documents included such a requirement, and should not be considered the norm in all procurement proceedings. Enacting States are encouraged to indicate in the procurement regulations the type of circumstances in which a written procurement contract may be required, taking into account that such a requirement may be particularly burdensome for foreign suppliers or contractors, and where the enacting State imposes measures for proving the authenticity of the signature.

42. A third method (in paragraph (7)) provides the prior approval of the procurement contract by another authority. In States in which this provision is enacted, further details may be provided in the procurement regulations as to the type of circumstances in which the approval would be required (e.g., only for procurement contracts above a specified value). Paragraph (7) reiterates the role of the solicitation documents in giving notice to suppliers or contractors of the formalities required for entry into force of the procurement contract. The requirement that the solicitation documents disclose the estimated period of time required to obtain the approval and the provision that a failure to obtain the approval within the estimated time should not be deemed to extend the validity period of the successful submission or of any tender security is designed to establish a balance taking into account the rights and obligations of suppliers and contractors. They are designed to avoid that a selected supplier or contractor would remain committed to the procuring entity for a potentially indefinite period of time with no assurance of the eventual entry into force of the procurement contract.

43. As a matter of best practice, paragraph (8) makes it clear that, if the winning supplier or contractor fails to sign a procurement when required, the procuring entity may choose to cancel the procurement or to award the contract to the next successful submission. That submission will be identified in accordance with the provisions applicable to the selection of the successful submission in procurement concerned. The flexibility given to the procuring entity to cancel the procurement in such cases is intended, among other things, to allow the consequences of collusion among suppliers or contractors to be mitigated. The procurement regulations or rules or guidance from the public procurement agency or similar body should guide the decision on the appropriate course of action, and discuss avoiding abuse of the discretion conferred.

Debriefing

44. Debriefing is an informal process whereby the procuring entity provides information, most commonly to an unsuccessful supplier or contractor on the reasons why it was unsuccessful or, less commonly, to successful suppliers. The overall aims are to reduce the potential for challenges, to hold the procurement officials accountable for their decisions, and to enhance the effectiveness of the procurement process and the quality of future submissions.

45. Debriefings can be provided, on request or offered routinely, to suppliers or contractors excluded through pre-qualification, or after award, but should be provided as soon as practically possible. Debriefings may be done orally (such as at meetings), in writing, or by any other method acceptable to the procuring entity. Although oral debriefings may be appropriate or necessary, the recording of the information provided is important for good governance purposes, and may be provided to the supplier or contractor that is given the debriefing (the “requesting supplier”).

46. At a minimum, the debriefing information should include:

(a) The procuring entity’s evaluation of the significant weaknesses or deficiencies in the requesting supplier’s qualifications, tender or other submission, as applicable;

(b) A comparison of the information in subparagraph (a) and the procuring entity’s evaluation of the characteristics, price and other quality elements, and relative advantages, of the successful submission;

(c) The qualifications, overall evaluated price and technical rating, if applicable, of any successful supplier or contractor and the requesting supplier, and qualification information regarding the requesting supplier;

(d) The overall ranking of all suppliers or contractors, when any ranking was developed by the agency during the procurement process;

(e) A summary of the rationale for any qualification decision or award; and

(f) Reasonable responses to relevant questions about whether the procurement procedures contained in the solicitation, applicable regulations, and other applicable authorities, were followed.

47. A key issue is that the debriefing must not reveal any commercially sensitive information — whether prohibited by the procurement law or not, and from whatever source — from disclosure. The procuring entity will therefore need to find the appropriate balance between providing helpful information to the requesting supplier and protecting confidential information.

48. A summary of the debriefing should be included in the record of the procurement. This is not only part of good governance and administrative practice, but can also help mitigate the risk of disclosure of confidential information, which in extreme cases might lead to legal action. The issues of due process arising in debriefings are not dissimilar to those arising in some challenge proceedings, notably a request for reconsideration made to the procuring entity. A discussion of those issues is found, therefore, in the introduction to Chapter VIII [[**hyperlink](#) and

check that the point is properly covered⁹]. [\[**hyperlink** to World Bank debarment system as additional example **\]](#)

Article 23. Public notice of awards of procurement contract and framework agreement [\[hyperlink**\]](#)**

49. In order to promote transparency in the procurement process, and the accountability of the procuring entity, article 23 requires prompt publication of a notice of award of a procurement contract and a framework agreement. This obligation is separate from the notice of the procurement contract (or framework agreement as applicable) required to be given under article 22(10) [\[**hyperlink**\]](#) to suppliers and contractors that presented submissions, and from the requirement that the information in the record that should be made available to the general public under article 25(2) [\[**hyperlink**\]](#). The Model Law does not specify the manner of publication of the notice, which is left to the enacting State and which, paragraph (3) suggests, may be dealt with in the procurement regulations. For the minimum standards for publication of this type of information, see the guidance to article 5 (see paragraphs ... above [\[**hyperlink**\]](#)), which is relevant in this context.

50. In order to avoid the disproportionately onerous effects that such a publication requirement might have on the procuring entity were the notice requirement to apply to all procurement contracts irrespective of their value, the procurement regulations will set out a monetary value threshold below which the publication requirement would not apply. Paragraph (2) requires periodic publication of cumulative notices of such awards, which must take place at least once a year.

51. While the exemption from publication in paragraph (2) covers low-value procurement contracts awarded under a framework agreement, it is most unlikely to cover framework agreements themselves, as the cumulative value of procurement contracts envisaged to be awarded under a framework agreement would probably exceed any low-value threshold.

Article 24. Confidentiality

52. The purpose of article 24 is to protect the confidential information of all parties to procurement. The article imposes different types of confidentiality requirements on different groups of persons, depending on which type of information is in question. It is supplemented by article 69 [\[**hyperlink**\]](#), which addresses the protection of confidential information in challenge and appeal proceedings.

53. Paragraph (1) refers to information that the procuring entity is prohibited from disclosing to suppliers or contractors and to the public comprising, first, information that may not be disclosed to protect the essential security interests of the enacting State, which may be legally identified as classified information. This could relate to procurement for national security or for national defence, and procurement of arms, ammunition, or war materials, involving medical research or procurement of vaccines during pandemics.⁹ See, further, the commentary to the definition in article 2 of “procurement involving classified information” [\[**hyperlink**\]](#).

⁹ Some experts question the appropriateness of reference to “procurement of vaccines during pandemics” in this context. The provision of the guidance to the Secretariat is requested.

54. Paragraph (1) also addresses other information whose disclosure may “impede fair competition”. The phrase should be interpreted broadly, referring not only to current but also to subsequent procurement. Because of the broad scope of the provision and possibility of abuse, it is essential for the enacting State to set out in the procurement regulations, if not an exhaustive list of such information, at least its legal sources. Paragraph (1) also provides that such information may be disclosed only by order of the court or authority (for example, the independent body referred to in article 66 [\[**hyperlink**\]](#)). The identity of any organ with such power is to be specified in the law; the order issued by the court or other designated organ will regulate the extent of disclosure and relevant procedures.

55. Paragraph (2) deals with information submitted by suppliers or contractors. By their nature, such documents contain commercially sensitive information; their disclosure to competing suppliers or contractors or to an unauthorized person could impede fair competition and would prejudice legitimate commercial interests. Such disclosure is therefore generally prohibited. The term “unauthorized person” in this context refers to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized in the enacting State to have access to the information in question. The Model Law, however, recognizes that disclosure of some information submitted — whether to competing suppliers or contractors or to the public in general — is important to ensure transparency and integrity in the procurement proceedings, meaningful challenge by suppliers or contractors and proper public oversight. Accordingly, paragraph (2) of the article sets out exceptions to the general prohibition. It cross-refers to the requirements under article 22(2) and (10) [\[**hyperlink**\]](#) to notify the intended award to suppliers or contractors that presented submissions; under article 23 [\[**hyperlink**\]](#), to identify the winning supplier and the winning price in the public notice of contract award; under article 25 [\[**hyperlink**\]](#), to disclose information through permitting access to certain parts of the documentary record; and, under article 42(3) [\[**hyperlink**\]](#), to announce certain information in tenders during their public opening.

56. Whereas paragraphs (1) and (2) have general application, paragraph (3) is restricted to procurement proceedings under articles 48(3) and 49 to 51 [\[**hyperlinks**\]](#). These proceedings envisage interaction between the procuring entity and suppliers or contractors. Paragraph (3) broadens the obligation from the procuring entity to any party and to all information arising in the interaction in these proceedings. Disclosure of any such information is permissible only with the consent of the other party, or when required by law or ordered by the court or other authority. The procuring entity may seek a blanket consent to disclosure of all information submitted by suppliers or contractors, such as by providing in the solicitation documents that participation in the procurement requires such consent, but this approach is at risk of abuse and requires additional authority. This approach emphasizes that any consent given should be construed narrowly, as a broader interpretation may violate paragraphs (1) or (2) of the article. The reference to orders by the court or other relevant organ designated by the enacting State is identical to the one found in paragraph (1) of the article. The enacting State in designating the relevant organ should ensure consistency between paragraphs (1) and (3) of the article.

57. Paragraph (4) is also of restricted application, applying only to procurement involving classified information (for the definition of “procurement involving classified information”, see article 2(1) and the relevant commentary in Section ** of the general commentary [**hyperlinks**]). It envisages that the procuring entity, may take measures to protect classified information in the context of a specific procurement additional to the general legal protection under paragraph (1). Such additional measures may concern only suppliers or contractors or may be extended through them to their sub-contractors. They might be justified by the sensitive nature of the subject-matter of the procurement or by the existence of classified information even if the subject-matter itself is not sensitive (for example, when the need arises to ensure confidentiality of information about a delivery schedule or the location of delivery), or both.

Article 25. Documentary record of procurement proceedings [hyperlink**]**

58. The purpose of the article is to promote transparency and accountability by requiring the procuring entity to maintain an exhaustive documentary record of the procurement proceedings and providing appropriate access to it. This record summarizes key information concerning the procurement proceedings; ensuring timely access where such is authorized is essential for any challenge by suppliers and contractors to be meaningful and effective. This in turn helps to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, observing robust record requirements facilitates the work of oversight bodies exercising an audit or control function and promotes the accountability of procuring entities.

59. The article does not prescribe the form and means in which the record must be maintained. These issues are subject to article 7 on communications in procurement [**hyperlink**], in particular the standards set out in paragraphs (1) and (4) of that article (see, further, the commentary thereto [**hyperlink**]).

60. The list of information to be included in the record under paragraph (1) is not intended to be exhaustive as the chapeau provisions (through the word “includes”) and paragraph (1)(w) indicate. The latter is intended to be a “catch-all” provision, which should ensure that all significant decisions in the course of the procurement proceedings and reasons therefor are recorded. Some decisions, although not listed in paragraph (1) of the article, are to be included in the record under other provisions of the Model Law. For example, article 35(3) [**hyperlink**] requires the decision and reasons for using direct solicitation in request-for-proposals proceedings to be recorded. Articles 53(2) and 59(7) [**hyperlinks**] require the decision and reasons for limiting participation in auctions and open framework agreements on the ground of technological constraints to be recorded. Paragraph (1)(w) refers also to information that the procurement regulations may require to be recorded.

61. The reference in the chapeau of paragraph (1) to maintaining the record also require it to be updated. Information is therefore included to the extent it is known to the procuring entity. For example, in procurement proceedings in which not all proposals were finalized by the proponents, or where the latter left the proceedings without submitting a BAFO, the procuring entity under paragraph (1)(s) should include a summary of each submission at the relevant time in the procurement proceedings. The reference to the price should be interpreted to allow for the

possibility that in some instances, particularly in procurement of services, the submissions would contain a formula by which the price could be determined rather than an actual price quotation.

62. Record requirements should specify the extent, and the recipients, of the disclosure, requiring factors to be balanced. They include such as full disclosure as a general rule to promote accountability; the need to provide suppliers and contractors with information necessary to permit them to assess their performance and consider a challenge where appropriate; and the need to protect suppliers' and contractors' confidential information. In view of these considerations, article 24 provides two levels of disclosure. It mandates in paragraph (2) disclosure to any member of the general public of the information referred to in paragraph (1)(a) to (k) of the article — basic information geared to the accountability of the procuring entity to the general public. Disclosure of more detailed information concerning the conduct of the procurement proceedings is mandated under paragraph (3) of the article for the benefit of suppliers and contractors that presented submissions, since that information is necessary to enable them to monitor their relative performance in the procurement proceedings and to monitor the conduct of the procuring entity in implementing the requirements of the Model Law. The procuring entity may not decline to disclose such information even if it considers that the disclosure would impede fair competition (for example by facilitating collusion in subsequent procurements, or driving suppliers out of business). However, it is recommended that the regulations or guidance issued by the public procurement agency or similar body should require the procuring entity to notify suppliers or contractors of its intention to disclose portions of the record relevant to them: those suppliers or contractors may wish to challenge the decision to do so, on the basis of a breach of confidentiality as required by article 24 [\[**hyperlink**\]](#), under the provisions of Chapter VIII [\[**hyperlink**\]](#).

63. The pool of suppliers or contractors under paragraph (3) is limited to those that presented submissions: other suppliers or contractors, including those disqualified, should not have access to information on the examination and evaluation of submissions. The reasons for their disqualification will have been communicated to them under the requirements of articles 18(10) and 49(3)(e) [\[**hyperlinks**\]](#), and should give them sufficient information to consider whether to challenge their exclusion.

64. The purpose of the provision in paragraph (3) allowing disclosure to the suppliers or contractors of the relevant parts of the record at the time when the decision to accept a particular submission (or a decision to cancel the procurement proceedings) has become known to them is to give efficacy to the right to challenge under article 64 [\[**hyperlink**\]](#). In order to make this provision effective, article 69 [\[**hyperlink**\]](#) permits access by the suppliers or contractors concerned to the relevant parts of the record. Delaying disclosure until, for example, the entry into force of the procurement contract might deprive suppliers and contractors of a meaningful remedy and, consequently, the procurement regulations should require the procuring entity to grant prompt access to those records. The provisions are also intended to capture two situations when the decision to accept a particular submission becomes known to the relevant suppliers or contractors: one is when it becomes known through a standstill period notification under article 22(2), and the second when it may become known despite no such notification having been served,

through the publication of a contract notice as required by article 23 [\[**hyperlink**\]](#), or through disclosure by civil society, or media or monitoring reports, etc.

65. The disclosure of information either to the public or to relevant suppliers or contractors is without prejudice to paragraph (4)(a) of this article, which sets out grounds that would allow the procuring entity to exempt information from disclosure, and to paragraph (4)(b) listing information that cannot be disclosed. (See the commentary to article 23 above [\[**hyperlink**\]](#) on the first ground.) As regards paragraph (4)(b), and as mentioned in the commentary to article 23 [\[**hyperlink**\]](#) and above, among the objectives of these provisions the avoidance of disclosure of confidential commercial information to suppliers and contractors; the need is particularly acute with respect to what is disclosed concerning the evaluation of submissions, as the information may naturally involve commercially sensitive information, which suppliers and contractors have a legitimate interest in protecting. Accordingly, the information referred to in paragraph (1)(t) involves only a summary of the evaluation of submissions, while paragraph (4)(b) restricts the disclosure of more detailed information that exceeds what can be disclosed in this summary.

66. The limited disclosure scheme in paragraphs (2) and (3) does not preclude the application of other statutes in the enacting State, conferring on the public at large a general right to obtain access to Government records, to certain parts of the record. For example, the disclosure of the information in the record to oversight bodies may be mandated as a matter of law in the enacting State.

67. Paragraph (5) of the article reflects a requirement in the United Nations Convention against Corruption that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (article 9(3) of the Convention [\[**hyperlink**\]](#)). The requirement to preserve documents related to the procurement proceedings and applicable rules on documentary records and archiving, including the period of time during which the record and all the relevant documents pertaining to a particular procurement should be retained, should be stipulated in other provisions of law of the enacting State. If the enacting State considers that applicable internal rules and guidance should also be stored with the record and documents for a particular procurement, the procurement regulations or guidance from the public procurement agency or similar body may so require.

Article 26. Code of conduct [\[hyperlink**\]](#)**

68. The purpose of article 26 is to emphasize the need for States to enact a code of conduct for officers and employees of procuring entities, which should address actual and perceived conflicts of interest, increased risks of impropriety on the part of officers and employees of the procuring entities in such situations, and measures to mitigate such risks, including through filing declarations of interest. Enacting such a code should be considered as a measure to implement certain requirements of the United Nations Convention against Corruption [\[**hyperlink**\]](#), articles 8 and 9 [\[**hyperlinks**\]](#) of which have direct relevance to public procurement, and to measures to regulate matters regarding personnel responsible for procurement (the

“procurement personnel”). Enacting States should ensure that gaps in regulation and in enacting measures for the effective implementation of the relevant provisions of the Convention are eliminated through such codes of conduct.

69. Depending on the legal traditions of enacting States, codes of conduct may be enacted as part of the administrative law framework of the State, either at the level of statutory law or regulations, such as the procurement regulations. They may be of general application to all public officials regardless of the sector of economy or may be enacted specifically for the procurement personnel, and some may be part of the procurement laws and regulations. When a general code of conduct for public officials is enacted, it is expected that some provisions will nevertheless contain provisions addressing specifically the conduct of the procurement personnel. The enacting State, in considering enacting or modernizing a code of conduct for its public officials or specifically for the procurement personnel, may wish to consult the relevant documents of international organizations, such as the Organization on Economic Cooperation and Development [\[**hyperlinks**\]](#).

70. The provisions of article 2 focus on the conflicts of interest situations in procurement, in the light of particularly negative effects of conflicts of interest on transparency, objectivity and accountability in public procurement. Without intending to be exhaustive, the provisions list only some measures to regulate the conduct of the procurement personnel in conflicts of interest situations, such as requiring them to file declarations of interest, undertake screening procedures and be involved in training. This is in line with article 8(5) of the Convention [\[**hyperlink**\]](#), referring to: “measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result”. The Model Law provides only general principles, recognizing that setting out in the Model Law exhaustive provisions on conflict of interest situations, including measures to mitigate the risks of impropriety in such situations, would be impossible in the light of varying ways of addressing conflicts of interest in different jurisdictions.

71. In addition to conflicts of interest situations and measures explicitly identified in the article to mitigate risks of impropriety in such situations, a code of conduct should address other matters, such as the concerns raised by the concept of the “revolving door” (i.e. that public officials seek or are offered employment in the private sector by entities or individuals that are potential participants in procurement proceedings). Although the provisions do not purport to mandate the enacting State to enact a code of conduct for suppliers or contractors in their relations with the procuring entity, some provisions of the code of conduct, such as those related to the concept of the “revolving door”, should indirectly establish boundaries for the behaviour of private sector entities or individuals with public officials.

72. The provisions of the article requiring the code of conduct to be promptly made accessible to the public and systematically maintained are to be read together with article 5(1) of the Model Law [\[**hyperlink**\]](#), in which a similar requirement applies to legal texts of general application. The commentary to article 5(1) is therefore relevant in the context of the relevant provisions of article 26 [\[**hyperlink**\]](#).

(A/CN.9/WG.I/WP.79/Add.7) (Original: English)**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany Chapter II. Part I addresses Methods of procurement and their conditions for use, comprising an introduction and commentary on articles 27 and 28. Part II addresses Solicitation and notices of the procurement, comprising an introduction and commentary on articles 33-35.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

...

CHAPTER II, Part I — Methods of procurement**A. Executive Summary**

1. The methods and techniques presented in part I of Chapter II are included to provide for the variety of circumstances that may arise in procurement in practice. They are designed to allow the procuring entity, when considering how to conduct a procurement procedure, to take account of what it is that is to be procured (the subject-matter), the market situation (the number of potential suppliers, degree of concentration in the market, the extent to which the market is competitive), any degree of urgency, and the appropriate level of technology (such as whether electronic procurement is appropriate).

B. Enactment: policy considerations

2. Taking account of the differing stages of development of procurement systems in enacting States, this section of the Guide comments on features of certain procurement methods that are intended to permit more or less discretion, and the capacity and infrastructure needed to operate them effectively. The aim is to enable enacting States to decide whether or not each method is appropriate for its local circumstances, by reference also to the issues raised in the commentary on implementation and use in the following section [\[**hyperlink**\]](#).

3. The Model Law requires that open tendering be enacted, as the commentary to article 27 explains [\[**hyperlink**\]](#). In deciding which of the methods to provide for in addition, enacting States should provide for sufficient options to address the normal situations in which it engages in procurement. At a minimum, enacting States should provide (in addition to open tendering) a method that can be used for low-value and simple procurement, a method that can be used for emergency and

other urgent procurement, and a method that can be used for more specialized or complex procurement.

4. The alternative procurement methods are designed to accommodate the procurement of various items and services, from off-the-shelf items to highly complex products, for which the use of open tendering may not be appropriate. Some of them are tendering-based methods (restricted tendering, two-stage tendering and open framework agreements within other procurement methods) that require a description of the subject-matter based on technical specifications and in which the procuring entity retains control of, and responsibility for, the technical solution. Some are request-for-proposals methods (request-for-proposals without negotiation, request-for-proposals with dialogue and request-for-proposals with consecutive negotiations) by means of which the procuring entity seeks proposals from suppliers or contractors to meet its needs, which are themselves formulated in as minimum technical requirements and standards. In these methods, the suppliers or contractors are responsible for ensuring that their proposed solutions in fact meet the procuring entity's needs. Further alternative methods are less structured or regulated (request for quotations, competitive negotiations and single-source procurement), to reflect the particular circumstances in which they can be used (very low-value procurement, urgency, emergency, etc.); these circumstances make the use of more structured and regulated methods less appropriate or inappropriate.

5. The available methods and techniques can be considered together as a toolbox, from which the procuring entity should select the appropriate tool for the procurement concerned. It is, however, recognized that the conditions for use and the functionality of certain methods will overlap, as explained further in the commentary to article 27 below [\[**hyperlink**\]](#). Where the conditions for use for restricted tendering on the basis low-value or simple of article 28(1)(b) apply, for example, a method for low-value or simple procurement such as request for quotations or ERA may also be available and appropriate. [\[**hyperlinks**\]](#) Enacting States are encouraged to consider the extent to which the enactment of overlapping procurement methods are appropriate in their local circumstances: the greater the number of available procurement methods, the more complex the decision-making process becomes.

6. For this reason, where the enacting State is introducing procurement legislation for the first time, it may be appropriate to base the system on a more limited number of methods than the full range available under the Model Law. It may also be considered that the methods to be enacted should include tendering methods for all other than urgent and very low-value procurement (for which less structured or regulated methods are presented in the Model Law); the capacity acquired in operating these procedures will allow the introduction of methods including request-for-proposals procedures involving negotiations or dialogue, at a later stage.

7. As some methods may be considered to be more vulnerable to abuse and corruption than others, and some methods require greater levels of capacity to function successfully, the guidance to each procurement method below [\[**hyperlinks**\]](#) is designed to assist enacting States in considering which methods are appropriate for their jurisdictions, to highlight issues that may arise in their use and capacity issues that they raise, and to be a resource for those that draft regulations and guidance.

8. Historically, the rules of some multilateral development banks (MDBs) have not included procurement methods equivalent to request-for-proposals with dialogue or competitive negotiations as provided for in the Model Law. The MDBs have included methods with the features of request-for-proposals without negotiation and request-for-proposals with consecutive negotiations that are in the Model Law only for the procurement of services that are of an advisory nature, such as consulting, legal or design services. Consequently, and in the light of possible developments, potential borrowers from the MDBs should verify the applicable public procurement policies at the relevant time.

9. Nonetheless, the Commission has decided not to base the selection of procurement method on whether it is goods, construction or services that are procured, but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (see article 27(2) [\[**hyperlink**\]](#)) (for the relevant guidance, see paragraphs [** below](#)). The Commission notes that the Model Law should reflect the fact that policies and practices evolve over time, and has therefore crafted its provisions in a flexible manner, balancing the needs of borrowers, ongoing developments in procurement methods and capacity development.

10. Finally, enacting States will wish to consider whether any international agreements to which they are party, or donor requirements, require the adaptation of the conditions for use and use of the procurement methods set out in the Model Law, as further discussed in particular in the guidance to request-for-proposals procurement methods.

C. Issues regarding implementation and use

11. In considering which methods of procurement to enact, enacting States should give particular consideration to whether the procuring entities possess adequate professional judgement and experience to select the appropriate procurement method from among the available options, and to operate it successfully. Further guidance on selection among alternative procurement methods, which highlights the capacity issues concerned, is provided in the commentary to article 27 and in the commentary to each procurement method below [\[**hyperlinks**\]](#).

12. Where enacting States consider that capacity development to enhance the quality of decision-making these matters would be of assistance, rules and guidance should focus in particular on how to select the appropriate procurement method where the conditions for use for several methods and/or techniques may apply. Consequently, enacting States may wish to consider the use of a typology of procurement methods and guidance on the identification of the appropriate procurement method in the circumstances concerned.

13. The footnote to article 27 [\[**hyperlink**\]](#) also provides that ‘States may consider whether, for certain methods of procurement, to include a requirement for external approval by a designated organ. The issues relating to whether or not to

include such an ex ante mechanism are considered in Section ** of the General Remarks [**hyperlinks**].¹

D. Article-by-article remarks

Article 27. Methods of procurement [**hyperlink**]

14. The purpose of article 27 [**hyperlink**] is to list all methods and techniques available for procurement procedures provided for in the Model Law. Paragraph (1) lists these available methods of procurement.

15. Article 27 [**hyperlink**] contains a footnote advising enacting States that they ‘may choose not to incorporate all the methods of procurement listed in this article into their national legislation,’ and continues that ‘an appropriate range of options, including open tendering, should be always provided for.’ In other words, enacting States should always provide for open tendering, which is considered under the Model Law to be the method of the first resort (the default procurement method). This is because its procedures most closely support the achievement of the goals and objectives of the Model Law, through implementing the principles of competition, objectivity and transparency (as further discussed in ...). The procuring entity must therefore use this method unless the use of alternative methods of procurement (that is, all methods other than open tendering), is justified. As further elaborated in the commentary to article 28 [**hyperlink**], the main mechanism for justifying the use of alternative methods is through satisfying conditions for use of these alternative methods.

16. Although listed in paragraph (1)(i) as a stand-alone procurement method, electronic reverse auctions may also be used as a technique (similarly to framework agreements referred to in paragraph (2)), as the final phase preceding the award of the procurement contract in any method of procurement listed in paragraph (1), as well as in the award of procurement contracts under framework agreements.

17. Paragraph (2) refers to framework agreement procedures. The framework agreement procedure is not a method of procurement as such but a procurement technique consisting of the award of a framework agreement by means of the methods of procurement listed in paragraph (1), or through the conclusion of an open framework agreement, and of the subsequent placement of purchase orders under the awarded agreement.

¹ Note to the Working Group: The Chapter of the Guide addressing changes from the 1994 Model Law will explain that the first part of the footnote also appeared in the 1994 Model Law, and that, in its provisions on conditions for use, the 1994 Model Law included, for each method of procurement other than tendering, the following optional language for enacting States to consider: ‘Subject to approval by ... (the enacting State designates an organ to issue the approval)’. The 1994 update Chapter will note that the Commission decided to remove that optional language from the individual provisions on conditions for use of procurement methods in the 2011 Model Law, and instead to address the concern more globally in the footnote to article 26. However, it will cross-refer to the general commentary on the ex ante approval mechanism, which could be included here as an additional safeguard.

Article 28. General rules applicable to the selection of a procurement method
[**hyperlink**]

18. The purpose of article 28 [**hyperlink**] is to guide the procuring entity in selection of the procurement method available in the circumstances of any given procurement.

19. Paragraph (1) provides for the basic rule that open tendering is the default procurement method. There are no conditions for its use: it is always available. The implication of open tendering as the default procurement method is that the use of any other procurement method requires justification, through a consideration of whether the conditions for its use are satisfied. Paragraph (1) sets out therefore the general requirement that these other methods can be used only where the conditions for their use set out in articles 29-31 of the Model Law [**hyperlinks**] so permit. Thus the procuring entity does not have an unfettered discretion to choose which alternative to open tendering it wishes, but is required, as a first step, to see whether it is available in the circumstances of the procurement at hand. The conditions for use contain safeguards in particular against abusive use of less structured and regulated methods of procurement to avoid open tendering or other methods of procurement that, although involving lengthier procedures, ensure more transparency, objectivity and competition.

20. As noted above, the conditions for use are intended to reflect the distinct and commonly encountered circumstances that may justify use of one or other of the alternative procurement methods. For example, one of the conditions justifying use of restricted tendering (article 29(1)(a)) [**hyperlink**] refers to the procurement of highly complex products where there are limited sources of supply. Where it is not feasible or appropriate to formulate a full description (including technical specifications) of the subject matter of the procurement at the outset of the procurement proceedings, two-stage tendering or request-for-proposals with dialogue may be appropriate. Where quality aspects may be highly significant (which is commonly the case in procurement of non-quantifiable, intellectual types of services), request-for-proposals without negotiations or with consecutive negotiations may be used. Competitive negotiations are intended for procurement involving national security issues and under situations of urgency, while resort to single-source procurement can be justified only on the listed and objective grounds (apart from situations of emergency, they include that there is only a single supplier in a given market capable of meeting the needs of the procuring entity).

21. Guidance on the conditions for use for each alternative procurement method under the Model Law is set out in [...], including, in each case, an explanation of the conditions for use for the method concerned. The guidance also considers some of the specific circumstances in which each method is available, and details of the procedures for each method (which themselves can have a bearing on the choice of procurement method). The conditions for use set out whether a particular procurement method or technique is available for a given procurement procedure, but such conditions alone will not answer the question of whether the method is appropriate for the procurement procedure under consideration.

22. The main reason why conditions for use do not provide a complete guide to choice of procurement method is that the conditions for use for more than one method may apply in the circumstances (in addition to open tendering, which is

always available). What is the appropriate, or the most appropriate, procurement method can only be determined through a consideration of all the circumstances of the procurement. This is reflected in paragraph (2) of the article, which requires the procuring entity to select an alternative method of procurement to accommodate the circumstances of the given procurement. Such circumstances will differ from procurement to procurement and, as noted above in the commentary to article 27 [\[**hyperlink**\]](#), the procuring entity will need to possess appropriate professional knowledge, experience and skills to select the procurement method most suitable for the circumstances of the given procurement.

23. For example, in deciding whether to use open tendering, two-stage tendering or request-for-proposals with dialogue, the procuring entity must assess whether it wishes to retain control of the technical solution in the procurement of relatively complex subject-matter. Where it wishes to retain such control but also to refine the description and technical specifications issued at the outset of the procedure to achieve the best solution through discussions with suppliers, a two-stage tendering procedure, rather than an open tendering procedure, may be the appropriate approach. (A consultancy may also precede the two-stage tendering procedure, to produce the design of the initial description and technical specifications.) Where the procuring entity cannot or considers it undesirable to retain such control, the request-for-proposals with dialogue procedure will be appropriate. The capacity required to operate request-for-proposals with dialogue, which involves the ability to assess and monitor different solutions, and to engage in dialogue on technical and commercial terms including price, is generally considered to be in excess of that required to operate two-stage tendering.

24. Paragraph (2) of the article requires the procuring entity, in addition, to “seek to maximize competition to the extent practicable” when selecting the procurement method. Competition in this context means, first, a preference for open solicitation to maximize the potential pool of participating suppliers, and, secondly, ensuring that the procedure does not restrict the number of participants below the number required to ensure that they in fact compete (and do not collude).

25. The requirement to maximize competition will determine the most appropriate method among those available in some situations. For example, in cases of urgency following a natural disaster or similar catastrophe, two methods are available under the Model Law: competitive negotiations and single-source procurement. The conditions for use of these methods are almost identical: they refer respectively to “an urgent” and “an extremely urgent” need for the subject matter of the procurement as a result of the catastrophe, in each case subject to the caveat that the urgency renders it impractical to use open tendering proceedings or any other method of procurement because of the time involved in using them. Although both competitive negotiations and single-source procurement are considered to provide less competition (as well as objectivity and transparency) than other procurement methods, it is clear that competition is to some degree present in competitive negotiations, and is essentially absent in single-source procurement. For this reason, only where there is an extreme degree of urgency can single-source procurement be justified: such as for the needs that arise in the immediate aftermath of the catastrophe (for example, for clean water, emergency food and shelter or immediate medical needs). Other needs, which may still arise as a direct result of the catastrophe, involve a time-frame that allows the use of competitive negotiations

rather than single-source procurement (and, the further in time from the catastrophe, the less likely it is that either of these methods remains available because there will be time to use other methods). The guidance to both methods discusses this issue, and other steps that can be taken to mitigate the risks that they pose; the guidance to framework agreements also highlights the use of that technique as a manner of planning for emergencies.

26. Paragraph (3) of the article reinforces the need for justification for resort to alternative procurement methods by requiring that the statement of reasons and circumstances for such resort be included in the record of the procurement proceedings. The same requirement is repeated in article 25(1)(e) [\[**hyperlink**\]](#). The importance of such records is a key requirement that allows for the traceability of the decisions concerned, and their oversight as necessary.

Articles 29-32: Conditions for use of procurement methods

27. The commentary on the conditions for use for each procurement method has been located with the commentary on the procedures for each such method. The commentary can therefore be found as follows:

- (a) Open tendering [\[**hyperlink**\]](#);
- (b) Restricted tendering [\[**hyperlink**\]](#);
- (c) Request for quotations [\[**hyperlink**\]](#);
- (d) Request for proposals without negotiation [\[**hyperlink**\]](#);
- (e) Two-stage tendering [\[**hyperlink**\]](#);
- (f) Request for proposals with dialogue [\[**hyperlink**\]](#);
- (g) Request for proposals with consecutive negotiations [\[**hyperlink**\]](#);
- (h) Competitive negotiations [\[**hyperlink**\]](#);
- (i) Electronic reverse auction [\[**hyperlink**\]](#);
- (j) Single-source procurement [\[**hyperlink**\]](#); and
- (k) Framework agreements [\[**hyperlink**\]](#).

CHAPTER II, Part II — Solicitation and notices of the Procurement

Executive Summary

28. Section II of Chapter II, comprising articles 33-35 of the Model Law, sets out the rules that govern solicitation in all procurement methods under the Model Law. The Model Law mandates unrestricted and public solicitation as the general rule. Such solicitation is required in open tendering under Chapter III, two-stage tendering under article 48, electronic reverse auctions under Chapter VI and open framework agreements under Chapter VII. It is also the default rule in request-for-proposals procurement methods under articles 47, 49 and 50. In other procurement methods, being restricted tendering under article 45,

request-for-quotations under article 46, competitive negotiations under article 51 and single-source procurement under article 52 direct solicitation, which involves the issue of the invitation to participate to suppliers or contractors identified by the procuring entity, is an inherent feature of the procurement method. The commentary to each such method, however, sets out safeguards to ensure effective participation and competition in such procurement.

Enactment policy considerations and issues regarding implementation and use of provisions on solicitation

29. The issues regarding implementation and use of the provisions on solicitation are inextricably linked with the policy issues concerned, in that the main requirement for effective implementation and use is for a clear and detailed explanation of the policy issues and how they delineate the elements of discretion involved in decisions regarding the manner of solicitation. For this reason, the issues are considered together in this section.

30. The default rule under the Model Law is for unrestricted and public solicitation, which involves an advertisement to invite participation in the procurement, the issue of the solicitation documents to all those that respond to the advertisement, and the full consideration of the qualifications and submissions of suppliers and contractors that submit tenders or other offers.

31. In order to promote transparency and competition, the first aspect of unrestricted and public solicitation (see, for example, paragraph (1) of article 33 [\[**hyperlink**\]](#)), involves minimum publicity procedures to be followed for soliciting tenders or other submissions from an audience wide enough to provide an effective level of competition. These procedures require the invitation to tender or to present other submissions to be advertised in a publication identified in the procurement regulations. The reasons for naming the publication in the procurement regulations rather than in the Model Law are to provide flexibility should procedures in an enacting State change, and also to ensure technical neutrality by avoiding a reference to a publication that requires a particular medium, as further explained in the commentary to articles 18 on pre-qualification and article 33 referred to above [\[**hyperlinks**\]](#). Including these procedures in the procurement law enables interested suppliers and contractors to identify, simply by reading the procurement law, publications that they may need to monitor in order to stay abreast of procurement opportunities in the enacting State. The Model Law does not regulate the means and media of publication, which are left to be determined by enacting States. There may be paper or electronic media or combination of both, as further explained in the commentary to article 5 [\[**hyperlink**\]](#).

32. In view of the objective of the Model Law of fostering and encouraging international participation in procurement proceedings, the second aspect of unrestricted and public solicitation is the additional publication of the invitation in international media: i.e. those with international circulation. These procedures are designed to ensure that the invitation is issued in such a manner that it will reach and be understood by an international audience of suppliers and contractors. In this regard, there is no requirement for the invitation to be published in any particular language, but it is implicit in the provisions for publication be made in a language

that will make the invitation in fact accessible to all potential suppliers or contractors in the context of the procurement concerned. As noted in the commentary to article 13 [\[**hyperlink**\]](#), however, the requirements of certain multilateral development banks (MDBs) include that the invitation must be published in a language customarily used in international trade, which may in practice imply the use of English. Enacting States may wish to consider the extent to which following the requirements of the MDBs may be appropriate when adopting the provisions on solicitation. Furthermore, similar provisions on the language for publication of procurement-related information in the WTO Agreement on Government Procurement were considered to be an important safeguard towards achieving transparency and competition.

33. There are exceptions to this general rule, however. The first arises where the procuring entity engages in domestic procurement, and the second arises in cases of procurement whose low value, in the judgement of the procuring entity, means that there is unlikely to be interest on the part of foreign suppliers or contractors. In such cases, the procuring entity may still solicit internationally but is not required to do so; however, where suppliers or contractors wish to participate (if they have seen an advertisement on the Internet, for example), they must be permitted to do so.

34. The first exception — the use of domestic procurement — is possible, under article 8 of the Law [\[**hyperlink**\]](#), only on the grounds specified in the procurement regulations or in other provisions of law of the enacting State (see, further, the commentary to that article [\[**hyperlink**\]](#)). The second exemption — low-value procurement — relies largely on the judgement of the procuring entity. See, further, the commentary to articles 18 on pre-qualification and article 33 referred to above [\[**hyperlinks**\]](#).

35. The publication requirements in the Model Law are only minimum requirements. The procurement regulations may additionally require procuring entities to publish the invitation to tender by additional means that would promote widespread awareness by suppliers and contractors of procurement proceedings. These might include, for example, posting the invitation on official notice boards, a contracts bulletin and circulating it to chambers of commerce, to foreign trade missions in the country of the procuring entity and to trade missions abroad of the country of the procuring entity. Where the procuring entity uses electronic means of advertisement and communication, it is possible to include in the invitation a Web link to the solicitation documents themselves: this approach is proving beneficial in terms of both efficiency and transparency.

36. The requirements for unrestricted and public solicitation do not apply to pre-qualification, but this is a technicality only, as article 18 on pre-qualification repeats the requirements for such solicitation as closely as possible (see, further, the commentary to article 18 [\[**hyperlink**\]](#)). The solicitation, where there have been pre-qualification proceedings, however, follows a different pattern: the invitation to tender or to present submissions follows those proceedings and is issued only to pre-qualified suppliers or contractors, under the provisions of article 18 [\[**hyperlink**\]](#). Wide international outreach to potentially interested suppliers and contractors is therefore ensured also when pre-qualification is involved, in the same way as in unrestricted and public solicitation.

37. The Model Law also provides for direct solicitation in several procurement methods: where the subject-matter of the procurement, by reason of its highly complex or specialized nature is available from a limited number of suppliers or contractors (in restricted tendering and request for proposals under articles 34(1)(a) and 35(2)(a) respectively [\[**hyperlinks**\]](#); where the time and cost required to examine and evaluate a large number of tenders or other submissions would be disproportionate to the value of the procurement (in restricted tendering and request for proposals under articles 34(1)(a) and 35(2)(b) respectively [\[**hyperlinks**\]](#)); in request-for-proposals procedures involving classified information under article 34(2)(c) [\[**hyperlink**\]](#); in request for quotations under article 34(2) [\[**hyperlink**\]](#); in competitive negotiations under article 34(3) [\[**hyperlink**\]](#) and in single-source procurement under article 34(4) [\[**hyperlink**\]](#). In all cases, save as regards request-for-quotations, and competitive negotiations and single-source procurement in cases of urgency, direct solicitation must be preceded by an advance notice of the procurement, as explained in the following section, so as to introduce transparency into the process.

38. Because direct solicitation impedes the objectives of the Model Law of fostering and encouraging open participation in procurement proceedings by suppliers and contractors and promoting competition among them, the Model Law requires the procuring entity to include in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings (see, for example, article 35(3) [\[**hyperlink**\]](#)). Together with the requirement for an advance notice of the procurement, discussed in the following section, this provision included to provide for transparency and accountability when direct solicitation is used.² Where the procurement takes place in a concentrated market, or on a repeated basis, an assessment should be made and recorded as to the likelihood of collusion before a decision to engage in direct solicitation is made (that is, at the outset of the procedure), bearing in mind, however, there may be fierce competition even in highly concentrated markets where the participants are known to each other.

Advance notice of the procurement

39. Articles 34(5) and 35(4) [\[**hyperlinks**\]](#) promote transparency and accountability as regards the decision to use the procurement methods set out in paragraph [10] above by requiring publication of a notice of the procurement in the media to be specified by the enacting State in its procurement law. Also relevant in this regard is the rule in article 28(3) (which is of general application) [\[**hyperlink**\]](#), read together with the provisions of article 25(1)(e) [\[**hyperlink**\]](#), which require the procuring entity to include in the record of procurement proceedings a statement of the grounds and circumstances relied upon to justify the selection of the procurement method concerned.

40. The provisions mandate the publication of a notice prior to the direct solicitation. The notice is therefore distinct from a public notice of the award of a procurement contract or framework agreement required under article 23 of the Model Law [\[**hyperlink**\]](#). Including the procedures described in these articles in

² Note to the Working Group and Commission: this paragraph was previously located in the commentary to solicitation for request-for-proposals procurement methods.

the procurement law enables interested suppliers and contractors to identify, simply by reading the procurement law, publications that they may need to monitor in order to stay abreast of procurement opportunities in the enacting State and of the way those procurement opportunities are allocated in the market. The Model Law does not regulate the means and media of publication, which are left to determination by enacting States. There may be paper or electronic media or combination of both. In this context, considerations raised in the guidance to article 5 in [\[**Section/paragraphs**\]](#) [\[**\]](#) above are relevant.

41. The information to be published is the minimum needed to ensure effective public oversight and possible challenge by aggrieved suppliers or contractors under chapter VIII of the Model Law [\[**hyperlink**\]](#). In particular, the selected method of procurement may be challenged by any affected supplier or contractor if, for example, single-source procurement or restricted tendering were selected on the ground that a particular supplier or limited group of suppliers existed in the market and was or were capable of supplying the subject matter of the procurement. Any other suppliers or contractors capable of delivering the subject-matter of the procurement in the market concerned may challenge the use of the procurement method relying on the information in the notice of the procurement. Under chapter VIII, they would be able to do so before the deadline for submission of tenders, and there may be a suspension of the procurement proceedings as a result. As is discussed in the commentary to chapter VIII, and in order to avoid vexatious challenges that can be highly disruptive when filed at the last minute, a challenging supplier or contractor has to show that its interests may or have been affected at the point in time concerned: thus, for example, it may have to show a real intention to participate in the circumstances described above (for example, by submitting a draft tender or other offer).

42. The requirement for an advance notice of the procurement in restricted tendering, request-for-proposals, competitive negotiations and single-source procurement is essential in the fight against corruption and as a means to achieve transparency. Together with the provisions of chapter VIII, it enables and encourage aggrieved suppliers or contractors to seek redress earlier in the procurement process rather than at a later stage where redress may not be possible or will be costly to the public and available remedies will thus be limited.

43. The requirement to publish an advance notice of the procurement is not applicable in request for quotations proceedings in the light of the very restrictive conditions for use of that method, which will constrain any excessive or abusive use of that method. Nor does it apply in the case of competitive negotiations and single-source procurement when those methods are used in urgent or extremely urgent situations due to catastrophic events (for example, under the conditions for use of these procurement methods under articles 30(4)(b) and 30(5)(b)). In the normal case, when an advance notice is in principle required, an exemption may nevertheless apply under article 24 (confidentiality), in particular in procurement involving classified information. (For the guidance on the relevant provisions of the Model Law on confidentiality and procurement involving classified information, see [\[**Section/paragraphs**\]](#) [\[**\]](#) of the general commentary above [\[**hyperlink**\]](#)); on issues of compliance and sanctions, see [\[**Sections/paragraphs**\]](#) above [\[**hyperlink**\]](#).

Articles 33-35: Solicitation in each procurement method

44. The commentary on the particular issues arising regarding solicitation in each procurement method has been located with the introductory comments for each subsequent Chapter and the commentary on the procedures for each procurement method.

45. The commentary can therefore be found as follows:

- (a) Open tendering [\[**hyperlink**\]](#);
- (b) Restricted tendering [\[**hyperlink**\]](#);
- (c) Request for quotations [\[**hyperlink**\]](#);
- (d) Request for proposals without negotiation [\[**hyperlink**\]](#);
- (e) Two-stage tendering [\[**hyperlink**\]](#);
- (f) Request for proposals with dialogue [\[**hyperlink**\]](#);
- (g) Request for proposals with consecutive negotiations [\[**hyperlink**\]](#);
- (h) Competitive negotiations [\[**hyperlink**\]](#);
- (i) Electronic reverse auction [\[**hyperlink**\]](#);
- (j) Single-source procurement [\[**hyperlink**\]](#); and
- (k) Framework agreements [\[**hyperlink**\]](#).

(A/CN.9/WG.I/WP.79/Add.8) (Original: English)**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany chapter III (Open tendering) of the UNCITRAL Model Law on Public Procurement, comprising an introduction and commentary on articles 36-44, and to a related article in Chapter II (article 33).

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

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Part II. Article-by-article commentary

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CHAPTER III. OPEN TENDERING [\[hyperlink**\]](#)****Executive Summary**

1. Open tendering is widely recognized as generally the most effective method of procurement in promoting the objectives of the Model Law as set out in the Preamble. The Model Law therefore mandates it as the default procurement method for the circumstances other than those described in articles 29-32 [\[**hyperlinks**\]](#). The key features of open tendering include the unrestricted solicitation of participation by suppliers or contractors; a comprehensive description and specification in solicitation documents of what is to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender; the strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; the public opening of tenders at the deadline for submission; and the disclosure of any formalities required for entry into force of the procurement contract. Suppliers and contractors can enforce compliance with these requirements, where necessary, through the challenge mechanism provided under Chapter VIII of the Model Law [\[**hyperlink**\]](#).

2. The provisions on open tendering, with few exceptions, are applicable under the Model Law to two-stage tendering and restricted tendering proceedings [\[**hyperlinks**\]](#). The guidance provided in this Section should also be considered when addressing those procurement methods.

Enactment: Policy Considerations

3. The Model Law requires that open tendering be enacted, as the footnote to article 27 explains [\[**hyperlink**\]](#), reflecting that the key features described in the executive summary above should be considered as the basis for the statement that the method is considered to be the most effective in promoting the objectives of the Model Law. Accordingly, and subject to any amendment necessary to ensure coherence in the enacting State's body of law, it is recommended that the solicitation rules in article 33 regarding open tendering [\[**hyperlink**\]](#) and the procedures in articles 36-44 [\[**hyperlink**\]](#) be enacted in full.

Issues of Implementation and Use

4. The regulations or rules or guidance on the use of the method should emphasize the importance of the key features set out in the Executive Summary above, the benefits of the method, and the implications of the rule under article 28 [\[**hyperlink**\]](#) that the procuring entity must use open tendering unless the use of an alternative method of procurement is justified. It will then be apparent that the justifications for the alternative methods are intended to be not the norm, but the exception.

5. In addition to the guidance that is recommended in the article-by-article remarks below, the regulations, rules or guidance should also emphasize the importance of the provisions of Chapter I (General Principles) [\[**hyperlink**\]](#) in ensuring transparency and a competitive and level playing field and so ensuring the appropriate use of the method. They should therefore highlight the interaction of these latter rules and, for example, the requirements for the solicitation documents in article 39 [\[**hyperlink**\]](#).

General description and use of open tendering

6. Article 28(1) [\[**hyperlink**\]](#) provides that unless the conditions for use of another procurement method set out in articles 29-31 [\[**hyperlink**\]](#) of the Model Law are satisfied, a procuring entity must conduct procurement through open tendering. There are therefore no conditions for its use, and it is always available for any procurement.

Article 33. Solicitation in open tendering, ... [\[hyperlink**\]](#)**

7. Solicitation in open tendering proceedings is regulated by the rules governing open tendering under article 33, which set out public and unrestricted international solicitation as the default rule (for a further explanation of that concept, see the commentary to part II of Chapter II above [\[**hyperlink**\]](#)). There are no exceptions to the requirement for such public and unrestricted solicitation (though where pre-qualification procedures precede open tendering, as is permitted by article 18 [\[**hyperlink**\]](#), the solicitation is then addressed only to pre-qualified suppliers). Nonetheless, pre-qualification procedures also require a published invitation to participate, so that the principle of public and unrestricted solicitation is preserved.

8. There are limited exceptions to the requirement for international solicitation under article 33(4) for domestic and low-value procurement only, as explained in the commentary to part II of Chapter II [\[**hyperlink**\]](#). In all other cases, therefore, the invitation to tender must be advertised both in the publication identified in the procurement regulations, and internationally in a publication that will ensure effective access by suppliers and contractors located overseas.

Article 36. Procedures for soliciting tenders [\[hyperlink**\]](#)**

9. Article 36 applies the provisions of article 33 to open tendering (article 36 also regulates solicitation in two-stage tendering and electronic reverse auctions used as a stand-alone procurement method). The requirement is for unrestricted and public international solicitation as the default rule, as that concept is further explained in the commentary to part II of Chapter II [\[**hyperlink**\]](#). The limited exceptions to international solicitation permitted in article 33(4) are also explained in the commentary to part II of Chapter II [\[**hyperlink**\]](#). These exceptions are permitted only to accommodate domestic and low-value procurement, as noted above.

Article 37. Contents of invitation to tender [\[hyperlink**\]](#)**

10. In order to promote efficiency and transparency, article 37 requires that invitations to tender should contain all information required for suppliers or contractors to be able to ascertain whether the subject-matter being procured is of a type that they can provide and, if so, how they can participate in the open tendering proceedings. The specified information requirements are the required minimum, and so do not preclude the procuring entity from including additional information that it considers appropriate.

Article 38. Provision of solicitation documents [\[hyperlink**\]](#)**

11. The solicitation documents are intended to provide suppliers or contractors with the information they need to prepare their tenders and to inform them of the rules and procedures according to which the open tendering proceedings will be conducted. Article 38 has been included in order to ensure that all suppliers or contractors that have expressed an interest in participating in the open tendering proceedings and that comply with the procedures set out by the procuring entity are provided with the solicitation documents. These procedures are to be set out in the invitation to tender in accordance with article 37 [\[**hyperlink**\]](#) and may concern such matters as the means of obtaining the solicitation documents, the place where they may be obtained, the price to be paid for the solicitation documents, the means and currency of payment as well as the more substantive matter referred to in subparagraph (d) of article 37 that the participation in the given procurement proceedings may be limited in accordance with article 8 [\[**hyperlink**\]](#) (with the consequence that suppliers or contractors excluded from participation in the procurement proceedings will not be able to obtain the solicitation documents).

12. The purpose of including a provision concerning the price to be charged for the solicitation documents is to enable the procuring entity to recover its costs of, for example, printing and providing those documents, but to avoid excessively high charges that could inhibit qualified suppliers or contractors from participating in open tendering proceedings. Development costs (including consultancy fees and

advertising costs) are not to be recovered through this provision. The costs should be limited to the charges incurred in fact in providing the documents.

Article 39. Contents of solicitation documents [\[hyperlink**\]](#)**

13. Article 39 contains a listing of the minimum information required to be included in the solicitation documents. This minimum information enables suppliers and contractors to submit tenders that meet the needs of the procuring entity and to verify that the procuring entity can compare tenders in an objective and fair manner. Many of the items listed in article 38 are regulated or dealt with in other provisions of the Model Law, such as article 9 on qualifications, article 10 on the description of the subject-matter of the procurement and terms and conditions of the procurement contract (or framework agreement) and article 11 on evaluation criteria [\[**hyperlink**\]](#). The enumeration in this article of items that are required to be in the solicitation documents, including all items the inclusion of which is expressly provided for elsewhere in the Model Law, is useful because it enables procuring entities to use the article as a “check-list” in preparing the solicitation documents. The need for all information listed is however to be assessed by the procuring entity on a case-by-case basis: some information listed (such as in subparagraphs (i), (j) and (s)) may be irrelevant in domestic procurement or, as in the case with information in subparagraph (g), where presentation of partial tenders is not permitted.

14. One category of items listed in article 39 concerns the subject-matter of the procurement and terms and conditions of the procurement contract (subparagraphs (b)-(f) and (w)). The purpose of including these provisions is to provide all potential suppliers or contractors with sufficient information about the procuring entity’s requirements as regards suppliers or contractors, the subject-matter of the procurement, terms and conditions of delivery and other terms and conditions of the procurement contract (or framework agreement). This information is essential for suppliers or contractors to determine their qualifications, ability and capacity to perform the procurement contract in question. Although the specification of the exact quantity of the goods is generally required under subparagraph (d), where tendering proceedings are used for the award of framework agreements the procuring entity will be in the position to specify at the outset of the procurement only an estimated quantity and will be permitted to do so under provisions of chapter VII of the Model Law (for further guidance, see paragraphs ** below). The reference to “contract form” in subparagraph (e) is linked to the formalities referred to in subparagraph (w) of this article: whereas under subparagraph (w) the procuring entity may specify that a procurement contract is to be concluded in writing, under subparagraph (e) the procuring entity will be required to specify in addition, where applicable, whether a contract in standard form is to be signed (which itself may provide, for example, standard terms and conditions of delivery, a standard warranty period, and a standard schedule of payments, etc.).

15. The second category of items listed concerns instructions for preparing and submitting tenders (subparagraphs (a), (g) through (p) and (u), such as the manner, place and deadline for presenting tenders and the manner of formulation of the tender price). The purpose of including these provisions is to limit the possibility

that qualified suppliers or contractors would be placed at a disadvantage or their tenders even rejected due to lack of clarity as to how the tenders should be prepared.

16. The Model Law recognizes that, for procurement actions that are separable into two or more distinct elements (e.g., the procurement of different types of laboratory apparatus; the procurement of a hydroelectric plant consisting of the construction of a dam and the supply of a generator), a procuring entity may wish to permit suppliers or contractors to submit tenders either for the entirety of the procurement or for one or more portions thereof. That approach might enable the procuring entity to maximize economy by procuring either from a single supplier or contractor or from a combination of them, depending on which approach the tenders revealed to be more cost effective. Permitting partial tenders may also facilitate participation by SMEs, who may have the capacity to submit tenders only for certain portions of the procurement. Article 39(g) is therefore included to allow such partial tenders and make the tender evaluation stage as objective, transparent and efficient as possible, since the procuring entity should not be permitted to divide the entirety of the procurement into separate contracts merely as it sees fit after tenders are submitted.

17. Some other items in article 39 (subparagraphs (b), (c) and (q)-(s)) concern in particular the manner in which qualifications of suppliers and contractors will be ascertained and the tenders will be examined and evaluated and the applicable criteria; their disclosure is required to achieve transparency and fairness in the tendering proceedings. The relevance of information listed in subparagraph (s) should however be assessed in domestic procurement.

18. The information referred to in subparagraphs (t) and (v) is an application of the general principle of transparency underpinning the Model Law: it informs suppliers and contractors about the legal framework applicable to public procurement in the enacting States in general and specific rules that may be applicable to the particular procurement proceedings (for example, if any classified information is involved); it also informs suppliers about the possibility of challenging and appealing the procuring entity's decisions or actions, alerting them in particular whether a specifically dedicated and defined time frame (standstill period) will be provided enabling them to challenge the procuring entity's decisions and actions as regards examination and evaluation of tenders before the procurement contract enters into force. The place where applicable laws and regulations may be found, referred to in subparagraph (t), intends to refer not to the physical location but rather to an official publication or portal where authoritative texts of laws and regulations of the enacting State are made accessible to the public and systematically maintained (see the relevant guidance to article 5 of the Model Law in paragraphs ** above).

19. The article lists only the minimum information that must be provided. The procuring entity may decide to include additional information, for example the

manner in which arithmetical errors under article 43 (1) [\[**hyperlink**\]](#) would be corrected if necessary.¹

20. All categories of items listed in article 39, supplemented by items listed in article 37 (contents of invitation to tender [\[**hyperlink**\]](#)) comprise terms and conditions of solicitation. Any or all of them may be challenged by suppliers or contractors under chapter VIII of the Model Law [\[**hyperlink**\]](#) before the deadline for presenting submissions.

SECTION II. PRESENTATION OF TENDERS

Article 40. Presentation of tenders [\[**hyperlink**\]](#)

21. Paragraph (1) ensures equitable treatment of all suppliers and contractors by requiring that the manner, place and the deadline for submission of tenders be specified in the solicitation documents (under article 2, the solicitation documents are defined as encompassing any amendments thereto). This requirement is further elaborated in article 14 [\[**hyperlink**\]](#) on the rules concerning the manner, place and deadline for presenting application to pre-qualify or applications for preselection or for presenting submissions. Particular safeguards are included in that article, as well as in article 15(3) [\[**hyperlink**\]](#), to address situations in which changes are made to the information originally issued about the procurement procedure concerned. Where those changes make the originally published information materially inaccurate, the amended information is to be published in the same manner and place in which the original information about procurement was published. Under article 14(5) [\[**hyperlink**\]](#), notice of any extension of the deadline is also to be given to each supplier or contractor to which the procuring entity provided the solicitation documents. (See, further, the commentary to articles 14 and 15 [\[**hyperlinks**\]](#).)

22. Paragraph (2) contains specific requirements as regards the form and manner of presentation of tenders that complement the general requirements of form and means of communication found in article 7 [\[**hyperlink**\]](#) (see the commentary to that article 7 [\[**hyperlink**\]](#)). The article provides that tenders have to be presented in writing and signed, and that their authenticity, security, integrity and confidentiality have to be preserved. The requirement for “writing” seeks to ensure the compliance with the form requirement found in article 7(1) (tenders have to be presented in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference [\[**hyperlink**\]](#)). The requirement for a “signature” seeks to ensure that suppliers or contractors presenting a tender identify themselves and confirm their approval of the content of their presented tenders, with sufficient credibility. The requirement of “authenticity” is intended to provide the appropriate level of assurance that a tender presented by a supplier or contractor to the procuring entity is final and authoritative, cannot be

¹ At its nineteenth session, the Working Group was requested to consider (A/CN.9/WG.I/WP.75/Add.3, footnote 49) whether the article should require the solicitation documents to specify the manner in which arithmetical errors would be corrected. The attention in this regard was drawn to the relevant discussion and query raised at the Working Group’s seventeenth session (A/CN.9/687, para. 151). Further guidance on this point may need to be included here as well in the commentary to the relevant provisions of articles 16 and 43.

repudiated and is traceable to the supplier or contractor submitting it. Together with the requirements of “writing” and “signature”, it thus is aimed at ensuring that there would be tangible evidence of the existence and nature of the intent on the part of the suppliers or contractors presenting the tenders to be bound by the information contained in their tenders. Additionally, that evidence would be preserved for record-keeping, control and audit. The requirements for “security”, “integrity” and “confidentiality” of tenders are intended to ensure that the information in presented tenders cannot be altered, added to or manipulated (“security” and “integrity”), and that it cannot be accessed until the time specified for public opening and thereafter only by authorized persons and only for prescribed purposes, and according to the rules (“confidentiality”).

23. In the paper-based environment, all the requirements described in the preceding paragraph of this Guide are met by suppliers or contractors presenting to the procuring entity, in a sealed envelope, tenders or parts thereof presumed to be duly signed and authenticated (at a risk of being rejected at the time of the opening of tenders if otherwise), and by the procuring entity keeping the sealed envelopes unopened until the time of their public opening. In the non-paper environment, the same requirements may be fulfilled by various standards and methods as long as such standards and methods provide at least a similar degree of assurances that tenders presented are indeed in writing, signed and authenticated and that their security, integrity and confidentiality are preserved. The procurement or other appropriate regulations should establish clear rules as regards the relevant requirements, and when necessary develop functional equivalents for the non-paper-based environment. Caution should be exercised not to tie legal requirements to a given state of technological development. The system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up in a way that allows traceability of all operations in relation to presented tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used should be commensurate with risk. A strong level of authentication and security can be achieved by various commercial software that is available at any given time but this will not be appropriate for low risk small value procurement. The choice should therefore be based on the cost-benefit analysis. Caution should also be exercised not to impose higher security measures than otherwise would be applicable in paper-based environment since these measures can discourage the participation of suppliers or contractors in non-paper-based procurement. These and other issues will have to be addressed in the procurement or other appropriate regulations. (For the general discussion of issues arising from the use of e-procurement, see section [** of the general commentary \[**hyperlink**\].](#))

24. Paragraph (2)(b) requires the procuring entity to provide to the suppliers or contractors a receipt showing the date and time when their tender was received. In

the paper-based environment, this usually is achieved through the procuring entity's written confirmation on a paper that the tender has been received with a stamp indicating day, time and place of receipt. In the non-paper-based environment, this should be done automatically. In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders presented would be recorded. However, this element of discretion should be regulated by reference to the applicable legal norms in electronic commerce, in order to prevent abuse and ensure objectivity. Whatever the method of recording the date and time will be used in any given procurement, it must be disclosed at the outset of the procurement proceedings in the solicitation documents. With these safeguards, the certification of receipt provided by the procuring entity should be conclusive. When the submission of a tender fails, particularly arising from the protective measures taken by the procuring entity to prevent the system from being damaged as a result of a receipt of a tender, it shall be considered that no submission was made, as an application of the general rule that the submission of tenders is at the risk of the suppliers or contractors. Suppliers or contractors whose tenders cannot be received by the procuring entity's system should be instantaneously informed about the event in order to allow them where possible to re-submit tenders before the deadline for submission has expired. No re-submission after the expiry of the deadline shall be allowed.

25. Paragraph (2)(c) raises issues of security, integrity and confidentiality of presented tenders, discussed above. Unlike subparagraph 2(a)(ii), it does not include a requirement for authenticity of tenders (such issues are relevant at the presentation of tenders only). It is presumed that, upon receipt of a tender by the procuring entity at the date and time recorded in accordance with paragraph 2(b) of the article, adequate authenticity has already been assured.

26. It is recognized that failures in automatic systems, which may prevent suppliers or contractors from presenting their tenders before the deadline, may inevitably occur. The Model Law leaves the issue to be addressed by procurement or other appropriate regulations. Under the provisions of article 14(4) [\[**hyperlink**\]](#), the procuring entity may, in its absolute discretion, prior to the deadline for presenting tenders, extend the deadline if it is not possible for one or more suppliers or contractors to present their tenders by the deadline owing to any circumstance beyond their control. In such a case, it would have to give notice of any extension of the deadline promptly to each supplier or contractor to which the procuring entity provided the solicitation documents (see article 14(5) of the Model Law [\[**hyperlink**\]](#)). Thus, where a failure occurs, the procuring entity has to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting tenders would be necessary. If, however, the procuring entity determines that a failure in the system will prevent it from proceeding with the procurement, the procuring entity can cancel the procurement and announce new procurement proceedings. Failures in automatic systems occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of automatic systems, can give rise to a challenge by aggrieved suppliers and contractors under article 63 of the Model Law [\[**hyperlink**\]](#).

27. The rule in paragraph (3) prohibiting the consideration of late tenders is intended to promote economy and efficiency in procurement and the integrity of and confidence in the procurement process. Permitting the consideration of late tenders after the commencement of the opening might enable suppliers or contractors to learn of the contents of other tenders before submitting their own tenders. This could lead to higher prices and could facilitate collusion between suppliers or contractors. It would also be unfair to the other suppliers or contractors. In addition, it could interfere with the orderly and efficient process of opening tenders. The provisions therefore require that any late tenders would be returned unopened to suppliers or contractors submitting them. Enacting States may require recording the submission of late tenders in the documentary record of procurement proceedings under article 25(1)(w) [\[**hyperlink**\]](#).

Article 41. Period of effectiveness of tenders; modification and withdrawal of tenders [\[hyperlink**\]](#)**

28. Article 41 has been included to make it clear that the procuring entity should stipulate in the solicitation documents the period of time that tenders are to remain in effect.

29. It is of obvious importance that the length of the period of effectiveness of tenders should be stipulated in the solicitation documents, taking into account the circumstances peculiar to the particular tendering proceeding. It would not be a viable solution to fix in a procurement law a generally applicable and lengthy period of effectiveness, with the aim of covering the needs of most if not all tendering proceedings. So doing would be inefficient since for many cases the period would be longer than necessary. Excessively lengthy periods may result in higher tender prices, since suppliers or contractors would have to include in their prices an increment to compensate for the costs and risks to which they would be exposed during such a period (e.g., tied capacity and inability to tender elsewhere; the risks of higher manufacturing or construction costs).

30. Paragraph (2) has been included to enable the procuring entity to deal with delays in tendering proceedings following requests for extensions of the tender validity period. The procedure is not compulsory on suppliers and contractors, so as not to force them to remain bound to their tenders for unexpectedly long durations — a risk that would discourage suppliers and contractors from participating or drive up their tender prices. In order also to prolong, where necessary, the protection afforded by tender securities, it is provided that a supplier or contractor failing to obtain a security to cover the extended validity period of the tender is considered as having refused to extend the validity period of its tender. In such a case, the effectiveness of the tender of the supplier or contractor will terminate upon the expiry of the original period of effectiveness specified in the solicitation documents.

31. Paragraph (3) is an essential companion of the provisions in article 15 concerning clarifications and modifications of the solicitation documents. This is because it permits suppliers and contractors to respond to clarifications and modifications of solicitation documents, or to other circumstances, either by modifying their tenders, if necessary, or by withdrawing them if they so choose. Such a rule facilitates participation, while protecting the interests of the procuring entity by permitting forfeiture of the tender security for modification or withdrawal

following the deadline for submission of tenders. However, in order to take account of a contrary approach found in the existing law and practice of some States, paragraph (3) permits the procuring entity to depart from the general rule and to impose forfeiture of the tender security for modifications and withdrawals prior to the deadline for submission of tenders, but only if so stipulated in the solicitation documents. (See also the commentary to article 48 [\[**hyperlink**\]](#).)

SECTION III. EVALUATION OF TENDERS

Article 42. Opening of tenders [\[**hyperlink**\]](#)

32. The rule in paragraph (1) is intended to prevent time gaps between the deadline for submission of tenders and the opening of tenders. Such gaps may create opportunities for misconduct (e.g., disclosure of the contents of tenders prior to the designated opening time) and deprive suppliers and contractors of an opportunity to minimize that risk by submitting a tender at the last minute, immediately prior to the opening of tenders.

33. Paragraph (2) sets out a rule that the procuring entity must permit all suppliers or contractors that have presented tenders, or their representatives, to be present at the opening of tenders. The modalities for the opening of tenders established by the procuring entity (the place, manner, time and procedures for the opening of tenders) should allow for the presence of suppliers or contractors, taking into account such factors as time difference, the need to supplement any physical location for opening of tenders with any means of ensuring presence of those who cannot be present at the physical location or opting for a virtual location. The presence may be in person or otherwise by any means that complies with requirements of article 7 of the Model Law (for a discussion of the relevant requirements, see paragraphs ** of this Guide). Paragraph (2) supplements those requirements of article 7(4) clarifying that, in the context of the opening of tenders, suppliers or contractors are deemed to have been permitted to be present at the opening of the tenders if they have been given the opportunity to be fully and contemporaneously apprised of the opening of the tenders: that is, the participation can be physical or virtual, and both are covered by the provisions. In practical terms, being apprised virtually may mean that the public reading of the basic elements of the tender that are required by paragraph (3) of the article are immediately uploaded on the relevant website. This provision is consistent with other international instruments addressing the same matter.

34. The term “fully and contemporaneously” in this context means that suppliers or contractors must be given the opportunity to observe (either by hearing or reading) all and the same information given out during the opening. This opportunity must be given at the same time as any person physically present at the opening of tenders would observe or hear the information concerned, subject to the time taken to upload it where it is to be read. The information concerned includes the announcements made in accordance with article paragraph (3) of this article.

35. Suppliers must also be able to intervene where any improprieties take place, to the extent that they would be able to do so if they were physically present. The system in place therefore has to be capable of receiving and acknowledging or responding to suppliers’ feedback without delay. Different methods may exist to satisfy the requirement for full and contemporaneous appraisal using information

technology systems. Regardless of the method used, sufficient information about them must be communicated to suppliers or contractors well in advance to enable them to take all measures required to connect themselves to the system in order to observe opening of tenders.

36. The rule requiring the procuring entity to permit all suppliers or contractors that have presented tenders, or their representatives, to be present at the opening of tenders contributes to transparency of the tendering proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of suppliers or contractors that have presented tenders, as well as the prices of their tenders, are to be announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers or contractors that were not present or represented at the opening of tenders.

37. Where automated opening of tenders takes place, the enacting State should be aware of additional safeguards that must be in place to ensure transparency and integrity of the process of the opening of tenders. The system must guarantee that only authorized persons clearly identified to the system will have the right to set or change in the system the time for opening tenders in accordance with paragraph (1) of the article, without compromising the security, integrity and confidentiality of tenders. Only such persons will have the right to open tenders at the set time. The enacting State may require that at least two authorized persons should by simultaneous action perform opening of tenders. “Simultaneous action” in this context means that the designated authorized persons within almost the same time span shall open the same components of a tender and produce logs of what components have been opened and when. It is advisable that before the tenders are opened, the system should confirm the security of tenders by verifying that no unauthorized access has been detected. The authorized persons should be required to verify the authenticity and integrity of tenders and their timely presentation.

38. Measures should be in place to prevent the integrity of tenders from being compromised, to prevent their deletion or to prevent the destruction of the system when the system opens them, such as through virus or similar infection. The system must also be set up in a way that provides for the traceability of all operations during the opening of tenders, including the identification of the individual that opened each tender and its components, and the date and time each was opened. It must also guarantee that the tenders opened will remain accessible only to persons authorized to acquaint themselves with their contents and data (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings). These and related technical issues should be addressed in procurement and other regulations to be adopted by the enacting State.

Article 43. Examination and evaluation of tenders [\[hyperlink**\]](#)**

39. Paragraphs (1) to (3) regulate the examination of tenders, which encompasses the ascertainment of the qualifications of suppliers and contractors presenting tenders, assessment of the responsiveness of those tenders and a determination as to whether any ground for rejection of tenders in accordance with paragraph (3) of the article is present. As required by various provisions of the Model Law, including

article 10 and 39 [\[**hyperlinks**\]](#), all examination criteria and procedure are to be disclosed to suppliers or contractors at the outset of the procurement proceedings.

40. The purpose of paragraph (1) is to enable the procuring entity to seek clarifications of tenders from suppliers or contractors, in order to assist in the examination and evaluation of the tenders concerned, while making it clear that this should not involve changes in the substance of tenders. Paragraph (1)(b), which refers to the correction of purely arithmetical errors, is not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or to other errors not apparent on the face of the tender. Enactment of the related notice requirement is important since, in paragraph (3)(b), provision is made for the mandatory rejection of the tender if the correction is not accepted.²

41. Paragraph (2) sets out the rule to be followed in determining whether tenders are responsive and permits a tender to be regarded as responsive even if it contains minor deviations. Permitting the procuring entity to consider tenders with minor deviations promotes participation and competition in tendering proceedings. Quantification of such minor deviations is required so that tenders may be compared objectively in a way that reflects positively on tenders that do comply to a full degree.³

42. Paragraph (3) lists the grounds for the rejection of tenders. The list is exhaustive and refers only to such grounds as are explicitly provided for in the Model Law. The ground listed in subparagraph (a) — the absence of qualifications — is to be implemented in the light of article 9 listing permissible qualification requirements and grounds for disqualification. The ground listed in subparagraph (b) — refusal by the supplier or contractor to accept the correction of the arithmetical error and unresponsiveness of the tender — is to be read together with provisions of paragraph (1)(b) that permit the procuring entity to correct purely arithmetical errors and require it in such case to give notice of such correction to the supplier or contractor that submitted the relevant tender. No further discussion between the procuring entity and supplier or contractor on the corrected arithmetical error should be permitted: the supplier or contractor concerned can either accept the correction made or its tender will be rejected. The ground listed in subparagraph (1)(c) — unresponsiveness of the tender — is to be understood in the light of article 10 and paragraphs (1) and (2) of article 43 [\[**hyperlink**\]](#) that set out the legal framework for the procuring entity to apply in deciding on responsiveness or unresponsiveness of tenders. The grounds listed in subparagraph (d) originate from article 19 that permit the procuring entity to reject an abnormally low submission and from article 20 that require the procuring entity to exclude a supplier or contractor from the procurement proceedings on the grounds of inducement from that supplier or contractor, an unfair competitive advantage or conflicts of interest.

43. Paragraphs (4) to (7) regulate the evaluation of tenders, i.e. comparison of all tenders that have not been rejected as a result of examination. As required under various provisions of the Model Law, such as articles 11 and 39 [\[**hyperlinks**\]](#)

² Further elaboration on the rules and principles applicable to the correction by the procuring entity of arithmetical errors and the role of the solicitation documents in this regard is needed; see footnote to article 39 above.

³ Further elaboration on what would constitute “minor deviations” will also be needed for the same reasons as for arithmetical errors.

and paragraph (4)(a) of this article, responsive tenders are evaluated against the pre-disclosed evaluation criteria and in accordance with the pre-disclosed evaluation procedures. The successful tender, as reiterated in paragraph (4)(b) of the article, may be the tender with the lowest tender price or the most advantageous tender.⁴ In accordance with article 11(5)(a) of the Model Law [\[**hyperlink**\]](#), whether the successful submission will be ascertained on the basis of only price or of price and other criteria is to be defined in the solicitation documents at the outset of the procurement and cannot be subsequently varied.

44. The rule in paragraph (5) on conversion of tender prices to a single currency for the purposes of comparison and evaluation of tenders is included to promote accuracy and objectivity in the decision of the procuring entity. That single currency is to be defined in the solicitation documents, as required under article 39(s), together with any applicable exchange rate or the method to be used for determination of the applicable exchange rate. These provisions may be irrelevant in domestic procurement.

45. Paragraph (6) has been included in order to enable procuring entities to require the supplier or contractor submitting the successful tender to reconfirm its qualifications. This may be of particular utility in procurement proceedings of a long duration, in which the procuring entity may wish to verify whether qualification information submitted at an earlier stage remains valid. Use of reconfirmation is left discretionary since the need for it depends on the circumstances of each tendering proceeding.

46. In order to make the reconfirmation procedure effective and transparent, paragraph (7) mandates the rejection of a tender if the supplier or contractor fails to reconfirm its qualifications, and establishes the procedures to be followed by the procuring entity to select the successful tender in such a case. That paragraph also reiterates the right of the procuring entity to cancel the procurement in such cases, which is an essential safeguard against risks of collusive behaviour by suppliers or contractors.

Article 44. Prohibition of negotiations with suppliers or contractors [\[**hyperlink**\]](#)

47. Article 44 contains a clear prohibition against negotiations between the procuring entity and a supplier or contractor concerning a tender it has submitted. This rule has been included because such negotiations might result in an “auction”, in which a tender offered by one supplier or contractor is used to apply pressure on another supplier or contractor to offer a lower price or an otherwise more favourable tender. Many suppliers and contractors refrain from participating in tendering proceedings where such techniques are used or, if they do participate, they raise their tender prices in anticipation of the negotiations. The prohibition of negotiations does not intend to cover discussions that may take place between the procuring entity and a supplier or contractor for the purpose of clarifying its tender

⁴ Note to the Working Group: the evolution of procurement practices since 1994 that justified the replacement of the term the “lowest evaluated tender” used in this context in the 1994 Model Law with the term the “most advantageous tender” will be included in the Chapter on the updates to the 1994 Model Law.

in accordance with article 43(1) of the Model Law [\[**hyperlink**\]](#), or for concluding the procurement contract.

(A/CN.9/WG.I/WP.79/Add.9) (Original: English)**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany Chapter IV of the UNCITRAL Model Law on Public Procurement, comprising an introduction and commentary on restricted tendering and request-for-quotations (articles 44 and 45), and on related articles in Chapter II (articles 29 and 34).

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT****Part II. Article-by-article commentary****Chapter IV. Procedures for Restricted Tendering,
Request-for-Quotations and Request-for-Proposals without
negotiation [**hyperlinks**]****A. Introduction to Chapter IV methods****Executive Summary**

1. Chapter IV of the Model Law sets out the procedures for three of the various procurement methods that are alternatives to open tendering: restricted tendering [**hyperlink**], request-for-quotations [**hyperlink**] and request-for-proposals without negotiation [**hyperlink**]. The typical use of these methods is in situations in which the procuring entity's needs can be determined and described in accordance with the requirements of article 10 at the outset, and in which there is no requirement for discussions, dialogue or negotiations between the procuring entity and suppliers or contractors; in other respects, these methods address a wide range of circumstances. These circumstances, which form the basis upon which the use of these methods rather than open tendering is justified (in accordance with articles 28 and 29), can be summarized into three broad categories, according to the situations in which they can be used. The first is for the procurement in a limited market of specialized or complex products or services; and the second is for the procurement of products or services that may be of low-value, already available in the market and/or available in a market with numerous suppliers; and the third is for the procurement of products and services for which technical and quality considerations are particularly important. In addition, the conditions for use of the procurement methods under Chapter IV are very closely linked with the rules on solicitation for each method. These rules and categories are explained further in the following sections.

Enactment: policy considerations

2. A common feature of Chapter IV procurement methods is that they can involve direct solicitation, either as a necessary feature of the method itself (restricted tendering and request-for-quotations) or as an option (request-for-proposals without negotiation). The default rule under the Model Law is for public and unrestricted solicitation, as is explained in section ** of the guidance to Part II of Chapter II [\[**hyperlink**\]](#). Such solicitation involves an advertisement to invite participation in the procurement, the issue of the solicitation documents to all those that respond to the advertisement, and the full consideration of the qualifications and submissions of suppliers and contractors that submit tenders or other offers.

3. Direct solicitation in Chapter IV procurement methods involves risks of abuse in that the identification of the market and hence of the suppliers and contractors to be invited to participate involves assessments that are essentially subjective. It is also at risk of abuse to favour one or more suppliers, or to restrict competition. To mitigate these risks and to introduce transparency, articles 34(5) and 35(4) [\[**hyperlinks**\]](#) require an advance notice of the procurement to be published both domestically and internationally as per the requirements for an invitation to tender, so that potential suppliers and contractors can contact the procuring entity and request to participate in the procurement.

4. Direct solicitation in restricted tendering and request-for-proposals without negotiation is available in two situations. The first is where the subject-matter comprises specialized or complex products or services and is available in a limited market (the first category described above). Direct solicitation requires an advance notice as described above, and that the solicitation be addressed to all suppliers and contractors from which the subject-matter is available. The implications of these requirements for the effective use of these procurement methods using direct solicitation, are discussed in the following section [\[**hyperlink**\]](#).

5. Direct solicitation is also available in restricted tendering and request-for-proposals without negotiation where the time and cost of examining and evaluating a large number of tenders would be disproportionate to the value of the procurement (the second category described above). In other words, the situation is that the market includes so many participants that are likely to be qualified that a cost-effective procedure cannot be guaranteed. The solicitation rules therefore allow the number of participants to be capped by the procuring entity, subject to safeguards to address the risks in identifying the appropriate number of invited participants and in the manner in which the suppliers to be invited to participate are chosen.

6. The first safeguard is the requirement for an advance notice of the procurement under articles 34(5) and 35(4) [\[**hyperlinks**\]](#), as described in paragraph ** above. The second is that the procuring entity must solicit tenders or proposals from a sufficient number of suppliers to ensure effective competition and must select the participating suppliers in a non-discriminatory manner (see articles 34(1)(b) and 35(2)(b) [\[**hyperlinks**\]](#)). How to ensure objectivity and avoid discrimination in such solicitation is discussed in the following section [\[**hyperlink**\]](#).

7. It should be noted that requiring the procuring entity to follow pre-qualification procedures in such cases would add administrative steps, but would not address the central issue, which is that the number of potentially qualified suppliers is excessive. The requirement under articles 34(1)(b) and 35(2)(b) [\[**hyperlinks**\]](#) is to find a way of selecting from among the large numbers of potentially qualified suppliers a sufficient number, without discrimination, to ensure effective competition. The requirement must also be read in the light of the requirement under article 28(2) [\[**hyperlink**\]](#) to maximize competition to the extent possible. Techniques for so doing are also discussed in the following Section [\[**hyperlink**\]](#).

8. Request-for-quotations procedures, which by their nature involve direct solicitation, do not include the above safeguards, as further discussed in the commentary to that procurement method in [\[**Section/paragraph ** below**\]](#). In particular, there is no requirement for an advance notice of the procurement or for publication of the terms of the procurement, and it is also likely that where a procurement falls below the low-value threshold for the use of this procurement method, it will also fall below the threshold for publication of a contract award notice under article 23 [\[**hyperlink**\]](#). As a result, the method is flexible but not transparent; this is the policy reason for restricting it so that it is an exceptional method, as the commentary to the method also explains.

9. The use of e-procurement means that many elements of the examination and evaluation of tenders can be automated, saving both time and costs, and reducing the administrative burden that underlies the justification for direct solicitation in Chapter IV procurement methods. In addition, the e-procurement and the tools it offers — such as electronic reverse auctions under Chapter VI, and framework agreements and e-catalogues under Chapter VII [\[**hyperlink**\]](#) — provide techniques that should diminish the need for the request-for-quotations method.

10. The issues arising from the third category of Chapter IV procurement methods — those in which technical and quality considerations are particularly important — include the solicitation questions discussed for the first category of chapter IV procurement methods described above. The use of the method to ensure that technical and quality considerations are appropriately treated is discussed in the commentary to request-for-proposals without negotiation below [\[**hyperlink**\]](#).

11. In the light of all the above considerations, enacting States may wish to consider whether their local circumstances require all chapter IV procurement methods, as well as framework agreements and electronic reverse auctions. Where all these methods are provided for, enacting States may wish to regulate their use in more detail than the Model Law provides, to ensure that the methods are not used where more transparent and objective procedures could be used in the alternative. The issues that might inform regulations, rules or guidance to such end are discussed in the following section.

Issues of implementation and use

12. It will be evident that assessing whether the conditions for use of the procurement methods in Chapter IV applies involves significant discretion on the part of the procuring entity. As the above discussion of the policy issues regarding

the procurement methods in Chapter IV indicates, the main issues to be addressed in ensuring effective implementation and use of these methods are:

(a) To emphasize the requirement for the publication of an advance notice of the procurement where direct solicitation is used, other than in request-for-quotations, as a transparency safeguard;

(b) To ensure that, where direct solicitation is used for highly complex or specialized procurement in a limited market, the market in which the items or services are available is correctly defined;

(c) To ensure that, where direct solicitation is used because of the likely excessive numbers of qualified suppliers (see paragraph ** above), that the identification of the number of participants to be invited and the participants to be invited is carried out objectively; and

(d) To discuss ways of reducing the administrative burden of public and unrestricted solicitation, without compromising objectivity, transparency and competition.

13. As regards advance notices, it should be noted that the notices in effect test the procuring entity's view of the extent of the market. They therefore are a way of mitigating the risk of abuse in market definition or identification of appropriate participants. The requirement for such notices is essential in the fight against corruption and as a means to achieve transparency. Together with the provisions of chapter VIII [\[**hyperlinks**\]](#), advance notices enable and encourage aggrieved suppliers or contractors to seek redress earlier in the procurement process rather than at a later stage where redress may not be possible or will be costly to the public and available remedies will thus be limited.

14. It is important to note that there is no threshold below which the requirement for advance notices is relaxed. This safeguard is particularly important given that the estimated value of the types of procurement described above may well fall below the threshold for publication of a contract award notice under article 23. The advance notices provide an oversight mechanism for the exercise of the procuring entity's discretion in assessing the markets and participants for the procurement concerned, and the enacting State may wish to ensure that the oversight of such procurements includes the monitoring of responses to such notices.

15. As regards the question of market definition, the importance of a consistent approach and the safeguard that the procuring entity must invite all potential suppliers or contractors to participate should be emphasized in rules for and guidance to procurement officials. As market definition is also a feature of competition law and policy, the suggested interaction between the competition law body and the public procurement agency or similar body described in section ** of the general commentary above [\[**hyperlink**\]](#) may allow the experience of the former body in the provision of rules and guidance to assist procuring entities and ensure objectivity in this regard.

16. Procuring entities should also be encouraged to bear in mind the risks of failing to identify all potential suppliers and contractors in limited markets. They include a challenge under Chapter VIII of the Model Law from a supplier or contractor that considers he is able to supply the subject-matter of the procurement but has not been invited to participate. If previously unknown suppliers respond to

the advance notice, they must be permitted to submit a tender or proposals unless they are disqualified or otherwise do not comply with the terms of the notice (for example, overseas suppliers where the procurement is purely domestic under article 8 of the Law). Where the extent of the market is not fully known or understood, therefore, a risk that rises where there may be overseas suppliers, public and unrestricted solicitation or open tendering with pre-qualification may be appropriate alternatives. An alternative approach would be to allow the use of pre-selection procedures as provided for in request-for-proposals with dialogue, under article 49920 [\[**hyperlink**\]](#). The latter approaches, in particular, means that only qualified participants or only the best qualified suppliers are able to present tenders or proposals. The procuring entity may be required to examine pre-qualification or pre-selection applications, but need not examine and evaluate tenders or proposals from unqualified suppliers, reducing the overall administrative burden.

17. In addition, the link between the requirement to invite all potential suppliers and contractors and the provisions of articles 14 and 15 of the Model Law should be highlighted: they raise the risks of an additional administrative burden and delays in the procurement should an additional supplier emerge. These articles require a submission deadline that provides sufficient time for suppliers or contractors to present their submissions, and permit the extension of the submission deadline if required. Although the provisions do not expressly require the extension of the submission deadline where new suppliers emerge, such a requirement can be inferred from the requirement for sufficient time to present submissions, and the public procurement agency or other body issuing regulations or rules and other guidance may wish to include such an express requirement. A practical way to minimize the risk of late requests to participate is to include, in the advance notice, a statement requesting potential participants to identify themselves to the procuring entity before the date upon which the solicitation documents will be issued.

18. As regards direct solicitation used to avoid the disproportionate costs of examining a large number of tenders or proposals as against the value of the procurement, both identifying the appropriate maximum and the manner of selection of the suppliers to be invited to participate will be key in avoiding misuse or overuse.

19. The procuring entity will have significant discretion in deciding the appropriate maximum by reference to the circumstances of the procurement concerned: the regulations, rules or guidance should also discuss a reasonable minimum. Here, they may also refer to the requirement under article 28(2) of the Model Law to seek to maximize competition to the extent possible when selecting and using any method of procurement [\[**hyperlink**\]](#). In request-for-quotations the minimum number of participants is three suppliers, but that method is available in a far narrower range of circumstances than other Chapter IV procurement methods. Many commentators consider that a minimum of five invited participants is a reasonable number to avoid collusion and the ability to direct the procurement towards a favour supplier in most circumstances.

20. Objectivity in identifying the suppliers or participants within the stated number can be achieved by various methods, such as first-come, first-served, the drawing of lots or other random choice in a commodity-type market. The goal should be to achieve maximum effective competition to the extent practicable. Here,

it should be noted that the manner in which the suppliers will be selected to participate may also be challenged under chapter VIII of the Model Law [\[**hyperlink**\]](#), but on the basis of a discriminatory selection rather than non-selection per se. Where repeated procedures are concerned, and the same limited group is repeatedly selected, though, it may be easier to show a lack of objectivity in the selection. In such cases, the procuring entity should be advised to take particular care to be demonstrably objective in its selection of the suppliers to be invited to participate (or may wish to consider the use of a tool such as a framework agreement, as noted above); rules and guidance should also emphasize that the desired goal of saving time and costs could be frustrated in the event of a challenge.

21. While the requirements for direct solicitation in request-for-quotations are less stringent, stipulating that as many suppliers and contractors as practicable, but at least three should be invited to participate, the requirement should also be read together with that in article 28(2) to seek to maximize competition to the extent possible [\[**hyperlink**\]](#). In addition, and as explained in the guidance to that procurement method below [\[**hyperlink**\]](#), the rules on estimation of the value of the procurement under article 12 [\[**hyperlink**\]](#) should be clarified to make it clear how a series of low-value procurements over a given period should be aggregated for the purposes of applicable thresholds.

22. As regards reducing the administrative burden of public and unrestricted solicitation, without compromising objectivity, transparency and competition, the Model Law contains several procurement methods and tools that can be procedurally efficient. For example, framework agreements are designed for repeated procurements, which may well be the situation in the types of relatively simple and low-value procurement that characterise the second category of Chapter IV procurement methods (request-for-quotations and some types of restricted tendering and request-for-proposals without negotiation). Framework agreements allow many mandatory procedural steps to be conducted once for what would otherwise be a series of procurements: these steps involve examination and evaluation of submissions, as further explained in the commentary to that procurement method [\[**hyperlink**\]](#). Electronic reverse auctions can involve administratively simpler procedures than tendering, as further explained in the commentary to that procurement method [\[**hyperlink**\]](#). In addition, e-procurement techniques and methods generally involve higher levels of transparency than traditional request-for-quotations, and as they require public and unrestricted solicitation as a general rule, higher levels of transparency in this aspect than the relevant restricted tendering and request for proposals methods.

B. Guidance on Chapter IV procurement methods

23. In order to assist the reader, the commentary to each of the Chapter IV procurement methods below includes a general description of each method and its main policy issues, and commentary on its conditions for use, its solicitation rules, and on the procedural articles for each such method. The procedures are set out in Chapter V itself, but as the conditions for use and solicitation rules are set out in Chapter II, the commentary also cross-refers to the issues raised by the relevant

provisions in Chapter II [\[**hyperlink**\]](#), expanding on that commentary where necessary.

1. Restricted tendering

General description and main policy issues

24. As noted in the introductory section to this Chapter [\[**hyperlink**\]](#), restricted tendering has been included in order to enable the procuring entity, in exceptional cases, to solicit participation only from a limited number of suppliers or contractors. Those exceptional cases are: the procurement of technically complex or specialized subject-matter that is available from only a limited number of suppliers (for example, equipment for nuclear power plants); or where the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement (for example, the supply of badges or pins intended to be traded at sporting events). As explained in the introductory section, a requirement for public and unrestricted solicitation in such cases would be inappropriate.

Article 29(1). Conditions for use of restricted tendering [\[hyperlink**\]](#)**

25. Article 29(1) sets out the conditions for use of restricted tendering. Although the use of restricted tendering is subject to transparency safeguards, in that an advance notice of the procurement is required under the provisions of article 34(5), and its procedures follow open tendering other than as regards solicitation, strict and narrow conditions for use have been included for restricted tendering, which have to be read together with the rules on solicitation in article 34(1). These conditions and rules are based on the notion that the use of restricted tendering other than in the limited situations set out would fundamentally impair the objectives of the Model Law.

26. Restricted tendering underground 1(a) is available only where all suppliers or contractors that can supply the subject-matter are invited to participate. Restricted tendering underground (1)(b) can be used only where the procuring entity solicits tenders from a sufficient number of suppliers to ensure effective competition, and chooses the selected participants in a non-discriminatory fashion. The risks to the efficiency and effectiveness of the procurement process if these rules are not respected, in terms of procedural delays, additional steps in the process and challenges under the Model Law are highlighted in the commentary in the introduction to Chapter IV procurement methods above [\[**hyperlink**\]](#).

27. The procuring entity runs fewer risks if recourse to restricted tendering has been justified on the ground referred to in paragraph (1)(b), that is the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement. As long as it has selected a sufficient number of suppliers or contractors in an objective manner to ensure effective competition, the procuring entity in such cases may decline to consider requests to tender coming from additional suppliers or contractors responding to the notice published in accordance with article 34(5).

28. The provisions of paragraph (1)(b) should also be read together with article 12 of the Model Law containing rules on estimation of the value of the procurement. That article contains essential safeguards against the artificial division of the

subject-matter of the procurement for the purpose, for example, of justifying the use of restricted tendering on the ground set out in paragraph (1)(b), i.e. that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement. The procuring entity should also be provided with guidance on aggregation rules where there are repeated procurements, as noted in paragraph ** of the introductory section ** above [\[**hyperlink**\]](#).

29. The procuring entity, under article 29(3) [\[**hyperlink**\]](#) read together with the provisions of article 25(1)(e) [\[**hyperlink**\]](#), is required to put on the record a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of restricted tendering instead of open tendering, in such detail as would allow the decision to be overseen or challenged where appropriate. However, the justification need not be included in the notice of the procurement (to avoid inaccurate summaries or excessively long notices). (See, also, the guidance to article 25 that explains how suppliers that may wish to challenge the choice of procurement method can have access to the justification in the record. [\[**hyperlink**\]](#).)

Article 34(1) and (5). Solicitation in restricted tendering [\[hyperlink**\]](#)**

30. Article 34(1) sets out minimum solicitation requirements in restricted tendering. They have been drafted in order to give effect to the purpose of article 29(1), i.e. limiting the use of restricted tendering to truly exceptional cases while maintaining the appropriate degree of competition. They are tailored specifically to each of the two exceptional cases reflected in the conditions for use: in the case of restricted tendering on the first ground (under article 29(1)(a) [\[**hyperlink**\]](#)), i.e. where the procurement is of technically complex or specialized subject-matter available from only a limited number of suppliers, all the suppliers or contractors that could provide that subject-matter must be invited to participate. In the case of restricted tendering on the second ground (under article 29(1)(a) [\[**hyperlink**\]](#)), i.e. that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement, suppliers or contractors should be invited in a non-discriminatory manner and in a sufficient number to ensure effective competition. The policy and implementation issues that should inform the guidance given to procuring entities in this regard is discussed in [\[**section/paragraphs**\]](#) of the introductory section to this Chapter above [\[**hyperlinks**\]](#).

31. The requirement for selection in a non-discriminatory manner also presupposes notification to the public in accordance with paragraph (5) of article 34 of not only the procuring entity's decision to use restricted tendering also of the maximum number of participants to be selected, and the manner of selection up to the maximum number notified — see, also, paragraphs ** of the introductory section to this Chapter above [\[**hyperlinks**\]](#).

Article 45. Restricted tendering [\[hyperlink**\]](#)**

32. Article 45 regulates the procedures for restricted tendering. The provisions are very short, in that they apply the provisions of Chapter III governing open tendering [\[**hyperlink**\]](#) to restricted tendering, save as regards solicitation as discussed in paragraphs ** above.

33. Paragraph (2) therefore excludes articles 36 to 38 [\[**hyperlinks**\]](#) from restricted tendering. Article 36 regulates procedures for soliciting tenders in open tendering and is therefore not applicable to restricted tendering. Article 37 [\[**hyperlink**\]](#) regulates the contents of an invitation to tender to be published in open tendering. In restricted tendering, it is not necessary to issue an invitation to tender; where one is issued, it need not include all information listed in article 37. As regards article 38 [\[**hyperlink**\]](#), the solicitation documents in restricted tendering will be provided to all suppliers that were directly invited and that expressed interest in tendering.

34. Some provisions of article 38 [\[**hyperlink**\]](#) will also not be applicable to restricted tendering. If the procuring entity decides to charge a price for the solicitation documents in restricted tendering, it should, despite the exclusion of article 38 from application to restricted tendering, be bound by the provision in its last sentence of (“the price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors”). This provision appears in other articles of the Model Law in similar context and may be considered as referring to good practice that is aimed at preventing the procuring entity from applying excessively high charges for the solicitation documents. The negative effect of such charges on participation in procurement of suppliers or contractors, in particular SMEs, and prices that suppliers or contractors participating in the procurement would eventually offer, should be carefully considered. Enacting States may wish to make express provision to such effect in the procurement regulations required under article 4 [\[**hyperlink**\]](#).

2. Request-for-quotations

General description and main policy issues

35. The request-for-quotations procedure provides a procurement method appropriate for low-value purchases of a standardized nature (commonly referred to as “off-the-shelf items”). In such cases, engaging in tendering proceedings, which can be costly and time-consuming, may not be justified. Article 29(2) limits the use of this method strictly to procurement of a value below the threshold set in the procurement regulations. As regards the considerations relevant to setting the threshold, see Section [**](#) of the commentary in the introduction to Chapter I [\[**hyperlink**\]](#).

36. In enacting article 29, it should be made clear that use of request-for-quotations is not mandatory for procurement below the threshold value. Article 28 containing the requirement to maximize competition and to have regard for the circumstances surrounding the procurement when choosing a procurement method, and the conditions for use of other procurement methods that might be appropriate, will guide the procuring entity in considering alternatives to request-for-quotations (for the relevant guidance to article 28, see paragraphs [**](#) of the commentary to Chapter II [\[**hyperlink**\]](#)).

37. In particular, the method is not intended to be used for repeated purchases, because of the risk of restricting the market and of abuse in so doing (such as through an abusive selection of participating suppliers or in justifying the need for repeated purchases by, for example, splitting procurement to avoid exceeding the threshold under article 12 (see, further, below [\[**hyperlink**\]](#))). For repeated

purchases, establishing an open framework agreement or, if more complex items are involved, concluding a closed framework agreement as a result of tendering proceedings, is a preferred alternative (see, further, the commentary to Chapter VII [\[**hyperlink**\]](#)). The use of electronic catalogues may assist in promoting transparency where the procedure is used on a periodic basis. For example, the procurement of spare parts for a fleet of vehicles may be for a single purchase that is unlikely to recur, in which case request-for-quotations may be appropriate; for regular purchases of such spare parts, a framework agreement would be more appropriate.

38. Where procurement of more complex items is involved, tendering with its greater transparency safeguards should be used, and restricted tendering on the ground set out in article 28(1)(b) may be appropriate in such cases. Where initial low-value procurement would have the long-term consequence of committing the procuring entity to a particular type of technological system or to repeat purchases of similar items, the use of other methods of procurement, perhaps in conjunction with framework agreements, is recommended. For procurement of commodities, simple services and similar items, an alternative approach may be to use an electronic reverse auction. (For the relevant guidance to article 28(1)(b) as applicable to restricted tendering, see paragraphs [**](#) of the commentary to Chapter II [\[**hyperlink**\]](#); for the relevant guidance to provisions on electronic reverse auctions, see paragraphs [**](#) of the commentary to Chapter VI [\[**hyperlink**\]](#); and for the relevant guidance to provisions on framework agreements, see paragraphs [**](#) of the commentary to Chapter VII [\[**hyperlink**\]](#).)

Article 29(2). Conditions for use of request-for-quotations [\[hyperlink**\]](#)**

39. Article 29(2) sets out the conditions for use of request-for-quotations, including the requirement for an upper threshold as set out above, and the requirement that the subject-matter of the procurement is not produced to the particular design of the procuring entity.

40. The provisions of paragraph (2) should be read together with article 12 of the Model Law containing rules on estimating the value of the procurement. That article gives added and important effect to the intended limited scope for the use of request-for-quotations. It does so by prohibiting the artificial division of the subject-matter of the procurement for the purpose of circumventing the value limit on the use of request-for-quotations with a view to avoiding use of the more competitive methods of procurement, a prohibition that is essential to the objectives of the Model Law.

Article 34(2) and (5). Solicitation in request-for-quotations [\[hyperlink**\]](#)**

41. Article 34(2) [\[**hyperlink**\]](#) regulates solicitation in request-for-quotations proceedings. The objectives of the Model Law of fostering and encouraging participation and competition are applicable to procurement regardless of its value. Thus, the procuring entity is bound to request quotations from as many suppliers or contractors as practicable, but from at least three, without exception. This minimum requirement is present in the light of the type of the subject-matter supposed to be procured by means of request-for-quotations — readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market (article 29(2)

[**hyperlink**]). For this type of procurement, it should always be possible to request quotations from at least three suppliers of contractors that are capable of providing the subject-matter of the procurement. The use of electronic procurement also allows the procuring entity to reach a broader audience and ensure that a sufficient number of quotations is sought.

42. Enacting States may wish to provide guidance to ensure that the selection of participants in request-for-quotations procedures is not carried out in a way so as to restrict market access or to allow abuse of the procedures, as there are no provisions in the Model Law that regulate the manner in which the participants are to be identified. Examples of abuse include the selection of two suppliers whose prices are known to be high, or two suppliers that are geographically remote, so as to direct the procurement towards a third, chosen supplier. The considerations raised as regards the manner of selection of participating suppliers in the context of the use of restricted tendering on the ground of article 29(1)(b) are relevant here (see the commentary in the introduction to Chapter IV above [**hyperlink**]). In addition, procedures that require the comparison of historical offers and to ensure rotation among suppliers, where the same items may be procured occasionally, are useful. Oversight procedures should identify the winning suppliers under this method, so that repeat awards can be evaluated.

43. Although request-for-quotations is available in a far narrower range of circumstances than other second-category Chapter IV procurement methods (the conditions being designed to ensure that the scope for use and consequently misuse of the method is limited), enacting States may alternatively consider a cautious approach and set out in regulations, rules or guidance the same requirements for objectivity and ensuring effective competition as for those other methods. So doing may to some extent reduce the flexibility in the method, but should make oversight of transparency, competition, and fair and equitable treatment that underpin the Model Law easier to monitor and will enhance consistency. Where this approach is combined with e-procurement, the additional administrative burden may be negligible.

44. Electronic methods of requesting quotations may generally be particularly cost-effective for low-value procurement and ensuring also more transparent selection. The use of electronic catalogues as a source of quotations may in particular be considered to offer better opportunity for transparency in the selection of suppliers from which to request quotations, in that such selection can be evaluated against those suppliers offering relevant items in catalogues (see, also, the guidance on framework agreements under chapter VII for the repeated procurement of low-cost items). Ensuring adequate transparency is a key issue, given that procurement under this method is not required to be preceded by a notice of the procurement (see, further, paragraph ... above) and may fall below the threshold for an individual public announcement of the contract award under article 23 [**hyperlink**].

45. The requirement to request quotations from at least three suppliers or contractors should not however be interpreted as invalidating the procurement where in response to request-for-quotations addressed to three or more suppliers only one or two quotations were received.

Article 46. Request-for-quotations [\[hyperlink**\]](#)**

46. Article 46 [\[**hyperlink**\]](#) sets out the procedures for request-for-quotations. In the light of the nature and low value of the subject-matter to be procured, only minimum procedural requirements are included, designed to provide for the fair and equitable treatment of suppliers or contractors participating in the procurement. Overseeing the use of the method, using electronic tools where possible to amortise the costs of so doing in low-value procurement, can introduce transparency and safeguards against abuse in practice.

47. With respect to the requirement in paragraph (1) that suppliers from which quotations are requested should be informed as to the charges to be included in the quotation, the procuring entity may wish to consider using recognized trade terms, in particular INCOTERMS, or other standard trade descriptions in common use — such as those in the information technology and communications markets — so that the off-the-shelf items for which the method is designed can be defined by reference to industry standards. So doing will both enhance transparency and reduce the administrative burden of submitting and reviewing quotations.

3. Request-for-proposals without negotiationGeneral description and main policy issues

48. Request-for-proposals without negotiation is a procurement method that may be used where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of their quality and technical aspects. When using this method, as a request-for-proposals procurement method, the procuring entity will express its needs in a functional or output-based manner which, while it may include technical specifications, is not based on a single technical solution.

49. This approach is appropriate where the procuring entity does not wish to be influenced by the financial aspects of proposals when it examines and evaluates their quality and technical aspects. These circumstances may arise, for example, where the procuring entity wishes to consider whether a particular technical solution will work, or to assess the quality of key personnel. The method is therefore suitable for procurement of items or services of a relatively standard nature, where all aspects of the proposals can be evaluated without resort to discussions, dialogue or negotiations with suppliers.

50. In this regard, it is important to delineate clearly the scope of “quality and technical” aspects of the proposals from their “financial aspects”. The term “financial aspects” in this context includes all the commercial aspects of the proposals that cannot be set out in the terms of reference as well as the final price. In particular, the financial capabilities of the suppliers or contractors, which will be assessed as part of the examination of their proposals and qualifications, are part of the “quality and technical” aspects. In other cases, however, the distinction may vary from case-to-case. For example, insurance or guarantee requirements, and delivery times and warranty terms may determine whether or not a proposal meets the minimum requirements of the procuring entity, in which case these aspects of the proposal are part of the “quality and technical” aspects. In other cases, they will be expressed as part of the commercial terms of the contract, in which case they fall

within “financial” aspects. The regulations, or rules or other guidance to be issued by the public procurement agency or similar body should be sufficiently articulate to assist procuring entities to ensure that they are sufficiently clear and transparent in their requirements; otherwise, the quality of proposals will be impaired, and there may be delays in the procurement process while uncertainties are resolved, using the mechanisms provided in articles 15 and 16 [\[**hyperlinks**\]](#).

51. The procurement method covered by the paragraph is therefore not appropriate in procurement where price is the only award criterion or one of the main award criteria, or where a complete evaluation would not be possible without evaluating price and non-price criteria together. In such circumstances, a tendering procurement method that focuses on the price, and which does not provide for a sequential examination and evaluation of quality and technical aspects and of financial aspects, would be appropriate. The procuring entity may find that a tendering-based procurement method is also more appropriate where it has many technical requirements. The method is also not appropriate where there is a need to negotiate on any aspects of proposals (be they quality, technical or financial) since the method, like tendering, does not allow for dialogue or negotiations (for the types of procurement in which dialogue or negotiations may be appropriate and necessary, see the commentary to procurement methods under Chapter V [\[**hyperlink**\]](#)).

52. In practical terms, the technical and quality proposals will be submitted in one envelope (or its electronic equivalent), and they will require manual evaluation by suitably qualified individuals. For those proposals that respond to the terms of reference, a second envelope (or electronic equivalent) containing the financial aspects of the proposal concerned is opened. The financial aspects may be susceptible to automated evaluation.

53. Under the Model Law, request-for-proposals without negotiation is available, subject to its conditions for use, for all types of procurement, in conformity with UNCITRAL’s decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 28(2) of the Model Law; for the relevant guidance, see paragraphs [**](#) of the commentary in the introduction to Chapter II [\[**hyperlink**\]](#)). Enacting States should be aware nevertheless that some multilateral development banks recommend, where procurement methods sharing the features of request-for-proposals without negotiation as provided for in the revised Model Law are to be used, that they be used for the procurement of well-defined services that are neither complex nor costly, including consultancy services such as the development of curricula. Such services are usually outsourced because procuring entities generally lack the internal capacity to undertake this type of work. Some multilateral development banks may not authorize the use of this method in other circumstances, at least as regards projects financed by them.

Article 29(3). Conditions for use of request-for-proposals without negotiation
[\[**hyperlink**\]](#)

54. Article 29(3) provides for the conditions for use of request-for-proposals without negotiation. By stating that the method is available where the procuring entity “needs to” consider the financial aspects of proposals separately from its examination and evaluation of their quality and technical aspects, they are intended

to require an objective and demonstrable need for this approach. As the procedures indicate, the method involves a sequential examination and evaluation procedure, in which the quality and technical aspects are considered first. Only if the technical proposal fully responds to the terms of reference in the request for proposals will the procuring entity continue to consider the price and financial aspects of the proposal concerned. For a discussion of the delineation between quality, technical and financial aspects of proposals, see paragraphs ** above.

Article 35. Solicitation in request-for-proposals procurement methods, and its particular application to request-for-proposals without negotiation
[hyperlink**]**

55. Article 35 regulates solicitation in request-for-proposals procurement methods. The default rule under the Model Law is for public and unrestricted solicitation in these methods, as that term is explained in section ** of the guidance to Part II of Chapter II [**hyperlink**]. Public and unrestricted solicitation involves an advertisement to invite participation in the procurement, the issue of the solicitation documents to all those that respond to the advertisement, and the full consideration of the qualifications and submissions of suppliers and contractors that submit tenders or other offers.

56. In request-for-proposals proceedings, an exception set out in article 35(1)(a) allows the above default rule to be relaxed and direct solicitation to be used where the subject-matter of the procurement is available from a limited number of suppliers or contractors, a situation that may arise in the circumstances in which request-for-proposals without negotiations is available. The relaxation of the default rule is also contingent upon soliciting proposals from all such suppliers and contractors (see article 35(2)(a) [**hyperlink**], and upon a prior public advance notice of the procurement under article 35(3) [**hyperlink**]. For a discussion of these requirements and their consequences, notably arising from the risk of unknown suppliers emerging as a result of the advance notice, see the commentary on solicitation in the introduction to Chapter IV [**hyperlink**]).¹

57. Where request for proposals without negotiation are preceded by pre-qualification proceedings, solicitation is subject to separate regulation under article 18 [**hyperlink**], the provisions of which also require international solicitation in the same manner as is required in article 33 [**hyperlink**]. Further guidance is set out in the commentary to the guidance to those articles [**hyperlinks**]. After the pre-qualification proceedings have been completed, the request for proposals must be provided to all pre-qualified suppliers.

58. The exceptions to the default rule requiring international solicitation, other than where the procurement process follows pre-qualification proceedings under article 18 [**hyperlink**], are contained in article 35(1)(b) and (c). Paragraph (1)(c) mirrors the exceptions for open tendering in article 33(4): that is, for domestic and low-value procurement. The commentary to Part II of Chapter II [**hyperlink**] discusses the policy issues arising in allowing for these latter exceptions; they are

¹ The implication is that the procuring entity is not authorized to reject any unsolicited proposals. Does the Working Group consider a discussion of the manner in which the procuring entity should consider any such proposals is required?

grounded in permitting a relaxation of international advertisement where its benefits will be outweighed by its costs, or where it is simply irrelevant.

59. A further exception set out in paragraph (1)(b) in effect offers a choice between open and direct solicitation. Recognizing that in certain instances, the requirement of open solicitation might be inappropriate or might defeat the objectives of cost-efficiency, paragraph (2) of this article then sets out the cases where the procuring entity may engage in direct solicitation. They are two-fold: where the subject-matter of the procurement, by reason of its highly complex or specialized nature, is available from a limited number of suppliers or contractors (article 35(2)(a) [\[**hyperlink**\]](#) or where the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the procurement (under article 35(2)(b) [\[**hyperlink**\]](#)). The considerations that arise in both allowing for and using direct solicitation in these circumstances are discussed in paragraphs [**](#) of the commentary in the introduction to Chapter IV [\[**hyperlink**\]](#).

60. Article 35(2)(c) sets out a distinct third ground that may justify the use of direct solicitation in request-for-proposals proceedings — procurement involving classified information. In such cases, the procuring entity must again solicit proposals from a sufficient number of suppliers or contractors to ensure effective competition.

61. Articles 35(3) and (4) are included to provide for transparency and accountability when direct solicitation is used. Paragraph (3) requires the procuring entity including in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings. Paragraph (4) requires the procuring entity, where it engages in direct solicitation publish an advance notice of the procurement (under article 33(5) [\[**hyperlink**\]](#)) (unless classified information would thereby be compromised). The commentary to part II of Chapter II [\[**hyperlink**\]](#) discusses the reasons for, contents and form of such notices.

Article 47. Request for proposals without negotiation [\[hyperlink**\]](#)**

62. Article 47 regulates the procedures for procurement using request for proposals without negotiations. Paragraph (1), by cross-referring to article 35 of the Model Law, reiterates the default rule public and unrestricted international solicitation. The exceptions to that rule are set out in the preceding section.

63. The invitation to participate in the request for proposals without negotiation proceedings must include the minimum information listed in paragraph (2). Providing that minimum information is designed to assist suppliers or contractors in determining whether they are interested and eligible to participate and, if so, how they can participate. The relevant requirements are similar to those applicable to an invitation to tender (article 37 [\[**hyperlink**\]](#)). They contain the required minimum and do not preclude the procuring entity from including additional information that it considers appropriate. The procuring entity should take into account that it is usual practice to keep the invitation brief and include in it the most essential information about procurement, which is most pertinent to the initial stage of the procurement proceedings. All other information about the procurement, including further details of the information contained in the invitation, is included in

the request for proposals (see article 47(4)). This approach helps to avoid repetition, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or contractors. Nonetheless, where the procuring entity uses electronic means of advertisement and communication, it is possible to include in the invitation a web link to the terms of the request for proposals itself: this approach is proving beneficial in terms of both efficiency and transparency.

64. Sub-paragraph (2)(e) refers to the minimum requirements with respect to technical and quality characteristics that proposals must meet in order to be considered responsive. This provision covers both the threshold that is to be established for rejecting proposals and assigning scores to proposals that meet or exceed the proposals. Ensuring an accurate statement of minimum requirements and the evaluation criteria (which must also be disclosed by virtue of this paragraph) will be key to facilitating the submission of quality proposals.

65. Paragraph (3) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given procurement, such suppliers may comprise the entire group of suppliers or contractors that respond to the invitation in accordance with the procedures and requirements specified in it; if pre-qualification has taken place, only to those that were pre-qualified; or in the case of direct solicitation, only to those that are directly invited. The provisions contain a standard clause, found also in other provisions of the Model Law in similar context, that the price that may be charged for the request for proposals may reflect only the cost of providing the request for proposals to suppliers or contractors. (See the guidance to article [...] for a further discussion of this limitation.)

66. Paragraph (4) contains a list of the minimum information that should be included in request for proposals in order to assist the suppliers or contractors in preparing their proposals and to enable the procuring entity to compare the proposals on an equal basis. The list is again largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 39) [[**hyperlink**](#)]. The differences reflect the procedural specifics of this procurement method, and are aimed at ensuring that the financial aspects of proposals are presented, although simultaneously, separately from quality and technical aspects of the proposals. As explained above, the procuring entity will not have access to the financial aspects of proposals until after it has evaluated their technical and quality aspects. The procuring entity may omit information about currency of payment referred to in sub-paragraph (4)(c) in domestic procurement, if it would be unnecessary in the circumstances.

67. Paragraphs (5) to (10) of the article regulate the sequential examination and evaluation procedure in this procurement method. They ensure that the procuring entity will not be influenced by the financial aspects of proposals when it evaluates quality and technical aspects of proposals and assigns scores to suppliers or contractors as a result of that evaluation. A number of provisions in those paragraphs are aimed at ensuring transparency and integrity in the process. Paragraphs (6) to (8), for example, contain requirements that the results of the evaluation of technical and quality aspects of the proposals are to be promptly reflected in the record of procurement proceedings and communicated to all suppliers or contractors that presented proposals. Special rules are designed for suppliers and contractors whose quality and technical aspects of proposals were

rejected: they are to receive promptly not only information about the fact of rejection but also the reasons therefor, and the unopened envelopes containing financial aspects of their proposals are returned to them. These provisions are essential for the timely debriefing of, and effective challenge, by aggrieved suppliers. (For a fuller discussion of the benefits and procedures for debriefing, see [\[**section ** of the general commentary and section ** of the introduction to Chapter VIII\] \[**hyperlinks**\]](#).)

68. Paragraphs (8) and (9) allow the presence at the opening of the second envelopes (those containing the financial aspects of proposals) of suppliers or contractors whose proposals as regards quality and technical aspects of proposals met or exceeded the minimum requirements. They can thus verify the accuracy of the information announced by the procuring entity at the opening of second envelopes that is relevant to them, such as on the scores assigned and the financial aspects of their proposals, and can observe whether the successful proposal is identified in accordance with the criteria and the procedure set out in the request for proposals.

69. The Model Law regulates complex scenarios involving the separate evaluation of all aspects of proposals and combining the results of those evaluations in order to determine the successful proposal. Paragraph (10) therefore defines the successful proposal in this procurement method as the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price. Enacting States should be aware however that in the procurement of simpler subject-matter, the procuring entity may select the successful proposal on the basis of the price of the proposals that meet or exceed the minimum technical and quality requirements, provided that the statement of the evaluation criteria in the invitation and request for proposals have so provided. This approach may be appropriate in situations where the procuring entity does not need to evaluate quality and technical aspects of proposals and assign any scores but rather establishes a threshold by which to measure quality and technical aspects of proposals at such a high level that all the suppliers or contractors whose proposals attain a rating at or above the threshold can in all probability perform the procurement contract at a more or less equivalent level of competence. There should also be no need in such cases to evaluate any financial aspects of proposals other than price.

(A/CN.9/WG.I/WP.79/Add.10) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for the Guide text to accompany Chapter V of the UNCITRAL Model Law on Public Procurement, comprising an introduction and commentary on two-stage tendering (article 48), and on related articles in Chapter II (articles 30 and 33).

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

Part II. Article-by-article commentary

**Chapter V: Procedures for two-stage tendering,
request-for-proposals with dialogue, request-for-proposals
with consecutive negotiations, competitive negotiations
and single-source procurement**

A. Introduction

Executive Summary

1. Chapter V of the Model Law sets out the procedures for five of the various procurement methods that are alternatives to open tendering: two-stage tendering [\[**hyperlink**\]](#), request-for-proposals with dialogue [\[**hyperlink**\]](#), request-for-proposals with consecutive negotiations [\[**hyperlink**\]](#), competitive negotiations [\[**hyperlink**\]](#) and single-source procurement [\[**hyperlink**\]](#). There is no one typical use of these methods, though they have a common feature in that discussions, dialogue or negotiations between the procuring entity and suppliers or contractors is envisaged.

2. In the case of two-stage tendering and request-for-proposals with dialogue, the main circumstances indicating the use of either method are that, first, it is not feasible for the procuring entity to determine and describe its needs with the precision and detail required by article 10 of the Model Law, and, secondly, the procuring entity assesses that interaction with suppliers or contractors is necessary (a) to refine its statement of needs and present them in a common description (two-stage tendering) or (b) to define its statement of needs and invite proposals to meet them (request-for-proposals with dialogue). These methods are also both available where tendering has failed; request-for-proposals is also available in other circumstances, as the commentary to that procurement method notes.

3. In the case of request-for-proposals with consecutive negotiations, the circumstances indicating the use of the method are that the procuring entity needs to consider and negotiate the financial aspects of proposals only after assessing their technical and quality aspects; the negotiations take place only with suppliers or contractors submitting responsive proposals.
4. Competitive negotiations and single-source procurement are highly exceptional procurement methods, available in limited circumstances that are quite different from the above Chapter V procurement methods. Competitive negotiations and single-source procurement should not therefore be considered as alternatives to the other methods described above. They are included in Chapter V essentially because they involve interaction between the procuring entity and suppliers or contractors. The circumstances indicating the use of these methods are varied: the main uses are for urgent or extremely urgent procurement, where there is an exclusive supplier or need for consistency with previous purchases, and in order to accommodate procurement involving classified information or special security needs. Negotiations take place with all participants (competitive negotiations, on a concurrent basis) or with the only participant (single-source procurement).
5. The interaction between the procuring entity and suppliers or contractors in two-stage tendering (called discussions) and request-for-proposals with dialogue (called dialogue) do not involve the type of bargaining that characterises negotiations in request-for-proposals with consecutive negotiations, competitive negotiations, and single-source procurement.

Enactment: policy considerations

6. As the circumstances in which the Chapter V procurement methods can be used vary widely, the majority of the policy issues arising in each method are discussed in the commentary to each such method itself. However, there are some issues of general application that can be identified.
7. The first main policy consideration is that enacting States should provide for a method of procurement that allows the procuring entity to interact with potential suppliers or contractors or the commercial market where it is not feasible for it to provide a description of its needs and the terms and conditions of the procurement as required by article 10 [\[**hyperlink**\]](#) and the requirements for disclosure in the solicitation documents (such as in article 39 on open tendering [\[**hyperlink**\]](#)). One way of identifying what is available in the market is for the procuring entity to engage a participant in the market concerned or other consultant to draft the above items, in a procedure separate from the procurement at issue (which may then be open tendering, generally with pre-qualification). There are several risks to this approach, which may compromise value for money and efficiency. First, there may be additional administrative time and cost arising from conducting two procedures rather than one. Secondly, the fact that this interaction is limited to one supplier or consultant raises the risk of failing to identify the latest market possibilities. Thirdly, the rules on unfair competitive advantage under article 21 [\[**hyperlink**\]](#) prevent the consultant from participating in the subsequent procurement: suppliers may be unwilling to participate in the consultancy because of those rules, and from the procuring entity's perspective, one supplier cannot be engaged both in the

design and the ultimate delivery. Consequently, an alternative to this approach is appropriate.

8. Two-stage tendering, as the commentary to that article below [\[**hyperlink**\]](#) discusses, allows the technical and quality aspects (but not the financial aspects) of the procuring entity's needs to be discussed between the procuring entity and potential suppliers within the framework of a transparent and structured process, which results in a single, common description of the needs, the technical requirements and specifications and other terms and conditions to be issued after the discussions; suppliers and contractors then submit tenders against the description. In this regard, the procuring entity will be responsible for producing that description and will examine and evaluate tenders against it. The successful use of the method presupposes that the participants will in fact disclose their proposed technical solutions and that the procuring entity is able to amalgamate them to finalize the description of its needs and other terms and conditions.

9. Request-for-proposals with dialogue is procedurally similar to two-stage tendering as the commentary below [\[**hyperlink**\]](#) indicates, but with several distinguishing features. The method allows the technical, quality and financial aspects of the procuring entity's needs to be discussed between the procuring entity and potential suppliers, again within the framework of a transparent and structured process. The process results in a request for best and final offers (BAFOs) to meet the procuring entity's needs, but there is no single, common set of technical specifications beyond stated minimum technical requirements. The BAFOs can present a variety of technical solutions to those needs; in this sense, the suppliers and contractors are responsible for designing the technical solutions. The procuring entity examines those solutions to ascertain whether they meet its needs; evaluating them on a competitive but equal basis is a more complex procedure than in two-stage tendering.

10. Given the need to provide for a mechanism to allow the procuring entity to seek input from the market on the way of responding to its needs, enacting States are encouraged to provide for at least one of two-stage tendering or request-for-proposals. Circumstances for which two-stage tendering has proved to be appropriate include the procurement of technically complex items, the supply and installation of plant, building roads and the procurement of specialist vehicles (further examples are set out below [\[**hyperlink**\]](#)). In these examples, formulating detailed specifications from the outset of the procurement may be possible but, after discussions with suppliers, the procuring entity may refine some technical aspects of the subject matter reflecting the information supplied (such as on more sophisticated materials or methods available in the market). The method requires the capacity to explain the procuring entity's needs and assess the resulting input from suppliers, and structures to avoid the abusive selection of the technical solution from a favoured supplier as the preferred one.

11. Circumstances for which request-for-proposals with dialogue has proved productive include infrastructure projects (for example the provision of accommodation with different technical construction methods and scope, and different commercial issues), and some high-technology procurement where the market is developing rapidly. The method requires the capacity to engage in the type of dialogue envisaged, notably as regards the presentation and explanation of needs, the examination and evaluation of different technical solutions, and structures to

avoid the possibility of abuse in favouring certain suppliers by providing different information to each of them during the dialogue. Enacting States should be aware that some multilateral development banks may have a general difficulty with authorizing the use of this method in projects financed by them.

12. A second major policy consideration, reflecting the inherent lack of transparency in negotiated procurement, is to provide a structure and procedural safeguards for the use of procurement methods involving negotiations. (Negotiations in this sense involve bargaining between the procuring entity and suppliers or contractors.) The first method concerned is request-for-proposals with consecutive negotiations. Circumstances in which this method has proved effective in practice include advisory services such as legal and financial, design, environmental studies, engineering works, and the provision of office space for government officials. The method requires the capacity to negotiate — in the sense of bargaining as set out above — with the private sector regarding the financial or commercial aspects of the proposals. Enacting States should be aware that some multilateral development banks may not authorize the use of this method other than for advisory services procurement in projects financed by them.

13. The common feature of the remaining procurement methods under Chapter V — the highly exceptional competitive negotiations and single-source procurement — is also that such negotiations are also envisaged. The circumstances in which these methods may be used are varied, and particular issues arising in their use, are set out in the commentary below [\[**hyperlink**\]](#). Enacting States should ensure that the safeguards set out in the procedures are not watered down, so as to avoid compromising the main objectives of the Model Law.

14. The methods of solicitation in Chapter V procurement methods do not raise new issues; enacting States are directed to the commentary to Chapter II, Part II [\[**hyperlink**\]](#) and to the introduction to Chapter IV [\[**hyperlink**\]](#), addressing the issues arising out of direct solicitation in particular.

Issues of implementation and use

15. It will be evident that assessing whether the conditions for use of the procurement methods in Chapter V applies involves significant discretion on the part of the procuring entity; regulations, rules or guidance can assist in enhancing objectivity in the assessment of the circumstances concerned, which will take place at the planning stage. The procurement system should therefore also require the procurement planning stage to be fully documented and recorded.

16. A second issue that arises in all these procurement methods is the capacity to engage in discussions, dialogue or negotiations — both to explain the procuring entity's needs in a way that can be fully and equally understood by all participants, and to assess the resulting tenders, proposals and BAFOs. An aspect of this capacity is that the procuring entity must have the facility to engage successfully in negotiations with the private sector such that its needs are properly met. Where there is no or limited in-house expertise in these matters, the regulations, or rules and guidance from the public procurement agency or other body should address external expert assistance that can be provided centrally or from other sources to assist the procuring entity.

17. These capacity outlined in the preceding section require more elucidation than a Model Law can provide. Enacting States should recognize that regulatory and procedural safeguards alone will not be sufficient. They must be supported by an appropriate institutional framework, measures of good governance, high standards of administration and highly-skilled procurement personnel. The experience of the multilateral development banks has indicated that putting in place the institutional frameworks and safeguards that are a prerequisite for the use of the Chapter V procurement methods have proved to be among the most difficult reforms to implement.¹

18. Enacting States should note the particular importance of the provisions of article 24 [\[**hyperlink**\]](#) on confidentiality in the context of all procurement methods under chapter V. The risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors (not limited to price) are an inherent feature of the chapter V procurement methods other than single-source procurement. Other risks include the provision of important information to favoured suppliers or to some but not all suppliers. Enacting States are encouraged to include oversight measures, including audit, to assess the use of the methods in practice, and to formulate guidance on appropriate managerial tools for the effective use of these procurement methods.² The importance of such safeguards should not be underestimated if the integrity of, and fairness and public confidence in, the procurement process is to be preserved, and the participation of suppliers or contractors in the ongoing and any future procurement proceedings involving interaction is to be ensured.

B. Guidance on Chapter V procurement methods

19. In order to assist the reader, the commentary to each of the Chapter V procurement methods below includes a general description of each method and its main policy issues, and commentary on its conditions for use, its solicitation rules, and on the procedural articles for each such method. The procedures are set out in Chapter V itself, but as the conditions for use and solicitation rules are set out in Chapter II, the commentary also cross-refers to the issues raised by the relevant provisions in Chapter II [\[**hyperlink**\]](#), expanding on that commentary where necessary.

Two-stage tendering

General description and main policy issues

20. The rationale behind the two-stage procedure used in this method of procurement is to combine two elements: first, to allow the procuring entity, through

¹ The Working Group should note that the advice of experts in consultations was that restricting this commentary to request-for-proposals with dialogue, in the manner in which the commentary was originally drafted, was unnecessarily restrictive. Accordingly, the commentary as drafted now applies to all Chapter V procurement methods. The Working Group may wish to consider the text from this perspective.

² Query whether to make a reference to the use of independent “probity officers” who can observe the conduct of the interaction. Human interaction as an opportunity for corruption is a key feature of UNCAC.

the examination of the technical aspects of tenders and optional discussions on them, to refine and finalize the terms and conditions of the procurement that the procuring entity may not have been able to formulate adequately — that is, in the level of detail required by article 10 of the Model Law [\[**hyperlink**\]](#) — at the outset of the procurement. The second is to ensure that the high degree of objectivity and competition provided by the procedures for open tendering proceedings under chapter III [\[**hyperlink**\]](#) will apply to the selection of the successful tender under two-stage tendering proceedings.

21. This procurement method is of long standing in various systems (including the previous version of the Model Law, and in procurement under the guidelines of the multilateral development banks). Examples of its successful use include procurement of high-technology items, such as large passenger aircraft, information or communication technology systems, technical equipment and infrastructure procurement, including large complex facilities or construction of a specialized nature. In such situations, it may be evident that obtaining best value for money is unlikely if the procuring entity draws up a complete description of the procurement setting out all the technical specifications, all quality and performance characteristics of the subject-matter, all relevant competencies of the suppliers or contractors, and all terms and conditions of the procurement at the outset and without examining what market suppliers can offer.

22. In the first stage, the procuring entity issues the solicitation documents with a full or partially-developed set of technical specifications and details of other characteristics, competencies and terms as above. Prospective suppliers and contractors are invited to submit initial tenders in response to the solicitation documents. Those initial tenders will propose technical solutions as to the exact capabilities and possible variations of what is available in the market, and may propose refinements to technical specifications or to the other characteristics, competencies or terms, or both.

23. The procuring entity may seek clarifications from and discuss the initial tenders with responsive suppliers under articles 16 and 48, respectively [\[**hyperlinks**\]](#), and uses the information obtained in this way to inform its decision on the final, single set of technical specifications and definitive scope of work.

24. At the second stage, suppliers or contractors present their final tenders (which then include price commitments) against the final single technical solution and the final and complete description of the procurement, which are issued as part of the request to present final tenders. Thus the procuring entity remains responsible for the design of the technical solution and determining the scope of work and setting the terms and conditions of the procurement throughout the procedure; the responsibility for the delivery of that design and fulfilment of the terms and conditions are subsequently borne by the supplier or contractor that is awarded the procurement contract. In this context, it should be noted that the initial statement of needs in the solicitation documents is likely to focus on the functional aspects of the items to be procured, so that the second stage allows for the technical aspects to be refined and included in the final request for tenders.

25. The procuring entity is not permitted to solicit price commitments from prospective suppliers or contractors for their respective proposed solutions at the

first stage of the procedure; suppliers and contractors do not make price commitments at that stage, and the procuring entity may not request such information from a bidder during the discussions.

26. The reference to holding “discussions” reflects the iterative nature of the process. In addition, the term distinguishes the nature of talks that may be held in this method — which may not include the tender price or other financial aspects of the procurement — from the bargaining that may take place in other procurement methods regulated by chapter V of the Model Law. Allowing bidders to assist in defining the technical specifications and scope of work (as well as the absence of seeking or obtaining price commitments from bidders at any stage of the proceedings) is a way in which this method differs from other methods available under chapter V. Nonetheless certain quality requirements may have a commercial impact, such as the acquisition or transfer of intellectual property rights: such aspects can properly form part of the terms and conditions of the procurement and be discussed with suppliers. For example, there may be a requirement in the solicitation documents for solutions to the use of intellectual property (for example, such rights could be licensed or acquired). If so, these requirements form part of the technical aspects of the procurement. Otherwise, the related costs for the use of the intellectual property concerned will be simply part of the tender price submitted at the second stage. Such discussions will allow the procuring entity to estimate what premium must be paid for a particular refinement and what benefits might be obtained for paying that premium, and thereby inform its decision on whether or not to include such a refinement in the amended statement of technical specifications and scope of work.

27. The flexibility and potential benefits described above are not risk-free. In particular, there is a risk that the procuring entity may tailor the final terms and conditions of the procurement to one particular supplier (regardless of whether discussions are held or not, though it should be acknowledged that this risk is also present in open tendering proceedings, particularly where informal market consultations precede the procurement). The transparency provisions applicable to all tendering proceedings should mitigate the risks of distorting the procurement to favour a particular supplier.

28. This method is a structured one. The rules of open tendering regulate the solicitation procedure and the selection of the successful tender in two-stage tendering (see articles 33 and 48 of the Model Law [\[**hyperlinks**\]](#), and the commentary in Part II of Chapter II, and in paragraphs [**](#) of that addressing open tendering under Chapter III [\[**hyperlinks**\]](#)).

Article 30(1). Conditions for use of two-stage tendering [\[hyperlink**\]](#)**

29. Article 30(1) provides for conditions for use of two-stage tendering. Subparagraph (a) deals with the procurement of technically sophisticated and complex items. The need for use of the procurement method in these circumstances may become clear at the procurement planning stage, as noted above [\[**hyperlink**\]](#). After its examination of the initial tenders, the procuring entity may hold discussions with suppliers and contractors whose proposed technical solutions met the minimum requirements set out by the procuring entity.

30. Subparagraph (2)(b) deals with a different situation — where open tendering was engaged in but it failed. (This condition also allows the use of request for proposals with dialogue, under subparagraph (2)(d).) In such situations, the procuring entity must analyse the reasons for the failure of open tendering. Where it concludes that its difficulties in formulating sufficiently precise terms and conditions of the procurement were the reasons for the failure, it may consider that a two-stage procedure in which suppliers are involved is the appropriate course. The reasons for the earlier failure should also guide the procuring entity in selecting between two-stage tendering under subparagraph (1)(b) and request for proposals with dialogue under subparagraph (2)(d): if formulating a single set of terms and conditions (including a single technical solution) for the procurement will be possible and appropriate, two-stage tendering will be the appropriate procurement method. The procuring entity will be able to engage with suppliers or contractors in order to be able to formulate those terms and conditions as necessary. (By contrast, the procuring entity may conclude that it is not possible or not appropriate to formulate a single technical solution, in which case request for proposals with dialogue may be the better course — see the guidance to that procurement method at [...].[**hyperlink**](#).)

Article 33. Solicitation in two-stage tendering [hyperlink**](#)**

31. Solicitation in two-stage tendering proceedings is regulated by the rules governing open tendering under article 33 [**hyperlink**](#), as article 48 [**hyperlink**](#) applies the provisions of Chapter III to two-stage tendering [**hyperlink**](#). (The application of Chapter III is subject to derogations under that article 48.) A key feature of open tendering — public and unrestricted solicitation of participation by suppliers or contractors — is therefore required in two-stage tendering.

32. This requirement involves public, unrestricted and international solicitation as the default rule, as that concept is further explained in the commentary to part II of Chapter II [**hyperlink**](#). There are no exceptions to the requirement for public and unrestricted solicitation (though where pre-qualification procedures precede open tendering, as is permitted by article 18 [**hyperlink**](#)), the solicitation is then addressed only to pre-qualified suppliers. In that case, pre-qualification procedures also require an open invitation to participate, so that the principle of open solicitation is preserved).

33. There are limited exceptions to the requirement for international solicitation under article 33(4), also as explained in the commentary to part II of Chapter II [**hyperlink**](#). These exceptions are permitted only to accommodate domestic and low-value procurement. In all other cases, therefore, the invitation to tender must be advertised both in the publication identified in the procurement regulations, and internationally in a publication that will ensure effective access by suppliers and contractors located overseas.

34. Further guidance on solicitation is set out in the commentary to part II of Chapter II [**hyperlink**](#).

Article 45. Two-stage tendering [\[hyperlink**\]](#)**

35. Article 48 regulates the procedures for two-stage tendering. Paragraph (1) serves as a reminder that the rules of open tendering apply to two-stage tendering, save where modification is required by the procedures particular to the latter method. Some of the open tendering rules will be applicable without modification, such as the procedures for soliciting tenders (article 36 [\[**hyperlink**\]](#)), the contents of invitation to tender (article 37 [\[**hyperlink**\]](#)) and the provision of the solicitation documents (article 38 [\[**hyperlink**\]](#)). Some other rules of chapter III will require modification in the light of the specific features of two-stage tendering described in paragraphs (2) to (4) of article 48. For example, the provisions of article 38 referring to price in the solicitation documents will not be relevant when initial tenders are solicited. The provisions of article 41 on the period of effectiveness of tenders and modification and withdrawal of tenders are to be read together with paragraph (4) (d) of article 48, which allows a supplier or contractor not wishing to present a final tender to withdraw from the proceedings without forfeiting any tender security (on the justification for the deviation from the applicable open tendering rules, see paragraph [** below \[**hyperlink**\]](#)).

36. Some provisions of chapter III, such as article 42 [\[**hyperlink**\]](#) on the opening of tenders and the provisions of article 43 [\[**hyperlink**\]](#) on the evaluation of tenders, will be applicable only to final tenders submitted in response to the revised set of terms and conditions for the procurement. The provisions on the presentation of tenders in article 40 [\[**hyperlink**\]](#) and on the examination of tenders in article 43 [\[**hyperlink**\]](#) will, on the other hand, be applicable to both initial and final tenders. The provisions of article 44, prohibiting negotiation with suppliers or contractors after tenders have been submitted, should be interpreted in the context of the interaction in two-stage tendering being discussions rather than negotiations as described above. The prohibition of negotiations per se applies throughout two-stage tendering proceedings (including to the period after final tenders have been submitted, should the procuring entity seek clarification of the submission under article 16, as also explained in the commentary to that article [\[**hyperlink**\]](#)).

37. Paragraph (2) contains specific rules for the solicitation of initial tenders. They modify the rules on solicitation of chapter III [\[**hyperlink**\]](#). At this stage, the procuring entity may solicit proposed solutions with respect to any terms and conditions of the procurement other than tender price. In the light of the conditions for use of this procurement method (see article 30(1) [\[**hyperlink**\]](#), as explained by the commentary in paragraphs [** above \[**hyperlink**\]](#)), it is expected that the procuring entity will solicit various solutions relating in the first place to the technical and quality requirements for the subject-matter of the procurement and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

38. The article does not provide for any specific rules on presentation and examination of initial tenders. The relevant provisions of chapter III [\[**hyperlink**\]](#) apply. In particular, the applicable provisions of article 43(3) [\[**hyperlink**\]](#) will regulate the instances in which initial tenders will be rejected: they are where the supplier or contractor that presented a tender is not qualified; where the tender presented is not responsive; where it includes a tender price; or where a supplier or contractor is excluded from the procurement proceedings on the

grounds specified in article 21 [\[**hyperlink**\]](#) (inducement, unfair competitive advantage or conflicts of interest). Other grounds for rejection specified in article 43(3) [\[**hyperlink**\]](#) are not applicable; they apply to situations when tender prices are examined, which is not the case at this first stage of two-stage tendering. All suppliers whose tenders are not rejected are entitled to participate further in the procurement proceedings.

39. Paragraph (3) provides for the possibility of holding discussions with suppliers or contractors whose tenders have not been rejected, concerning any aspect of their tenders. Discussions may involve any aspect of the procurement but price and are of a non-bargaining nature (on this point, see the guidance in paragraphs [** above \[**hyperlink**\]](#)). Discussions will not always be necessary: the procuring entity may be able to refine and finalize the terms and conditions of the procurement itself, on the basis of the initial tenders received. The provisions of paragraph (3) require that, when the procuring entity decides to engage in discussions, it must extend an equal opportunity to discuss to all suppliers or contractors concerned. An “equal opportunity” in this context means that the suppliers or contractors are treated as equally as the requirement to avoid disclosure of confidential information and the need to avoid collusion allow. The rules or guidance from the public procurement agency or other similar body should focus on this key aspect of the two-stage tendering process. In addition, the rules or guidance should highlight the need to record the details of the discussions in the record of the procurement required under article 25 [\[**hyperlink**\]](#).

40. Paragraph (4) regulates the procedural steps involved at the subsequent stages of the two-stage tendering to the extent that they are different from the rules of open tendering in chapter III of the Model Law. It also regulates issues arising from the preparation and issue of a final revised set of terms and conditions, such as the extent of permissible changes to the terms and conditions originally advertised.

41. Subparagraph (4)(a) imposes the obligation on the procuring entity to extend the invitation to present final tenders, following the issuance of a revised set of terms and conditions for the procurement, to all suppliers or contractors whose tenders were not rejected at the first stage. Final tenders are equivalent to the tenders submitted in open tendering: that is, they will be assessed for responsiveness to the solicitation and will include prices.

42. Subparagraph (4)(b) addresses the extent of permissible changes to the terms and conditions of the procurement originally announced. No changes to the subject-matter of the procurement itself are permitted, for the simple reason that such changes would alter those terms and conditions of the procurement that are considered to be so essential for the advertised procurement that their modification would have to lead to the new procurement. Paragraphs [** of the commentary to request-for-proposals with dialogue explains this policy consideration in more detail \[**hyperlink**\]](#).

43. However, changes (such as deletions, modifications or additions) are permitted to the technical and quality aspects of that subject-matter and to the criteria for examining and evaluating tenders, under certain conditions that aim at limiting the discretion of the procuring entity in this respect. In the light of the objective of the Model Law of providing for the fair and equitable treatment of all suppliers and contractors, changes to the technical and quality aspects made following the first

stage of the procedure may not change the description of the subject-matter of the procurement as originally announced. If a change in the description of the subject-matter is needed, new procurement proceedings must be held to allow new suppliers or contractors to participate (including suppliers or contractors whose initial tenders have been rejected or that would now become qualified). Article 15(3) [\[**hyperlink**\]](#) is relevant in this context: it requires the procuring entity to re-advertise the procurement if, as a result of clarifications and modifications of the solicitation documents, the information about procurement published when first soliciting participation of suppliers or contractors in the procurement proceedings has become materially inaccurate (for the guidance to article 15(3), see paragraphs [...] of the commentary to Chapter I [\[**hyperlink**\]](#)).

44. Subparagraph (4)(b)(i) addresses the extent of permissible changes to the description of the subject matter of the procurement. They refer primarily to technical and quality aspects of the subject matter of the procurement in the light of the main aim of the two-stage tendering — to enhance the precision of technical and quality specifications of the subject matter of the procurement, to narrow down the possible options to the one that would best meet the procuring entity's needs, and on that basis to finalize a single set of terms and conditions of the procurement. The types of changes that are envisaged include alterations in technical characteristics — such as the grade of building material components, wood or steel fixings, the quality of wood for flooring, the manner in which to mitigate acoustic problems in sports facilities. This type of refinement is sometimes termed “value engineering”.

45. Changes to the technical or quality aspects of the subject-matter of the procurement may imply changes to the examination and/or evaluation criteria. Subparagraph (b)(ii) therefore provides that those changes may be introduced to the examination and evaluation criteria that are necessary as a result of changes made to the technical or quality aspects of the subject-matter of the procurement. Other changes to the examination and/or evaluation criteria at the second stage would mean that these criteria would no longer reflect the applicable technical and quality aspects, as well as raising a risk of abuse, and so are not permitted.

46. Subparagraph (c) requires any changes made to the terms and conditions of the procurement as originally announced to be communicated to suppliers or contractors, through the medium of the invitation to present final tenders.

47. Subparagraph (d) permits suppliers or contractors to refrain from submitting a final tender without forfeiture of any tender security that may have been required for entry into the first stage. The latter provision is included to enhance participation by suppliers or contractors since, upon the deadline for submission of initial tenders, the suppliers or contractors cannot be expected to know what changes to the terms and conditions of the procurement may subsequently be made. In the light of the features of this procurement method, tender securities most likely will be required however in the context of presentation of final tenders rather than of initial tenders.

48. Subparagraph (e) subjects the procedural steps involved in examination and evaluation of final tenders and determination of the successful tender to the rules of open tendering in chapter III of the Model Law [\[**hyperlink**\]](#).

49. As regards confidentiality in the context of this procurement method, the risks of revealing, inadvertently or otherwise, commercially sensitive information of

competing suppliers or contractors may arise not only at the stage of discussions but also in the formulation of the revised set of the terms and conditions of the procurement. Examples include the use of requirements, symbols and terminology to describe the revised technical and quality aspects of the subject matter, which may inadvertently reveal the source of information, and the communication of changes made to the terms and conditions originally advertised to the suppliers or contractors (required under subparagraph (4)(c)). In conformity with the requirements of article 24 [\[**hyperlink**\]](#), the procuring entity must respect the confidentiality of the suppliers' or contractors' technical proposals throughout the process.

(A/CN.9/WG.I/WP.79/Add.11) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for the Guide text to accompany Chapter V of the UNCITRAL Model Law on Public Procurement, comprising commentary on request-for-proposals with dialogue (article 49), and on related articles in Chapter II (articles 30 and 35).

**GUIDE TO ENACTMENT OF
THE UNCITRAL MODEL LAW ON PUBLIC
PROCUREMENT**

Part II. Article-by-article commentary

**Chapter V: Procedures for two-stage tendering,
request-for-proposals with dialogue, request-for-proposals
with consecutive negotiations, competitive negotiations and
single-source procurement (*continued*)**

B. Procurement methods (*continued*)

2. Request-for-proposals with dialogue

General description and policy considerations

1. Request-for-proposals with dialogue is a procedure designed for the procurement of relatively complex items and services. The typical use for this procurement method is procurement aimed at seeking innovative solutions to technical issues such as saving energy, achieving sustainable procurement, or infrastructure needs. In such cases, there may be different technical solutions: the material may vary, and may involve the use of one source of energy as opposed to another (wind vs. solar vs. fossil fuels).

2. The procurement method involves a dialogue, the nature of which is set out in the introduction to this Chapter [\[**hyperlink**\]](#); in summary, the objective is to enable suppliers and contractors to understand, through the dialogue with the procuring entity, the needs of the procuring entity as outlined in its request for proposals. The dialogue, which may involve several phases, is an interaction between the procuring entity and the suppliers or contractors on both the technical and quality aspects of how their proposals meet the needs of the procuring entity, and the financial aspects of their proposals. The dialogue may involve a discussion of the financial implications of particular technical solutions, including the price or price range. However, as in two-stage tendering, it is not intended to involve binding negotiations or bargaining from any party to the dialogue.

3. Methods based on this type of dialogue have proved to be beneficial to the procuring entity in the procurement of relatively complex items and services where the opportunity cost of not engaging in negotiations with suppliers is high, while the economic gains of engaging in the process are evident. They are appropriate for example in the procurement of architectural or construction works, where there are many possible solutions to the procuring entity's needs and in which the personal skill and expertise of the supplier or contractor can be evaluated only through negotiations. The complexity need not be at the technical level: in infrastructure projects, for example, there may be different locations and types of construction as the main variables. The method has enabled the procuring entity in such situations to identify and obtain the best solution to its procurement needs.
4. In this regard, it should be recalled that were the procuring entity to discuss potential technical solutions with one potential supplier or contractor, and as a result formulate a statement of its technical requirements as in two-stage tendering, that supplier or contractor would be considered to have a conflict of interest during the discussions with the procuring entity and a subsequent unfair competitive advantage compared with other suppliers or contractors during the subsequent procurement procedure. As explained in article 21 and the commentary thereto [\[**hyperlinks**\]](#), the supplier or contractor concerned should be excluded from the procurement. The request-for-proposals with dialogue procedure therefore can avoid the undesirable situation where a potentially responsive supplier is excluded from participating in the procurement concerned.
5. Since the dialogue normally involves complex and time-consuming procedures, the method should be utilized only when its benefits are appropriate, and not for simple items that are usually procured through procurement methods not involving interaction with suppliers. The procurement method is, for example, not intended to apply to cases where negotiations are required because of urgency or because there is an insufficient competitive base (in such cases, the use of competitive negotiations or single-source procurement is authorized under the revised Model Law). It does not address the type of negotiations that seek only technical improvements and/or price reductions, as are envisaged in request-for-proposals with consecutive negotiations. Nor it is intended to apply in situations in which two-stage tendering proceedings should be used in accordance with paragraph (1) of this article — i.e. when the procuring entity needs to refine its procurement needs and envisages formulating a single set of terms and conditions (including specifications) for the procurement, against which tenders can be presented.
6. As with all procurement methods under the Model Law, the use of this method is not intended exclusively for any type of procurement (be it procurement of goods, construction or services). Also in common with all procurement methods under the Model Law, the procuring entity will be able to choose this procurement method when the conditions for use are satisfied, and when it assesses that the method is best suited to the given circumstances. As the commentary in the introduction to Chapter V notes [\[**hyperlink**\]](#), rules and guidance from the public procurement agency or other similar body may assist the procuring entity in that assessment.
7. The method requires the procuring entity to issue a statement of needs with minimum technical requirements, to understand technical solutions that are proposed and to evaluate them on a comparative basis, and so may require capacity

in procurement officials that is not required in other procurement methods, particularly to avoid the method's use as an alternative to appropriate preparation for the procurement. A particular risk is that the responsibility of defining procurement needs may be shifted to suppliers and contractors or the market. Although the suppliers or contractors, not the procuring entity, make proposals to meet the procuring entity's needs, they should not take a lead in defining those needs.

8. Article 49 contains detailed rules regulating the procedures for this procurement method, which are designed to include safeguards against possible abuses or improper use of this method and robust controls. Nonetheless, they also preserve the necessary flexibility and discretion on the part of the procuring entity in the use of the method, without which the benefits of the procedure disappear. The provisions have been aligned with the UNCITRAL instruments on privately financed infrastructure projects (see paragraphs ... below) [\[**hyperlink**\]](#).¹

9. The safeguards in particular aim at: (a) transparency by requiring proper notification of all concerned about the essential decisions taken in the beginning, during and at the end of the procurement proceedings, at the same time preserving confidentiality of commercially sensitive information as required under article 24 [\[**hyperlink**\]](#); (b) objectivity, certainty and predictability in the process, in particular by requiring that all methods of limiting or reducing a number of participants in the procurement proceedings are made known from the outset of the procurement, and also by regulating the extent of permissible modifications to the terms and conditions of the procurement and by prohibiting negotiations after the submission of best and final offers ("BAFOs"); (c) promoting effective competition through the same mechanism; (d) enhancing participation and ensuring the equitable treatment of suppliers and contractors by requiring that the dialogue be held on a concurrent basis and be conducted by the same representatives of the procuring entity, by regulating communication of information from the procuring entity to the participating suppliers or contractors during the dialogue stage and by setting rules for the stages following the completion of the dialogue; and (d) accountability by requiring comprehensive record-keeping in supplementing provisions of article 25 [\[**hyperlink**\]](#).

10. Similarly, suppliers or contractors will not be willing to participate if their proposals, which have a commercial value, are subsequently turned into a description available to all potential participants. The procedures for the method, as explained above, provide safeguards since they do not envisage the issue of a complete set of terms and conditions of the procurement against which proposals can be presented at any stage of this procurement method (by contrast with the position in two-stage tendering under article 48 [\[**hyperlink**\]](#)). A single set of minimum requirements and an ordered list of evaluation criteria are made available at the outset of the procurement, which cannot be varied during the proceedings.

11. The procedure itself involves two stages. At the first stage, the procuring entity issues a solicitation setting out a description of its needs expressed as terms of reference to guide suppliers in drafting their proposals. The needs can be expressed

¹ The UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the UNCITRAL Legislative Guide on the same subject, available as of the date of this report at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

in functional, performance or output terms but are required to include minimum technical requirements. By comparison with two-stage tendering (which is a procedurally similar but substantively different method), it is not intended that the procedure will involve the procuring entity in setting out a full technical description of the subject-matter of the procurement.

12. The second stage of the procedure involves the dialogue, which is to be conducted “concurrently”. This term is used in the text to stress that all suppliers and contractors are entitled to an equal opportunity to participate in the dialogue, and there are no consecutive discussions. The term also seeks to avoid the impression that the dialogue is to be conducted at precisely the same time with all suppliers or contractors, which would presuppose that different procurement officials or negotiating committees composed of different procurement officials, are engaged in dialogue. Such a stance has been considered undesirable as it may lead to the unequal treatment of suppliers and contractors. For guidance on the conduct of the dialogue, see paragraphs [...] below.

13. Upon conclusion of the dialogue, the suppliers and contractors make BAFOs to meet those needs. BAFOs may be similar in some respects while significantly different in others, in particular as regards proposed technical solutions. The method therefore gives the procuring entity the opportunity of comparing different technical solutions to and alternatives and options for its needs.

Article 30(2). Conditions for use of request-for-proposals with dialogue
[**hyperlink**]

14. Article 30(2) provides the conditions for use of request-for-proposals with dialogue. The Model Law regulates this procurement method in considerable detail to mitigate the risks and difficulties that it can involve where used inappropriately or without the degree of care and capacity required to use it effectively. The conditions in paragraph (2) may mitigate concerns over the inappropriate use of this procurement method, by effectively preventing its use to procure items that should be procured through tendering or other, less flexible, methods of procurement.

15. Paragraph (2) (a) of the article sets out the condition for what is expected to be the main use of request-for-proposals with dialogue: that it is not objectively feasible for the procuring entity to formulate a complete description of the subject matter of the procurement at the outset of the procedure, and the procuring entity assesses that it needs to engage in dialogue with suppliers or contractors capable of delivering the subject matter of the procurement in order to come to acceptable solutions to satisfy its needs. In practice, the procuring entity must be able to describe its broad needs at the outset of the procurement at the level of functional (or performance or output) requirements. This requirement reflects the fact that inadequate planning is likely to mean that the procurement will be unsuccessful; it is also needed so as to provide the minimum technical requirements that article 49 calls for and to allow the effective participation of suppliers or contractors.

16. Similarly, the situation described in subparagraph (b) refers to procurement in which a tailor-made solution is needed (for example, an information technology system for the archiving of legal records, which may need particular features such as long-term accessibility), and where technical excellence is an issue. The third condition, in subparagraph (c), refers to procurement for the protection of essential

security interests of the State. This condition would usually cover the security and defence sectors where the need may involve the procurement of highly complex subject matter and/or conditions for supply, at the same time requiring measures for the protection of classified information.

17. The last condition for use of this method, in subparagraph (d), is the same as one of the conditions for use of two-stage tendering — open tendering was engaged in but it failed. In such situations the procuring entity must analyse the reasons for the failure of open tendering. Where it concludes that using open tendering again or using any of the procurement methods under chapter IV of this Law [\[**hyperlink**\]](#) would not be successful, it may also conclude that it faces difficulties in formulating sufficiently precise terms and conditions of the procurement at the outset of the procurement. The reasons for the earlier failure should guide the procuring entity in selecting between two-stage tendering under subparagraph (1)(b) of this article and request-for-proposals with dialogue under subparagraph (2)(d) of this article. In order to use request-for-proposals with dialogue proceedings, the procuring entity would have to conclude that formulating a complete single set of terms and conditions of the procurement would not be possible or would not be appropriate, and therefore dialogue with suppliers or contractors is necessary for the procurement to succeed.

18. Apart from imposing exhaustive conditions for use of this procurement method, the revised Model Law refers to the possibility of requiring external approval for the use of this procurement method. If an enacting State decides to provide for ex ante approval by a designated authority for such use, it must enact the opening phrase put in parenthesis in the chapeau provisions of paragraph (2). (For a discussion of the general policy considerations regarding ex ante approval mechanisms, see Section [**](#) of the general commentary above [\[**hyperlink**\]](#).) The exceptional reference to an ex ante approval mechanism was made in this case to signal to enacting States that higher measures of control over the use of this procurement method may be justifiable in the light of the particular features of this procurement method that make it at risk of abusive behaviour, which may be difficult to mitigate in some enacting States. If the provisions are enacted, it will be for the enacting State to designate an approving authority and its prerogatives in the procurement proceedings, in particular whether these prerogatives will end with granting to the procuring entity the approval to use this procurement method or also extend to some form of supervision of the way proceedings are handled.

Article 35. Solicitation in request-for-proposals procurement methods, and its particular application to request-for-proposals with dialogue [\[hyperlink**\]](#)**

19. Article 35 regulates solicitation in request-for-proposals procurement methods. The default rule under the Model Law is for public and unrestricted solicitation in these methods, as that term is explained in Section [**](#) of the guidance to Part II of Chapter II [\[**hyperlink**\]](#). Public and unrestricted solicitation involves an advertisement to invite participation in the procurement, the issue of the solicitation documents to all those that respond to the advertisement, and the full consideration of the qualifications and submissions of suppliers and contractors that submit tenders or other offers.

20. In request-for-proposals proceedings, the provisions allow the default rule to be relaxed and direct solicitation to be used where the subject-matter of the

procurement is available from a limited number of suppliers or contractors, a situation that is likely to arise in the circumstances in which request-for-proposals with dialogue is available. The relaxation of the default rule is also contingent upon soliciting proposals from all such suppliers and contractors (see article 35(2)(a) [\[**hyperlink**\]](#), and upon a prior public advance notice of the procurement under article 35(3) [\[**hyperlink**\]](#). For a discussion of these requirements and their consequences, notably arising from the risk of unknown suppliers emerging as a result of the advance notice, see the commentary on solicitation in the introduction to Chapter IV [\[**hyperlink**\]](#)).²

21. Where request-for-proposals with dialogue proceedings are preceded by pre-qualification proceedings, solicitation is subject to separate regulation under article 18 [\[**hyperlink**\]](#), the provisions of which also require international solicitation in the same manner as is required in article 33 [\[**hyperlink**\]](#). Further guidance is set out in the commentary to the guidance to those articles [\[**hyperlink**\]](#). After the pre-qualification proceedings have been completed, the request for proposals must be provided to all pre-qualified suppliers.

22. As explained in the commentary on solicitation in Part II of Chapter II, and in the commentary to article 18 [\[**hyperlink**\]](#), pre-qualification proceedings identify qualified suppliers or contractors, but are not a method to limit the participating numbers since they involve a pass/fail test as regards qualifications. Inherent in the method is the fact that participating suppliers or contractors will invest significant time and resources in their participation. Participation will be discouraged if there is no reasonable chance of winning the contract to be awarded at the end of the procurement process; the risk for the procuring entity is that too many potential suppliers and contractors may be pre-qualified and all pre-qualified suppliers must be admitted to the proceedings. The procedures for request-for-proposals with dialogue proceedings therefore set out a process that enables the procuring entity to limit the number of participants to an appropriate number — called “pre-selection”, which is described in the following section on procedures. Where preselection procedures are followed, the request for proposals must be provided to all preselected suppliers.

23. The exceptions to the default rule requiring international solicitation, other than where the procurement process follows pre-qualification proceedings under article 18 [\[**hyperlink**\]](#), are contained in article 35(1)(b) and (c). Paragraph (1)(c) mirrors the exceptions for open tendering in article 33(4): that is, for domestic and low-value procurement. The commentary to Part II of Chapter II [\[**hyperlink**\]](#) discusses the policy issues arising in allowing for these latter exceptions; they are grounded in permitting a relaxation of international advertisement where its benefits will be outweighed by its costs, or where it is simply irrelevant.

24. Article 35(2)(c) sets out a distinct third ground that may justify the use of direct solicitation in request-for-proposals proceedings — procurement involving classified information. In such cases, the procuring entity must again solicit

² The implication is that the procuring entity is not authorized to reject any unsolicited proposals. Does the Working Group consider a discussion of the manner in which the procuring entity should consider any such proposals is required?

proposals from a sufficient number of suppliers or contractors to ensure effective competition.

25. Articles 35(3) and (4) are included to provide for transparency and accountability when direct solicitation is used. Paragraph (3) requires the procuring entity including in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings. Paragraph (4) requires the procuring entity, where it engages in direct solicitation publish an advance notice of the procurement (under article 33(5) [\[**hyperlink**\]](#)) (unless classified information would thereby be compromised). The commentary to Part II of Chapter II [\[**hyperlink**\]](#) discusses the reasons for, contents and form of such notices.

Article 49. Request-for-proposals with dialogue [\[hyperlink**\]](#)**

26. Article 49 regulates the procedures for request-for-proposals with dialogue. The steps involved in this procedure are: (a) an optional request for expressions of interest, which does not confer any rights on suppliers or contractors, including any right to have their proposals evaluated by the procuring entity. In this sense, it resembles an advance notice of possible future procurement referred to in article 6 (2) (for the guidance to article 6, see Section [** above \[**hyperlink**\]](#)); (b) pre-qualification or pre-selection when it is expected that more than the optimum number of qualified candidates would express interest in participating; if neither pre-qualification or pre-selection is involved, open or direct solicitation as regulated by article 35 [\[**hyperlink**\]](#); (c) issue of the request for proposals to those responding to the open or direct solicitation or to those pre-qualified or pre-selected, as the case may be; (d) concurrent dialogue, which as a general rule is held in several rounds or phases; (e) completion of the dialogue stage with a request for BAFOs; and (f) award. The article regulates these procedural steps in the listed chronology, except for an optional request for expressions of interest, which, as stated, is covered by provisions of article 6 [\[**hyperlink**\]](#).

27. Paragraph (1), by cross-referring to article 35 [\[**hyperlink**\]](#), reiterates the default rule that an invitation to participate in the request-for-proposals with dialogue proceedings must as a general rule be publicized as widely as possible to ensure wide participation and competition (unless the solicitation has been preceded by pre-qualification or pre-selection, both of which procedures also include a substantive requirement for wide publicity).

28. When public and unrestricted solicitation without pre-qualification or pre-selection is involved, an invitation to participate in the request-for-proposals with dialogue is issued, which must contain the minimum information listed in paragraph (2). This minimum information is designed to assist suppliers or contractors to determine whether they are interested and eligible to participate in the procurement proceedings and, if so, how they can participate. The information specified is similar to that required for an invitation to tender (article 37 [\[**hyperlink**\]](#)).

29. Paragraph (2) lists the required minimum information and does not preclude the procuring entity from including additional information that it considers appropriate; a full statement of its needs and the terms and conditions is required in order to allow suppliers or contractors to prepare high-quality proposals, which the

procuring entity can assess on an equal basis. The procuring entity should take into account however that it is the usual practice to keep the invitation brief and include the most essential information about procurement; that information is also most relevant to the initial stage of the procurement proceedings. All other information about the procurement, including further detail of the information contained in the invitation, is included in the request-for-proposals (see paragraph (5) of this article). This approach helps to avoid repetitions, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or contractors. It is in particular advisable in this procurement method since some information may become available or be refined later in the procurement proceedings (to the extent permitted by paragraph (9) of the article).

30. Paragraph (3) regulates pre-selection proceedings, as an option for the procuring entity to limit a number of suppliers or contractors from which to request proposals. The provisions have been aligned generally with the provisions on pre-selection found in the UNCITRAL instruments on privately financed infrastructure projects [\[**hyperlink**\]](#). Pre-selection proceedings allow the procuring entity to specify from the outset of the procurement that only a certain number of best qualified suppliers or contractors will be admitted to the next stage of the procurement proceedings. This tool is available as an option where it is expected that many qualified candidates will express interest in participating in the procurement proceedings. The Model Law provides for this possibility only in this procurement method: it is considered justifiable in the light of the significant time and cost that would be involved in examining and evaluating a large number of proposals. It is therefore an exception to the general rule of open participation as described in [...] above.

31. Pre-selection is held in accordance with the rules applicable to pre-qualification proceedings. The provisions of article 18 [\[**hyperlink**\]](#) therefore apply to pre-selection, to the extent that they are not derogated from in paragraph (3) (to reflect the nature and purpose of pre-selection proceedings). For example, to ensure transparency and the equitable treatment of suppliers and contractors, paragraph (3) requires the procuring entity from the outset of the procurement to specify that the pre-selection proceedings will be used, the maximum number of pre-selected suppliers or contractors from which proposals will be requested, the manner in which the selection of that number of suppliers or contractors will be carried out and criteria that will be used for ranking suppliers or contractors, which should constitute qualification criteria and should be objective and non-discriminatory.

32. The maximum number of suppliers to be pre-selected must be established by the procuring entity in the light of the circumstances of the given procurement to ensure effective competition. When possible, the minimum should be at least three. If the procuring entity decides to regulate the number of suppliers or contractors to be admitted to the dialogue (see paragraph (5) (g) of the article), the maximum number of suppliers or contractors from which proposals will be requested should be established taking into account the minimum and maximum numbers of suppliers or contractors intended to be admitted to the dialogue phase as will be specified in the request-for-proposals under paragraph (5) (g) of this article. It is recommended that the maximum number of suppliers or contractors from which proposals will be requested should be higher than the maximum to be admitted to the dialogue phase,

in order to allow the procuring entity to select from a bigger pool the most suitable candidates for the dialogue phase. To enable effective challenge, the provisions require promptly notifying suppliers or contractors of the results of the pre-selection and providing to those that have not been pre-selected reasons therefor.

33. Paragraph (4) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given procurement, this group could constitute the entire group of suppliers or contractors that respond to the invitation; or, if pre-qualification or pre-selection was involved, to only those that were pre-qualified or pre-selected; in the case of direct solicitation, the group would comprise only those that are directly invited. The provisions also contain a standard clause in the Model Law that the price that may be charged for the request-for-proposals may reflect only the cost of providing the request-for-proposals to the suppliers or contractors concerned.

34. Paragraph (5) contains a list of the minimum information that should be included in the request for proposals in order to assist the suppliers or contractors in preparing their proposals and to enable the procuring entity to compare them on an equal basis. The list is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (see article 39 [\[**hyperlink**\]](#)) and contents of the request for proposals in request-for-proposals without negotiation proceedings (see article 48 (4) [\[**hyperlink**\]](#)). The differences reflect the specific procedures of this procurement method.

35. Information about the proposal price may not be relevant in procurement of non-quantifiable advisory services where the cost is not a significant evaluation criterion and in such cases initial proposals need not contain financial aspects or price. Instead, in the context of evaluation criteria referred to in subparagraph (h), the emphasis in this type of procurement will be placed on the service-provider's experience for the specific assignment, the quality of the understanding of the assignment under consideration and of the methodology proposed, the qualifications of the key staff proposed, transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and when applicable, the extent of participation by nationals among key staff in the performance of the services.

36. These evaluation criteria may be in addition to a minimum requirement for skills and experience expressed as qualification criteria under article 9 [\[**hyperlink**\]](#) and paragraph (2) (e) of this article. Whereas by virtue of article 9 the procuring entity has the authority not to evaluate or pursue the proposals of unqualified suppliers or contractors, including the same types of skills and experience in the evaluation criteria, the procuring entity will be able to weigh, for example, the required experience of one service provider against experience of others. On the basis of such a comparison, it may be more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the proposal.

37. While the primary focus of dialogue typically may be on technical aspects or legal or other supporting issues, the subject matter of the procurement and market conditions may allow and even encourage the procuring entity to use price as an aspect of dialogue. In addition, in some cases, it is not possible to separate price and

non-price criteria. Thus a preliminary price may be required to be provided in the initial proposals. The price is always included in the BAFOs.

38. Paragraph (5) (g) is applicable in situations when the procuring entity, in the light of the circumstances of the given procurement, decides that a minimum and/or maximum number of suppliers or contractors with whom to engage in dialogue should be established. Those limits should aim at reaching the optimum number of participants, taking into account that in practice holding concurrent negotiations with many suppliers has proved to be very cumbersome and unworkable, and may discourage participation. The provisions refer to a desirable minimum of three participants. They are supplemented by provisions of paragraphs (6) (b) and (7).

39. Paragraph (5) (h) refers to the criteria and procedures for evaluating the proposals in accordance with article 11 [\[**hyperlink**\]](#) that in particular sets out exceptions to default requirements as regards assigning the relative weights to all evaluation criteria, to accommodate the specific features of this procurement method. These features may make it impossible for the procuring entity to determine from the outset of the procurement the relative weights of all evaluation criteria. It is therefore permitted under article 11 to list the relevant criteria in the descending order of importance. Where sub-criteria are also known in advance, they should be specified as well and assigned relative weight if possible; if not, they should also be listed in the descending order of importance. It is recognized that different procurements might require different levels of flexibility as regards specification of evaluation criteria and procedures in this procurement method. However, providing a true picture of the evaluation criteria and procedure from the outset of the procurement proceedings is a fundamental requirement of article 11.

40. In the context of paragraph (5) (m) requiring the procuring entity to specify in the request for proposals any other requirements relating to the proceedings, it may be beneficial to include the timetable envisaged for the procedure. The proceedings by means of this procurement method are usually time- and resource-consuming on both sides — the procuring entity and suppliers or contractors. An estimated timetable of the proceedings in the request for proposals encourages better procurement planning and makes the process more predictable, in particular as regards the maximum period of time during which suppliers or contractors should be expected to commit their time and resources. It also gives both sides a better idea as regards the timing of various stages and which resources (personnel, experts, documents, designs, etc.) would be relevant, and should be made available, at which stage.

41. After the provision of the request for proposals to the relevant suppliers or contractors, sufficient time should be allowed for suppliers or contractors to prepare and submit their proposals. The relevant timeframe is to be specified in the request for proposals and may be adjusted if need be, in accordance with the requirements of article 14 [\[**hyperlink**\]](#).

42. Paragraph (6) regulates the examination (assessment of responsiveness) of proposals. All proposals are to be assessed against the established minimum examination criteria notified to suppliers or contractors in the invitation to the procurement and/or request for proposals. The number of suppliers or contractors to be admitted to the next stage of the procurement proceedings — dialogue — may fall as a result of the rejection of non-responsive proposals, i.e. those that do not

meet the established minimum criteria. As in the case with pre-qualification proceedings (see paragraph [25] above), examination procedures cannot be used for the purpose of limiting the number of suppliers or contractor to be admitted to the next stage of the procurement proceedings. If all suppliers or contractors presenting proposals turn out to be responsive, they all must be admitted to the dialogue unless the procuring entity reserved the right to invite only a limited number. As stated in the context of paragraph (5) (g) (see paragraph [33] above), such a right can be reserved in the request for proposals. In this case, if the number of responsive proposals exceeds the established maximum, the procuring entity will select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals. The Model Law itself does not regulate this procedure and criteria, which may vary from procurement to procurement. A certain level of subjectivity in the selection cannot be excluded in this procurement method. The risk of abusive practices should be mitigated by the requirement to specify the applicable selection procedure and criteria in the request for proposals, and to provide prompt notification of the results of the examination procedure, including reasons for rejection when applicable. These requirements should allow the aggrieved suppliers effectively to challenge the procuring entity's decisions. Managerial techniques to oversee the procedure can also support these regulatory tools.

43. In accordance with paragraph (7), the number of suppliers or contractors invited to the dialogue in any event must be sufficient to ensure effective competition. The desirable minimum of three suppliers or contractors mentioned in paragraph (5) (g) is reiterated in this paragraph. The procuring entity will not however be precluded from continuing with the procurement proceedings if only one or two responsive proposals are presented. The reason for allowing the procuring entity to continue with the procurement in such case is that, even if there is a sufficient number of responsive proposals, the procuring entity has no means of ensuring that the competitive base remains until the end of the dialogue phase: suppliers or contractors are not prevented from withdrawing at any time from the dialogue.

44. Paragraph (8) sets out two requirements for the format of dialogue: that it should be held on a concurrent basis and that the same representatives of the procuring entity should be involved to ensure consistent results. The reference to "representatives" of the procuring entity is in plural in these provisions since the use of committees comprising several people is considered to be good practice, especially in the fight against corruption. This requirement does not prevent the procuring entity from holding dialogue with only one supplier or contractor, as explained above. Dialogue may involve several rounds or phases. By the end of each round or phase, the needs of the procuring entity are refined and participating suppliers or contractors are given a chance to modify their proposals in the light of those refined needs and the questions and comments put forward by the negotiating committee during dialogue.

45. The reference in subsequent paragraphs of this article to "suppliers or contractors remaining in the procurement proceedings" indicates that the group of suppliers or contractors entering the dialogue at the first phase may decline throughout the dialogue process. Some suppliers or contractors may decide not to participate further in dialogue, or they may be excluded from further negotiations by

the procuring entity on the grounds permitted under the Model Law or other provisions of applicable law of the enacting State. Unlike some systems with similar procurement methods, the Model Law does not give an unconditional right to the procuring entity to terminate competitive dialogue with a supplier or contractor, for example, only because in the view of the procuring entity that supplier or contractor would not have a realistic chance of being awarded the contract. The dialogue phase involves constant modification of solutions and it would be unfair to eliminate any supplier only because at some stage of dialogue a solution appeared not acceptable to the procuring entity. Although terminating the dialogue with such a supplier might allow both sides to avoid wasting time and resources (which could turn out to be significant in this type of procurement), and might consequently reduce the risk of reduced competition in future procurements, UNCITRAL has proceeded on the basis that the risks to objectivity, transparency and equal treatment significantly outweigh the benefits.

46. On the other hand, the procuring entity should not be prohibited from terminating dialogue with suppliers or contractors on the grounds specified in the Model Law or through other provisions of applicable law of the enacting State. Some provisions in the Model Law would require the procuring entity to exclude suppliers or contractors from the procurement proceedings. For example, they must be excluded on the basis of article 21 [\[**hyperlink**\]](#) (inducement, unfair competitive advantage or conflicts of interest), or if they are no longer qualified (for example in the case of bankruptcy), or if they materially deviate during the dialogue phase from the minimum responsive requirements or other key elements that were identified as non-negotiable at the outset of the procurement. In such cases, the possibility of a meaningful challenge under chapter VIII by aggrieved suppliers or contractors is ensured since the procuring entity will be obligated to notify promptly suppliers or contractors of the procuring entity's decision to terminate the dialogue and to provide grounds for that decision. It may be useful to provide suppliers or contractors at the outset of the procurement proceedings with information about the grounds on which the procuring entity will be required under law to exclude them from the procurement.

47. Paragraph (9) imposes limits on the extent of modification of the terms and conditions of the procurement as set out at the outset of the procurement proceedings. Unlike article 15 [\[**hyperlink**\]](#) that regulates modification of the solicitation documents before the submissions/proposals are presented, paragraph (9) deals with restriction on modification of any aspect of the request for proposals after the initial proposals have been presented. The possibility of making such modifications is inherent in this procurement method; not allowing sufficient flexibility to the procuring entity in this respect will defeat the purpose of the procedure. The need for modifications may be justified in the light of dialogue but also in the light of circumstances not related to dialogue (such as administrative measures).

48. At the same time, the negative consequences of unfettered discretion may significantly outweigh the benefits in terms of flexibility. The provisions of paragraph (9) seek to achieve the required balance by preventing the procuring entity from making changes to those terms and conditions of the procurement that are considered to be so essential for the advertised procurement that their modification would have to lead to the new procurement. They are the subject

matter of the procurement, qualification and evaluation criteria, the minimum requirements established pursuant to paragraph (2) (f) of this article and any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that the procuring entity explicitly excludes from the dialogue at the outset of the procurement (i.e. non-negotiable requirements). The provisions would not prevent suppliers or contractors from making changes in their proposals as a result of the dialogue; however, deviation from the essential requirements of the procurement (such as the subject matter of the procurement, the minimum or non-negotiable requirements) may become a ground for the exclusion from the procurement of the supplier or contractor proposing such unacceptable deviations.

49. Paragraph (10) provides an essential measure to achieve equal treatment of suppliers and contractors in the communication of information from the procuring entity to suppliers or contractors during the dialogue phase. It subjects any such communication to the provisions of article 23 on confidentiality, some of which are specifically designed for chapter V procurement methods. Concerns over confidentiality are particularly relevant in this procurement method in the light of the format and comprehensive scope of the dialogue. The general rule is that no information pertinent to any particular supplier or its proposal should be disclosed to any other participating supplier without consent of the former. Further exceptions are listed in article 24 (3) [\[**hyperlink**\]](#) (disclosure is required by law, or ordered by competent authorities, or permitted in the solicitation documents). (For the guidance to article 24, see the commentary to that article in Section [** above \[**hyperlink**\]](#).)

50. Achieving equal treatment of all participants during the dialogue requires implementing a number of practical measures. The Model Law refers only to the most essential ones, such as those in paragraph (10), and the requirement that negotiations be held on a concurrent basis by the same representatives of the procuring entity (paragraph (8) as explained in paragraph [\[39\]](#) above). Other measures, such as ensuring that the same topic is considered with the participants concurrently for the same amount of time, should be thought through by committees when preparing for the dialogue phase. Enacting States may wish to provide for other practical measures in the procurement regulations.

51. Upon completion of the dialogue stage, all the remaining participants must be given an equal chance to present BAFOs, which are defined as best and final with respect to each supplier's proposal. This definition highlights one of the main distinct features of this procurement method — the absence of any complete single set of terms and conditions of the procurement beyond the minimum technical requirements against which final submissions are evaluated.

52. Paragraphs (11) and (12) regulate the BAFOs stage. The safeguards contained in these paragraphs are intended to maximize competition and transparency. The request for BAFOs must specify the manner, place and deadline for presenting them. No negotiation with suppliers or contractors is possible after BAFOs have been presented and no subsequent call for further BAFOs can be made. Thus the BAFO stage puts an end to the dialogue stage and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict an undesirable situation in which the procuring entity uses the offer made by one supplier or contractor to pressure another supplier or contractor, in particular as regards the price offered.

Otherwise, in anticipation of such pressure, suppliers or contractors may be led to raise the prices offered, and there is a risk to the integrity of the marketplace.

53. Paragraph (12) prohibits negotiations on the terms of the BAFOS. It should be read in conjunction with the provisions of article 16 [\[**hyperlink**\]](#), which allow the procuring entity to seek clarification of BAFOS as for other submissions, but do not allow price or other significant information to be altered as part of the clarification process, as the commentary to that article explains. The dialogue phase means that the article 16 [\[**hyperlink**\]](#) procedure is unnecessary as regards the initial proposals, unless there are queries as to whether or not they meet the minimum criteria set out in the request for proposals itself.

54. Paragraph (13) deals with the award of the procurement contract under this procurement method. It is to be awarded to the successful offer, which is determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals. The reference to the criteria and procedure for evaluating the proposals as set out in the request for proposals in this provision reiterates the prohibition of modification of those criteria and procedures during the dialogue stage, found in paragraph (9) of the article as explained in paragraphs [\[**42 and 43**\]](#) above.

55. The procuring entity will be required to maintain a comprehensive written record of the procurement proceedings, including a record of the dialogue with each supplier or contractor, and to give access to the relevant parts of the record to the suppliers or contractors concerned, in accordance with article 25 [\[**hyperlink**\]](#). This is an essential measure in this procurement method to ensure effective oversight, including audit, and possible challenges by aggrieved suppliers or contractors.

(A/CN.9/WG.I/WP.79/Add.12) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for the Guide text to accompany to accompany Chapter V of the UNCITRAL Model Law on Public Procurement, comprising commentary on request-for-proposals consecutive negotiations (article 50), commentary on competitive negotiations (article 51), on single-source procurement (article 52) and on related articles in Chapter II (articles 30, 34 and 35).

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

Part II. Article-by-article commentary

**Chapter V: Procedures for two-stage tendering,
request-for-proposals with dialogue, request-for-proposals
with consecutive negotiations, competitive negotiations and
single-source procurement (*continued*)**

B. Procurement methods (*continued*)

3. Request-for-proposals with consecutive negotiations

General description and policy considerations

1. The conditions for use and procedures of this method resemble those of the request-for-proposals without negotiation referred to in article 29 (3) of the Model Law. The difference between this procurement method and request-for-proposals without negotiation is in the need to hold negotiations on the financial aspects of the proposals, reflecting that it is appropriate for the procurement of items or services that are designed for the procuring entity, rather than for the procurement of items or services of a fairly standard nature. The request-for-proposals with consecutive negotiations procedure is thus appropriate for use in the procurement of more complex subject matter where holding negotiations on commercial or financial aspects of proposals is indispensable — there may be so many variables in these aspects of proposals that they cannot be all foreseen and specified at the outset of the procurement and must be refined and agreed upon during negotiations. Examples of the use of this method in practice include advisory services such as legal and financial, design, environmental studies, engineering works, and the provision of office space for government officials.

2. All stages in this procurement method preceding the stage of negotiations are the same as in the request-for-proposals without negotiation: the procuring entity

sets a threshold on the basis of the quality and technical aspects of the proposals, and then ranks those proposals that are rated at and above the threshold, ensuring that the suppliers or contractors with whom it will negotiate are capable of providing the required subject matter of the procurement. The procuring entity then holds negotiations on financial aspects of the proposals first with the supplier or contractor that was ranked highest; if negotiations with that supplier are terminated, the procuring entity holds negotiations with the next highest-ranked supplier and so on, to the extent necessary, until it concludes a procurement contract with one of them. These negotiations are aimed at ensuring that the procuring entity obtains fair and reasonable financial proposals. The format of consecutive, as opposed to concurrent or simultaneous, negotiations has proved to be the most appropriate in the context of this procurement method in the light of the scope of negotiations covering exclusively financial or commercial aspects of the proposals. When the need exists to negotiate on other aspects of proposals, this procurement method may not be used.

3. Request-for-proposals with consecutive negotiations is not reserved exclusively for the procurement of services. This approach is in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 28(2)) [\[**hyperlink**\]](#) (for the relevant guidance, see Section [**](#) of the commentary to Chapter II, Part I above [\[**hyperlink**\]](#)). Enacting States should be aware, nevertheless, that some multilateral development banks recommend the use of the procurement method with features of the request-for-proposals with consecutive negotiations as provided for in the Model Law for the procurement of advisory services (i.e. those with an intellectual output). The method has traditionally been widely used in such type of procurement. Such banks may not authorize the use of this method in other circumstances, at least as regards projects financed by them.

Article 30(3). Conditions for use of request-for-proposals with consecutive negotiations [\[hyperlink**\]](#)**

4. Article 30(3) sets out conditions for use of request-for-proposals with consecutive negotiations. Like request-for-proposals without negotiations, this method has proved to be beneficial where quality and technical characteristics may be the main priority and where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of their quality and technical aspects, so that the procuring entity is not influenced by the financial aspects when it examines and evaluates quality and technical aspects of proposals. The words “needs to” in the provisions are intended to convey that there is an objective and demonstrable need for the procuring entity to follow this sequential examination and evaluation procedure. Thus, like request-for-proposals without negotiation, this procurement method is appropriate for use only where the examination and evaluation of quality and technical aspects of the proposals separately from consideration of financial aspects of proposals is possible and needed.

Article 35. Solicitation in request-for-proposals procurement methods, and its application to request-for-proposals with consecutive negotiations
[**hyperlink**]

5. Article 35 regulates solicitation in request-for-proposals procurement methods; its application to request-for-proposals with consecutive negotiations raises identical issues to those discussed in the commentary to request-for-proposals with dialogue, in Section ** above [**hyperlink**].

Article 50. Request-for-proposals with consecutive negotiations

6. Article 50 regulates the procedures request-for-proposals with consecutive negotiations. All stages in this procurement method preceding the stage of negotiations are the same as in request-for-proposals without negotiation. Paragraph (1) therefore makes reference to the applicable provisions of article 47 [**hyperlink**]. The guidance to those provisions therefore applies also to this article (see the commentary to that procurement method at ** above) [**hyperlink**].

7. Paragraphs (2) to (6) regulate the distinct procedures of this procurement method. Paragraph (2) addresses issues of ranking and the invitation to consecutive negotiations. The ranking is set on the basis of the scores assigned to the quality and technical aspects of the proposals.

8. As noted in the commentary to request-for-proposals without negotiation above [**hyperlink**], it is important to delineate clearly what is caught by the terms “technical and quality aspects” and “financial aspects” of proposals. The reference in paragraph (2)(b) to “financial aspects” in this context includes all the commercial aspects of the proposals that cannot be set out in the terms of reference, as well as the final price; the financial aspects are intended to exclude any quality, technical and other aspects of proposals that have been considered as part of the examination and evaluation of the quality and technical characteristics of proposals. Practical examples of elements of proposals that might fall into one or other category are also provided in the commentary to request-for-proposals without negotiation.

9. Paragraphs (3) and (6) refer to the notion of “termination of negotiations”. This notion means the rejection of a supplier’s final financial proposal and the consequent exclusion of that supplier from further participation in the procurement proceedings. Thus, no procurement contract can be awarded to the supplier(s) with which the negotiations have been terminated as provided for in paragraphs (3) and (4).

10. UNCITRAL decided to include this feature of this procurement method in order to emphasize competition on the quality and technical aspects of proposals. When the procurement method is used in appropriate circumstances, this distinct feature of the procurement method may impose discipline on both suppliers and procuring entities to negotiate in good faith. The first-ranking supplier faces a risk that negotiations with the procuring entity may be terminated at any time, leading to the permanent exclusion of the supplier from the procurement proceedings. That supplier may also consider that negotiations with the lower-ranked suppliers are more likely to succeed since such suppliers will have an incentive to improve their position to win, and it is in the interest of the procuring entity to have the

procurement contract in the end of the process. Thus the highest-ranked supplier will be under some pressure to negotiate while the procuring entity, facing the risk of rejecting the best technical proposal, will exercise restraint in putting an excessive focus on the financial aspects of proposals at the expense of quality and technical considerations. Fixing a period for the negotiations in the solicitation documents may be considered another effective discipline measure on both sides in negotiations.

11. Nevertheless, this feature may be considered inflexible. Only at the end of a process of negotiation with all suppliers may the procuring entity know which proposal in fact constitutes the best offer; that offer however may have been rejected as a result of the termination of negotiation with the supplier or contractor submitting it. In addition, the procedure does not necessarily ensure a strong bargaining position on the part of the procuring entity since the highest-ranked supplier, knowing its preferred status, may have little incentive to negotiate, particularly as regards price, so that the pressure that a procuring entity may be able to exert in concurrent negotiations is not present. However, this method has been restricted to consecutive negotiations in order to avoid the risk of abuse that may arise in concurrent negotiations which are provided for only in the limited circumstances in which competitive negotiations are available under article 51 [\[**hyperlink**\]](#) (see, further, the commentary to that article [\[**hyperlink**\]](#)).

12. Whether the procuring entity is willing to compromise on quality and technical considerations by terminating negotiation with a better-ranked supplier and beginning negotiations with the next ranked supplier will very much depend on the circumstances of procurement, in particular the results of the examination and evaluation of the quality and technical aspects of proposals. The extent of the gap between the proposals of various suppliers may vary widely, and the procuring entity's strategies in negotiations must be adjusted accordingly. The procuring entity can always cancel the procurement if it faces unacceptable proposals.

4. Competitive negotiations

General description and policy considerations

13. Competitive negotiations constitute a procurement method that may be used only in the exceptional circumstances set out in subparagraphs (a) to (c): urgency, catastrophic events and the protection of essential security interests of the enacting State. As noted in the introduction to Chapter V procurement methods above [\[**hyperlink**\]](#), it is not to be considered as an alternative to any other method in the Model Law, including where the circumstances may indicate the use of two-stage tendering or request-for-proposals procurement methods, with one exception. The participation of more than one supplier means that, as is further explained in paragraphs [**](#) below, competitive negotiations are considered to offer more competition than single-source procurement and, in accordance with article 28(2) [\[**hyperlink**\]](#), should be used in preference to single-source procurement whenever possible.

14. The restrictions in the use of the method are necessary in the light of its very flexible procedures. Those procedures do not provide the same levels of transparency, integrity and objectivity in the process as are present in other

competitive procurement methods, and the method is therefore at greater risk of abuse and corruption.

15. The unstructured nature of the procedures in competitive dialogue, as described in article 51 and explained in paragraphs [...] below mean managing the use of the method will be the key to ensuring its success in appropriate circumstances. The issues discussed regarding managerial techniques in the context of Chapter V proceedings (see to the commentary in the introduction to Chapter V and Sections ** of [**procurement methods**] [**hyperlinks**]) will apply to competitive negotiations, particularly given the heightened integrity risks that this method involves. Issues of capacity, in particular, should be addressed as a general matter, particularly as this procurement method is most commonly used for urgent procurement.

Article 30(4). Conditions for use of competitive negotiations [hyperlink**]**

16. Article 30(4) sets out the conditions for use of competitive negotiations. Subparagraph (a) addresses situations of urgency not caused by the conduct of the procuring entity, and that do not arise out of foreseeable circumstances. Subparagraph (b) refers to urgency arising out of catastrophic events. Both situations imply that the use of open tendering proceedings or any other competitive method of procurement is impractical, because of the time involved in using those methods. The cases of urgency contemplated in both situations are intended to be truly exceptional, and not merely cases of convenience, and include the need for urgent medical or other supplies after a natural disaster or the need to replace an item of equipment in regular use that has malfunctioned. The method is not available if the urgency is due to a lack of procurement planning or other (in)action on the part of the procuring entity, and the extent of the procurement through this method must be directly derived from the urgency itself. In other words, if there is an urgent need for one item of equipment, and an anticipated need for several more of the same type, competitive negotiations can be used only for the item needed immediately.

17. Subparagraph (c) refers to the procurement for the protection of essential security interests of the State, as those interests are described in section ** of the general commentary above [**hyperlink**], where the procuring entity determines that the use of any other method of procurement is not appropriate.

18. The provisions in subparagraphs (a) to (c) are without prejudice to the general principle contained in article 28(2) [**hyperlink**], according to which the procuring entity must seek to maximize competition to the extent practicable when it selects and uses a procurement method, and must have regard to the circumstances of the procurement. It is therefore to be understood that where an alternative to competitive negotiation, such as restricted tendering or request-for-quotations, is available, the procuring entity must select that other method so as to ensure the greatest level of competition as is compatible with other circumstances of the procurement (such as the urgent need for the subject-matter concerned).

19. In conformity with the same principle, subparagraph (b) dealing with cases of urgency owing to a catastrophic event, and subparagraph (c) dealing with procurement for the protection of essential security interests of the State, prevent the procuring entity from using single-source procurement where competitive

negotiations are available. In situations covered by these subparagraphs, the procuring entity is required first to consider the use of open tendering or any other competitive method of procurement. Where the procuring entity concludes that the use of other competitive methods is impractical, it must use competitive negotiations, not to single-source procurement, unless it concludes that there is extreme urgency or another distinct ground justifying the use of single-source procurement under paragraph (5) of this article (for example, the absence of a competitive base, exclusive rights involved, etc.). This is because competitive negotiations are inherently more competitive than single-source procurement and more rigorous safeguards are built in the provisions of the Model Law regulating procedures in competitive negotiations, making the latter more structured and transparent than single-source procurement. This method can therefore be considered the preferred alternative to single-source procurement in situations of urgency and for the protection of the essential security interests of the State.

20. Enacting States may consider that certain circumstances envisaged for the use of competitive negotiations are unlikely to arise in their current systems, and so conclude that not all the conditions require inclusion in their domestic law.

21. Enacting States may also wish to impose additional requirements for the use of competitive negotiations. Where it does so, the procurement regulations or rules and guidance issued by the public procurement agency or other similar body may require that the procuring entity take steps such as: establishing basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; preparing various documents to serve as the basis for the negotiations, including documents setting out the desired technical characteristics of the goods or construction to be procured, or a description of the nature of services to be procured, and the desired contractual terms and conditions; and requesting the suppliers or contractors with which it negotiates to itemize their prices so as to assist the procuring entity in comparing what is being offered by one supplier or contractor during the negotiations with offers from the other suppliers or contractors. (For more detailed guidance on such comparisons, including risk mitigation, see the discussion on evaluation in request-for-proposals with dialogue proceedings [\[**hyperlink**\]](#).)

Article 34(3), (5) and (6). Solicitation in competitive negotiations [\[hyperlink**\]](#)**

22. Article 34(3) [\[**hyperlink**\]](#) regulates solicitation in competitive negotiations, and is coupled with the requirement of article 34(5) for an advance notice of the procurement. (For general considerations relating to the exceptional nature of direct solicitation under the Model Law (and for an explanation of the term “open solicitation”, see the commentary to Part II of Chapter II [\[**hyperlink**\]](#).) The advance notice must specify, in particular, that competitive negotiations will be used and must also provide a summary of the principal terms and conditions of the procurement contract envisaged. This is an essential public oversight measure. On the basis of the information published, any aggrieved supplier or contractor may challenge the use of competitive negotiations where a more transparent and regulated procurement method is available. This safeguard is particularly important in the context of this procurement method and of single-source procurement, both of which are considered exceptional and justified for use only in the very limited cases provided for in article 29 of the Model Law.

23. The procuring entity will not be required to publish such a notice, but may still choose to do so, when competitive negotiations are used in situations of urgency due to catastrophic events (article 30(4)(b) [\[**hyperlink**\]](#)). This exemption is set out in paragraph (6) of this article. In the other cases of urgency referred to in article 30(4)(a) [\[**hyperlink**\]](#), providing an advance notice of the procurement is the default rule. This is also the default rule when competitive negotiations are used in procurement for the protection of essential security interests of the State referred to in article 30(4)(c) [\[**hyperlink**\]](#). The default rule is subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement (for guidance on the provisions of the Model Law on confidentiality and procurement involving classified information, see Section ** of the general commentary, above [\[**hyperlink**\]](#)).

24. Additional guidance on both the use of advance notices under article 34(5) and (6) and on the objective identification of suppliers to participate in the process is found in introduction to Chapter IV [\[**hyperlink**\]](#). The issues raised there are also relevant in the context of competitive negotiations.

Article 51. Competitive negotiations [\[hyperlink**\]](#)**

25. Article 51 [\[**hyperlink**\]](#) regulates the procedures for competitive negotiations. Safeguards have been included aimed at ensuring transparency and the equal treatment of participants in procurement by means of this procurement method.

26. The article is relatively short in the light of the flexible nature of the method itself. However, it would be wrong to state that procedures of this procurement method remain largely unregulated in the Model Law. This procurement method, as any other, is subject to the general provisions and rules set out in chapters I and II of the Model Law, the procurement regulations and any other bodies of applicable law. For example, under the Model Law, the procuring entity will be required to maintain a detailed record of the procurement proceedings, including details of negotiations with each participating supplier or contractor, and to provide access by suppliers or contractors to the record, as provided by article 25 [\[**hyperlink**\]](#). This requirement is an essential measure for this procurement method to ensure effective oversight, and to permit challenges by aggrieved suppliers.

27. To the extent that the procuring entity complies with all the applicable rules, and that the negotiations are conducted on a concurrent basis and so as to ensure equal treatment of the suppliers, the procuring entity may organize and conduct the negotiations as it sees fit. The rules that are set out in the present article are intended to confer this freedom upon the procuring entity, while attempting to foster competition in the proceedings and objectivity in the selection and evaluation process. In particular, since the main use of competitive negotiations in practice will be in procurement in situations of urgency, the procedures should allow for negotiations of very short duration. As to the distinction between the type of bargaining that is envisaged in this procurement method, as compared with the

discussions and dialogue that take place under other Chapter V procurement methods, see the commentary in the introduction to Chapter V [\[**hyperlink**\]](#).

28. Paragraph (1) cross-refers to the relevant provisions of article 34 on solicitation in competitive negotiations, one of which requires providing an advance notice of the procurement, except in cases of urgency. (For the guidance on advance notices, see the commentary to Chapter II, Part II, above [\[**hyperlink**\]](#).)

29. Paragraph (2), regulating communication of information during negotiations, is subject to the rules on confidentiality contained in article 24 [\[**hyperlink**\]](#) of the Model Law. The provisions are similar to the provisions addressing request-for-proposals with dialogue contained in article 49(10). The guidance to article 49(10) is therefore relevant in the context of this paragraph (see paragraphs ... of the commentary to that procurement method, above [\[**hyperlink**\]](#)).

30. Paragraph (3) provides that the procuring entity should, at the end of the negotiations, request suppliers or contractors to submit best and final offers (BAFOs), on the basis of which the successful offer is to be selected. BAFOs are defined as best and final with respect to all aspects of each supplier's proposal. Thus, no single set of terms and conditions of the procurement against which final submissions are evaluated is issued in this procurement method. BAFOs are to be presented by a date specified by the procuring entity in its request for BAFOs. To ensure that all participating suppliers are on an equal footing as regards receiving information about termination of negotiations and available time to prepare their BAFO, best practice involves issuing the request in writing and communicating it simultaneously to all participating suppliers. The provisions are similar to those of article 49(11) [\[**hyperlink**\]](#). The guidance to that provision [\[**hyperlink**\]](#) is therefore relevant in the context of this method.

31. UNCITRAL considers the BAFO stage essential since it provides for the equal treatment of participating suppliers. It puts an end to the negotiations and terminates the ability of the procuring entity to modify its requirements or the terms and conditions of the procurement; the terms and conditions offered by suppliers and contractors are also then set. In addition, requiring requests for BAFOs to be issued to all suppliers remaining in the negotiations, leaves an audit trail as regards all actual offers that were before the procuring entity and that it should have considered in making the selection in accordance with paragraph (5) of this article. Without that stage, excess discretion is given to the procuring entity to decide with which supplier or contractor to conclude the contract, with no transparency and verifiable traces in the process that would allow effective challenge.

32. Paragraph (4) prohibits negotiations after BAFOs were submitted, so as to conform the competitive negotiations procedure with equivalent stages in other procurement methods and to ensure the equal treatment of suppliers. It draws on similar provisions in article 48 (12). The guidance to article 48 (12) (see paragraphs ... above) is therefore relevant in the context of this paragraph. UNCITRAL considers it best practice to prevent the procuring entity from negotiating further after BAFOs have been presented, and to prevent multiple requests for "BAFOs": this stance is taken consistently throughout the Model Law where the BAFOs stage is envisaged.

5. Single-source procurement

General description and policy considerations

33. In view of the non-competitive character of single-source procurement, this method is considered under the Model Law the method of last resort after all other alternatives have been exhausted. The use of single-source procurement is therefore subject to the general principle contained in article 28(2) [\[**hyperlink**\]](#), according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to single-source procurement, such as restricted tendering, request-for-quotations or competitive negotiations, is appropriate, the procuring entity must select the procurement method that would ensure most competition in the circumstances of the given procurement. This is a particular concern in cases of urgency: the extent of urgency of the subject-matter of the procurement will dictate whether competitive negotiations, which are preferable to single-source procurement as offering some competition, are feasible.

34. It is recognized that, except for situations of urgency catastrophe and where single-source procurement is used to promote a socio-economic policy (as to which, see, further paragraph [** below](#)), the procuring entity may avoid the use of single-source procurement by using alternative methods or tools or through proper procurement planning. For example, in situations of extreme urgency due to a catastrophic event where negotiations with more than one supplier would be impractical (the second condition for use), the procuring entity may consider using procurement methods not involving negotiations, such as request-for-quotations for procurement of off-the-shelf items. A closed framework agreement without second-stage competition may also effectively address situations of extreme urgency, where it has been concluded in advance against a background of an identified and probable need occurring on a periodic basis or within a given time-frame (see, further, the commentary to framework agreements in section [** below \[**hyperlink**\]](#)). With better procurement planning, framework agreements may also be a viable alternative to single-source procurement in situations referred to in subparagraph (c) (the need for additional supplies from the same source for reasons of standardization and compatibility).

Article 30(5). Conditions for use of single-source procurement [\[hyperlink**\]](#)**

35. Article 30(5) sets out the conditions for use of single-source procurement. The first, in subparagraph (a), refers to objectively justifiable reasons for the use of single-source procurement: the existence of only one supplier or contractor capable of providing the subject matter, either because that supplier or contractor has exclusive rights with respect to the subject matter of the procurement or for other reasons that confirm the exclusivity. The rules concerning the description of the subject matter of the procurement contained in article 10 of the Model Law [\[**hyperlink**\]](#) prohibit the procuring entity from formulating the description of the subject matter of the procurement in a way that artificially limits the market concerned to a single source. Where the risk or practices of formulating such narrow descriptions exist, the use of functional descriptions (performance/output specifications) should be encouraged. The enacting State should in addition ensure, through appropriate authorities, the regular monitoring of the practice of its procurement entities with the use of single-source procurement on this ground, since

its improper use may encourage monopolies and corruption, whether inadvertently or intentionally.

36. In these circumstances, enacting the requirement for an advance public notice of single-source procurement (contained in article 34(5) of the Model Law [\[**hyperlink**\]](#)) should be considered an essential safeguard: it tests the procuring entity's assumption that there is an exclusive supplier, and so enhances transparency and accountability in this aspect of procurement practice. Where additional suppliers emerge, provided that they are qualified, the justification for single-source procurement falls away, and another procurement method will be required. Another aspect of best practice, which the rules or guidance from the public procurement agency or similar body should emphasize, is encourage procuring entities to plan for future procurements and to acquire appropriate licences, so as to allow for competition in those future procurements and avoid the unnecessary use of single-source procurement. This is particularly the case for the purchase of products protected by intellectual property rights, such as spare parts, which have traditionally been procured using single-source procurement.

37. The second condition, set out in subparagraph (b), referring to extreme urgency owing to a catastrophic event, overlap to some extent with the condition for use of the competitive negotiations in the case of urgency owing to a catastrophic event (paragraph (4)(b) of this article). The difference is in the level of urgency: to justify to the use of single-source procurement, the urgency must be so extreme that holding negotiations with more than one supplier would be impractical. For example, following a catastrophic event, there may be immediate needs for clean water and medical supplies; a need for semi-permanent shelter may arise out of the same catastrophe but is perhaps not so urgent. As is the case in competitive negotiations, the need to link the extent of the procurement with the extreme urgency will limit the amount that can be procured using this method: the amount procured using emergency procedures should be strictly limited to the needs arising from that emergency situation.

38. Subparagraph (c) refers to the need for standardization or compatibility with existing goods, equipment, technology or services as the justification for to the use of single-source procurement. This use must be truly exceptional: otherwise needs may be cited that are in reality due to poor procurement planning on the part of the procuring entity (see also the commentary in paragraph 1 above in this regard). Procurement in such situations should therefore also be limited both in size and in time.

39. Subparagraph (d) justifies the use of single-source procurement for the protection of essential security interests of the State. This provision addresses, in particular, procurement involving classified information where the procuring entity concludes that the information concerned will be insufficiently protected if any other method of procurement, including another exceptional method of procurement such as competitive negotiations, is used.

40. Subparagraph (e) has been included in order to permit the use of single-source procurement to implement a socio-economic policy of the government in the enacting State concerned. The term "socio-economic policy" is defined in article 2 [\[**hyperlink**\]](#), noting in particular that it is a declared policy goal of that government set out in other laws or the procurement regulations, rather than a

policy that an individual procuring entity may wish to pursue. Articles 8-11 [\[**hyperlinks**\]](#) explain that such policies may be implemented through the use of domestic procurement (under article 8 [\[**hyperlink**\]](#)); qualification criteria (under article 9 [\[**hyperlink**\]](#)); descriptions and specifications (under article 10 [\[**hyperlink**\]](#)); and evaluation criteria (under article 11 [\[**hyperlink**\]](#)).

41. This subparagraph is drafted to provide safeguards to ensure that it does not give rise to more than a very exceptional use of single-source procurement: it is allowed only where no other supplier or contractor is able to implement that policy. It should be interpreted in very restrictive terms, not to allow the use of single-source procurement for any other considerations. The requirement for an advance public notice of the procurement (as explained in paragraph 1 above), and the additional requirement for an opportunity to comment, will allow the procuring entity's assertion of the circumstances justifying this use of single-source procurement to be tested. Although this stage is not regulated in detail in the Model Law, to make the opportunity to comment meaningful, the procuring entity will need to allow sufficient time to elapse between the notice and the start of the procurement proceedings. The procuring entity may receive comments from any member of the public and should be expected to provide explanations. The procurement regulations, or other rules and guidance from the public procurement agency or similar body should regulate further aspects of these provisions: in particular, whose comments should specifically be sought (for example, of local communities) and the purpose or the effect of comments, especially negative, if received. Additional guidance should be provided on other, less restrictive ways of implementing socioeconomic policies, as outlined in the commentary referred to earlier in this paragraph.

42. As a general rule, the Model Law does not require approval by a designated organ for resort to the use of single-source procurement. This approach is in conformity with the decision of UNCITRAL not to require, also as a general rule, the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for more detailed guidance on this point, see Section [**](#) of the general commentary above [\[**hyperlink**\]](#)). As an exceptional measure and to emphasize the highly exceptional use of single-source procurement under the conditions of subparagraph (e), however, enacting States may wish to provide for an ex ante approval mechanism. UNCITRAL acknowledges that this safeguard may be illusory: there can be elevated risks of corruption involving the approval chain where resort to single-source procurement is sought in improper cases. At the same time, there can be an unjustifiable waste of time and costs where permission for use of single-source procurement is sought for perfectly appropriate circumstances.

43. As in competitive negotiations, enacting States may consider that certain circumstances envisaged for the use of single-source are unlikely to arise in their current systems, and so conclude that not all the conditions require inclusion in their domestic law. Similarly, enacting States may wish to impose additional requirements for the use of single-source procurement, such as those discussed in the context of competitive negotiations above [\[**hyperlink**\]](#).

Article 34(4), (5) and (6). Solicitation in single-source procurement
[hyperlink**]**

44. Article 34(4) regulates solicitation in single-source procurement and is coupled with the requirement in article 34(5) of this article for an advance notice of the procurement. (For general considerations relating to the exceptional nature of the use of direct solicitation under the Model Law (and for an explanation of the term “open solicitation”, see the commentary to Part II of Chapter II [**hyperlink**]).) The notice must specify in particular that single-source procurement will be used and must also provide a summary of the principal required terms and conditions of the envisaged procurement contract. This is an essential public oversight measure. On the basis of the information published, any aggrieved supplier or contractor may challenge the use of single-source procurement where a competitive method of procurement appropriate in the circumstances of the given procurement is available. This safeguard is particularly important in the context of this procurement method, which is considered exceptional and justified for use only in the very limited cases provided for in article 30(5) [**hyperlink**].

45. The procuring entity will not be required to publish such a notice, but may still choose to do so, when single-source procurement is used in situations of extreme urgency owing to a catastrophic event (article 30(5)(b) [**hyperlink**]). This exemption is set out in paragraph (6) of this article. In the other cases justifying resort to single-source procurement, providing an advance notice of the procurement is the default rule, subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of the essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement. This situation may arise in particular when resort to single-source procurement is made in procurement for the protection of essential security interests of the State under article 30(5)(d). (For guidance on the provisions of the Model Law on confidentiality and procurement involving classified information, see Section ** of the general commentary above [**hyperlink**].)

46. Additional guidance on both the use of advance notices under article 34(5) and (6) and on the objective identification of suppliers to participate in the process is found in introduction to Chapter IV [**hyperlink**]. The issues raised there are also relevant in the context of single-source procurement.

Article 52. Single-source procurement [hyperlink**]**

47. Article 52 sets out relatively simple procedures for single-source procurement procedures. The simplicity reflects the highly flexible nature of single-source procurement, which involves a sole supplier or contractor, thus making the procedure essentially a contract negotiation (and which therefore falls outside the general scope of the Model Law). Issues of competition and equal treatment of suppliers or contractors in the procurement proceedings, although important at the stage when the decision on the resort to this procurement method is made, do not arise during the procurement proceedings.

48. The provisions cross-refer to the requirement of an advance notice of the procurement and an exemption thereto in article 34 [\[**hyperlink**\]](#), other than in cases of urgency as set out in the commentary on solicitation in the preceding section. They also contain a requirement to engage in negotiations, unless to do so is not feasible in the light of extreme urgency. The requirement has been introduced so that procuring entity can negotiate and request, when feasible and appropriate, market data or costs clarifications, in order to avoid unreasonably priced proposals or quotations.

49. The provisions of chapter I are generally applicable to single-source procurement, including the obligation to cancel the procurement in situations described in article 21 [\[**hyperlink**\]](#). The issues discussed in the commentary to that article [\[**hyperlink**\]](#) are also relevant in the context of single-source procurement (for example, if the sole supplier must be excluded from further participation in the procurement proceedings on the ground of inducement, unfair competitive advantage or conflicts of interest). In addition, a number of provisions of the Model Law aimed at transparency in the procurement proceedings will be applicable, such as article 23 [\[**hyperlink**\]](#) on publication of notices of procurement contract awards, article 25 [\[**hyperlink**\]](#) on keeping the comprehensive record of the procurement proceedings, including justifications for to the use of single-source procurement, in addition to the general requirement for an advance notice of the procurement. The procedures of single-source procurement should not therefore be regarded as largely unregulated in the Model Law because of the brevity of article 52. They must be implemented and used taking into account all applicable provisions of the Model Law, as well as those of procurement regulations and other applicable provisions of law of the enacting State.

(A/CN.9/WGI/WP.79/Add.13) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for the Guide text to accompany Chapter VI of the UNCITRAL Model Law on Public Procurement on electronic reverse auctions, comprising an introduction, commentary on related provisions of Chapter II (article 31), and commentary on article 53.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

Part II. Article-by-article commentary

**Chapter VI: Procedures for the use of
electronic reverse auctions**

A. Introduction

1. Executive Summary

1. An electronic reverse auction (“auction,” or “ERA”), as defined in article 2 of the Model Law, is an online, real-time purchasing technique utilized by a procuring entity to select the successful submission. It involves the presentation by suppliers or contractors (“bidders”) of successive bids during a scheduled period of time and the automatic evaluation of those bids using ICT systems, until a winning bidder is identified. The term “successive bids” in the definition refers to successive reductions in the price or improvements in overall offers to the procuring entity. It thus provides an exception to the general rule under the Model Law that a supplier or contractor has one opportunity to present its price in response to an invitation to present a submission.

2. It has been observed that ERAs have many potential benefits. First, they can improve value for money through successive competition among bidders, using dynamic and real-time trading. The use of the Internet as the medium for holding the auction can also encourage wider participation and hence increased competition. Secondly, auctions can reduce the time and administrative costs required to conduct the procurement of simple and off-the-shelf goods and standardized services. Thirdly, they can enhance internal traceability in the procurement process as information on the successive results of the evaluation of bids at every stage of the auction and the final result of the auction are recorded; all this information is made available to the procuring entity instantaneously. In addition, they can enhance transparency as each bidder’s relative position is made known to him instantaneously; the progress and outcome of the auction are made known to all bidders instantaneously and simultaneously. Fourthly, the enhanced transparency

and a fully automated evaluation process that limits human intervention may assist in the prevention of abuse and corruption.

3. Recognizing these potential benefits of ERAs, the Model Law enables such auctions on the conditions contained in article 31 [\[**hyperlink**\]](#) so as to allow their use in appropriate circumstances, and subject to the procedural requirements set out in articles 53 to 57 [\[**hyperlink**\]](#). Consistent with its approach to all procurement methods under the Model Law, UNCITRAL provides for auctions in all procurement — whether of goods, construction or services. While goods may be the most common application of the technique, such as for the purchase of office supplies, simple services — such as the purchase of hourly labour from technicians certified in a particular discipline — are found in practice.

4. ERAs have been increasing in use in recent years. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs, and by permitting the anonymity of the bidders to be preserved as the auctions take place virtually, rather than in person. For this reason, the Model Law allows only online auctions with automatic evaluation processes, where the anonymity of the bidders, and the confidentiality and traceability of the proceedings, can be preserved. The risk of collusion may nevertheless be present even in ERAs especially when they are used as a phase in other procurement methods or preceded by off-line examination or evaluation of initial bids. The procedures are discussed in more detail in the commentary to the articles in Chapter VI itself.

5. The introduction of an ERA system involves a significant investment, and is generally carried out as part of the introduction of an e-procurement system. The discussion of e-procurement in Section [**](#) of the general commentary above [\[**hyperlink**\]](#) should be considered in addition to the commentary to Chapter VI.

2. Enactment: policy considerations

6. The UNCITRAL approach is to provide for ERAs used to select the winning bidder. Although there are other models in use, which involve a further examination and/or evaluation after the auction, the Model Law requires that the ERA itself is to be the final stage in the procurement proceedings in which the winner is selected, and the winning terms and conditions are to figure in the contract. The UNCITRAL approach is considered the most transparent and at lowest risk of abuse, and reflects the general prohibition of negotiations after the selection of the successful supplier or contractor throughout the Model Law.

7. ERAs under the Model Law may be conducted either as a procurement method (“stand-alone ERAs”) or as the final phase preceding the award of the procurement contract in other procurement methods (or under framework agreements with second-stage competition, “ERAs as a phase”), as and where appropriate. The two types of ERAs require different provisions to some extent; enacting States may choose to provide for both these types of ERAs, or only one. The provisions in chapter VI are drafted to allow for either option to be exercised without significant drafting amendments to the Model Law’s provisions.

8. By their very nature, ERAs encourage a focus on price, which means that for standardized and off-the-shelf products or services, the procuring entity can reap the benefits of strong competition on price. Anecdotal evidence indicates that where quality considerations are important, or where the items or services to be procured

are not standardized, the risks to effective procurement are greater, because price reductions may be paid for by reducing variable quality elements (such as the materials used in manufacture). A noted concern in the use of ERAs is their relative ease of use from an administrative perspective, once systems are in place allowing for them, such that they may be overused and used in inappropriate situations. Overuse or inappropriate use may be based on an intention to reduce the numbers of competitors in the market, with risks of concentrating procurement markets and of collusion in repeated procurements, as discussed in sections ** and ** of the general remarks above [\[**hyperlinks**\]](#). The conditions for use and procedures, as discussed in paragraphs ** below [\[**hyperlink**\]](#), have been designed to mitigate this risk, without unduly restricting the use of ERAs and their potential for development in the medium to longer term.

9. ERAs may also have an anti-competitive impact in the medium and longer term, as they may be more vulnerable than other procurement processes to collusive behaviour. The opportunity arises because there is a risk, where participating suppliers become aware of each others' identities, of price-signalling or other collusion, through the successive presentation of bids in an individual auction, and also where there is regular or periodic procurement of the same subject-matter using ERAs.¹ By comparison, in a traditional tender or other procedure, the participating suppliers are not publicly identified when submissions are presented.

10. The maintenance of anonymity is therefore critical to mitigate the risks of collusion in ERAs, so that they are no higher than in other procurement methods. Generally speaking, ERAs are more vulnerable to price manipulation, price-signalling or other anti-competitive behaviour in markets with only a limited number of potentially qualified and independent suppliers or contractors known to each other, or in markets dominated by one or two major players, and in the repeated use of auctions with the same participants, because anonymity is in practice more difficult to maintain. The Model Law's procedures have also been designed to mitigate this risk, for example by encouraging the combination of ERAs and open framework agreements under Chapter VII [\[**hyperlink** for repeated purchases\]](#), as further explained in the commentary to that Chapter [\[**hyperlink**\]](#).

11. The provisions in the conditions for use of and procedures for auctions to mitigate the risks to competition, described in the following section, address the two types of auctions provided for in the Model Law separately: in auctions as a phase, considering the risk of collusion and other anti-competitive behaviour requires a more in-depth assessment of the market concerned, as the commentary explains [\[**hyperlink**\]](#). For this reason, the issues described regarding implementation and use in the following section may also inform policy decisions on enactment.

12. Enacting States will wish to consider whether or not tender securities should be permitted in ERAs. For simple auctions, which will include most stand-alone ERAs, they are unlikely to be cost-effective. As regards more complex auctions, tender securities might be appropriate. In such cases, the regulations or rules and additional guidance should address how the requirements will work in practice;

¹ The Glossary will include the following explanation of collusion: Collusion occurs when two or more bidders work in tandem to manipulate and influence the price, keeping it artificially high, or share the market by artificially inflating bid prices or not presenting bids, or otherwise distort the process.

including on what situations would allow the procuring entity to call on the tender security. For example, it may be considered that failing to register for an auction under article 54 may prevent the procuring entity from holding the auction because insufficient bidders will participate to provide effective competition. In practice, however, bidders cannot be obliged to change any aspects of their bids and can simply abstain from the bidding, so the tender security may in fact be worthless, or at best, not cost-effective. The implications for future participation should also be considered.²

3. Issues of implementation and use

13. The following policy considerations are viewed as particularly important for the successful introduction and use of ERAs, which may inform the regulations, and rules and guidance, to be issued to support the Model Law:

(a) Appropriate use of auctions:

(i) Stand-alone auctions are most suitable for commonly used goods and services, which generally involve a highly competitive, wide market, where the procuring entity can issue a detailed description or one referring to industry standards, and where the offers from bidders offer the same quality and technical characteristics such as office supplies, commodities, standard information technology equipment, primary building products and simple services. A complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated. In such procurement, the system is comparing like with like, and price can be the determining, or a significant determining, evaluation criterion. Where there is an Internet-based market, such as for office supplies, the results may be optimal [x ref e-catalogues];

(ii) This type of procurement is likely to take place in a market with many participants, so that anonymity is assured, and competition should result. Where there are repeated such auctions, however, and whether or not they take place within framework agreements, rules or guidance should address how to ensure that the same small group of participants does not always take part; procuring entities should monitor their procedures and take steps to modify them if there is any evidence of manipulation (see, further, the guidance to article ** below [**hyperlink**]);

(iii) The types of procurement where non-quantifiable factors prevail over price and quantity considerations including the procurement of construction or services involving intellectual input that is not objectively quantifiable, such as design works, and other quality-based procurement, are less suitable for auctions. Rules or guidance should therefore stress that it would be inappropriate to use auctions in these circumstances;

(iv) In addition, in order for an ERA to function correctly in eliciting low but realistic prices, it is important for bidders to be fully aware of their cost structures;

² The Working Group may wish to consider whether to make a stronger recommendation on this matter.

(v) Further, the greater the number of criteria to be evaluated in the auction, the more difficult it is for both procuring entity and suppliers or contractors to understand how varying one element will impact on the overall ranking. Thus, where there are many variables, the auction will be less appropriate. In addition, there will be no meaningful competition where the auction effectively ceases to be based on a common description of the subject-matter of the procurement. Such risk is higher where many variables related to technical, quality and performance characteristics of the subject matter are involved;

(vi) In some auctions as a phase, the conditions set out in subparagraphs (i) and (ii) may apply: for example, where an auction is held within an open framework agreement, within request-for-quotations procedures, and other methods with many participating suppliers. In others, with some or all of the features described in subparagraphs (iii)-(v), auctions may strictly speaking be available under the conditions for use of article 31(2), but are unlikely be appropriate, both because effective competition will be more difficult to achieve and because the risk of collusion will probably be higher than it would be without the auction as a phase. However, where more detailed initial steps in the procedure are required (such as assessing qualifications and responsiveness, and perhaps ranking on the basis of quality considerations that are evaluated before the auction), so that the auction itself retains more of the features of the competitive market described above, an auction may narrow down the number of outstanding evaluation items and then be appropriate. Nonetheless, it should be borne in mind that the result may be to add a layer of complexity to an already complex procurement procedure;

(vii) Regulations, or rules and other guidance should therefore guide the procuring entity in considering the market concerned before a procurement procedure commences, to identify the relative risks and benefits of an auction. In similar vein to the comments made on solicitation in the introduction to Part II of Chapter II, an assessment should be made as to whether the risks of collusion rather than competition would be higher in an ERA than in any other procurement method, before a determination as to which method and technique to use. The competition authorities in the enacting State may be able to provide relevant information on the relative risks, and any others, such as the risk of dumping in the market concerned;

(b) Phased introduction of auctions: it is recommended that enacting States lacking experience with the use of ERAs should introduce them in a staged fashion as experience with the technique evolves; that is, to commence by allowing price only auctions, where price only is to be used in determining the successful submission, and subsequently, if appropriate, to proceed to the use of more complex auctions, where the award criteria include non-price criteria;

(c) Capacity-building: in order to derive maximum benefits from the use of ERAs, both procuring entities and suppliers and contractors must have confidence in the process and its results so as to encourage participation, and must be able to operate ERAs effectively. To that end, States should be prepared to invest sufficient resources in awareness and training programmes at an early stage, for overhead costs in training and facilitating suppliers or contractors in participating in ERAs. For the procuring entity, the training should address both technical issues, such as

how to quantify any non-price criteria objectively and to express them so that they can be factored in the automated mathematical formula or algorithm, and the provision of information to suppliers and contractors, especially SMEs. For suppliers and contractors, the training should address the system and how it functions, the changes involved in doing business with the government through an ERA and what impact these changes will have on their business opportunities. Otherwise, the risk is that a marketplace in which procurement was previously handled successfully may be abandoned, prices will be higher than they would have been absent the introduction of auctions, and the government's investment in the ERA system may fail. This capacity-building also implies a higher overhead cost per procurement than traditional methods, at least in the early stages of the use of ERAs;

(d) Transparency in procedures and planning: a clear description of the subject-matter and other terms and conditions of procurement must be established and made known to suppliers or contractors at the outset of procurement, together with the formula to select the winner and all information regarding how the auction will be conducted, in particular the timing of the opening and criteria governing the closing of the auction. This may require more detailed planning than in other procurement methods, and procuring entities should be made so aware;

(e) Drafting evaluation criteria: the provisions allow, in theory, any evaluation criterion to be part of the auction, provided that it can be factored into a formula or algorithm that automatically evaluates and re-evaluates the bids during the auction itself, and which identifies the highest-ranking bid at each successive stage of the auction. During the auction, each revised bid results in a ranking or re-ranking of bids using these automated techniques. As the requirement for automatic evaluation requires the evaluation criteria to be capable of being expressed in monetary terms; the further those criteria stray from price and similar criteria (such as delivery times, and warranties or guarantees expressed as a percentage of price), the less objective their expression in monetary terms will be. There may then be a disincentive for bidders to participate, and the outcome is less likely to be successful. Non-price criteria may vary from simple criteria such as delivery and guarantee terms to more complex criteria (such as the level of emissions in cars); further guidance on what constitutes price and other criteria, and their expression as a percentage of the total price, is to be found in the commentary to article 11 above [\[**hyperlink**\]](#).

14. Technical issues, such as ensuring adequate infrastructure, that the relevant Internet sites are available and supported by adequate bandwidth, and appropriate security to avoid the elevated risk of bidders' gaining unauthorized access to competitors' commercially sensitive information should be addressed in the regulations, rules or other guidance. Issues of authenticity, integrity of data, security and related topics in the use of e-procurement generally are addressed in the Section of the general commentary on e-procurement, above [\[**hyperlink**\]](#).

15. In the light of the above commentary on ensuring appropriate use and a phased introduction to ERAs, enacting States may wish to restrict — perhaps on a temporary basis — the use of auctions to markets that are known to be competitive (e.g. where there is a sufficient number of bidders to ensure competition and to preserve the anonymity of bidders) or through qualitative restrictions such as limiting their use to the procurement of goods only, where costs structures may be

easier to discern. Historically, some jurisdictions have used lists identifying specific goods, construction or services that may suitably be procured through ERAs, or excluding items from procurement through ERAs. However, experience indicates that this approach is cumbersome in practice, since it requires periodic updating as new commodities or other relevant items appear. Illustrative lists of items suitable for acquisition through ERAs or, alternatively, to list generic characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique, may therefore be a preferable tool.

16. Enacting States may also wish to provide, for example in the procurement regulations and further rules and supporting guidance, additional conditions for the use of ERAs, such as consolidating purchases to amortize the costs of setting up the system for holding auctions, including those of third-party software and service providers, and guidance on the concept of “price” criteria drawing on the provisions of article 11 and associated commentary [\[**hyperlinks**\]](#).

17. It is recommended that the public procurement agency or other body and the competition law authorities in an enacting State monitor competition in markets where techniques such as ERAs are used. The public procurement system should require the procuring entity to possess good intelligence on past similar transactions, the relevant marketplace and market structure.

18. Finally, it is common for third-party agencies to set up and administer auctions for procuring entities, which can further increase their relative ease of operation, and hence raise the risks of overuse and misuse noted above. Procuring entities should also be aware of other possible issues arising from outsourcing decision-making beyond government, such as to third-party software and service providers; the latter may have organizational conflicts of interest posing a serious threat to competition in that the third parties will wish to maximize their returns by promoting ERAs, without necessarily considering whether they are the appropriate procurement technique. To this extent, these third parties may effectively advise on procurement strategies. These issues arise also in other procurement techniques, such as framework agreements, and generally where outsourcing is concerned, and are discussed in Section [** of the general commentary above \[**hyperlink**\]](#). The Model Law discourages charging fees for the use of procurement systems, including for auctions, because they operate as a disincentive to participate, contrary to the principles and objectives of the Model Law; the manner of remunerating a third-party service-provider should be considered in the light of these matters. Finally, even if the public procurement agency or similar body or a procuring entity outsources the conduct of an auction or auctions to third-party service providers, the relevant body or procuring entity must retain sufficient skills and expertise to supervise the activities of such third-party providers.

B. Provisions on electronic reverse auctions

Article 31. Conditions for use electronic reverse auctions [\[hyperlink**\]](#)**

19. The purpose of article 31 is to set out conditions for the use of ERAs, either as stand-alone ERAs or ERAs as a phase (in which case they are cumulative with the other conditions for use of the procurement method concerned). These conditions

are designed to mitigate the risks of improper use of or overuse of ERAs described in paragraphs ** of the Introduction to this Chapter [**hyperlink**].

20. Paragraph (1) sets out the conditions for use of stand-alone ERAs. They are based on the notion that stand-alone ERAs are primarily intended to satisfy the needs of a procuring entity for standardized, simple and generally available items that it may need, as further described in the introduction to this Chapter above [**hyperlink**].

21. The requirement for a precise description of the subject-matter of the procurement found in paragraph (1)(a), coupled with the requirement for a detailed description in article 10 [**hyperlink**], will preclude the use of this procurement technique in procurement of most services and construction, unless they are of a highly simple nature and are in reality quantifiable (for example, straightforward maintenance works).

22. In formulating that and other terms and conditions of the procurement, procuring entities will need to set out clearly the detailed technical and quality characteristics of the subject-matter, as required in article 10 of the Model Law, so as to ensure that bidders will bid on a common basis. In this respect, the fact that bids will be automatically compared means that technical specifications, rather than functional ones, are generally more effective. The use of a common procurement vocabulary to identify goods, construction or services by codes or by reference to general market-defined standards is therefore desirable.

23. Paragraph (1)(b) is aimed at mitigating the risks of collusion and ensuring rigorous competition in stand-alone auctions (for a discussion of these matters, see paragraphs ** of the Introduction to this Chapter [**hyperlink**]). It requires that there must be a competitive market of suppliers or contractors anticipated to be qualified to participate in the ERA, but does not impose any minimum per se. It is, however, supplemented by article 55(2) [**hyperlink**] under which the procuring entity has the right to cancel the auction if the number of suppliers or contractors registered to participate in the auction is insufficient to ensure effective competition during the auction (see paragraphs ... of this Guide for the guidance on the relevant provisions of article 55(2) [**hyperlink**]).

24. The reference in paragraph (1)(b) to suppliers or contractors that are “anticipated to be qualified” to participate in the ERA should not be interpreted as implying that pre-qualification will be involved in procurement through ERAs. It may be the case that, in order to expedite the process and save costs, the qualifications of the winning bidder only are assessed after the auction. See paragraphs ... of this Guide for guidance on the relevant provisions of article 57 [**hyperlink**].

25. The award of contracts under ERAs may be based on either the price or the price and other criteria that are specified in the beginning of the procurement proceedings. When non-price criteria are involved in the determination of the successful submission, paragraph (1)(c) requires that such criteria must be quantifiable and capable of expression in monetary terms (e.g., figures, percentages): this provision overrides the caveat in article 11 that the expression in monetary terms should be made “where practicable” [**hyperlink**]. While all criteria can in theory be expressed in such terms, as noted above [**hyperlink**],

an optimal result will arise where the evaluation criteria are objectively and demonstrably capable of expression in such terms.

26. Paragraph (2) addresses the use of ERAs as a phase. Such ERAs may be used in the second-stage competition in framework agreements, where there are limited numbers of variables to auction. Although there will be risks of collusion as the bidders will be known to each other, such risks are inherent in the use of closed framework agreements, and the determination as to whether or not ERAs are suitable as described above should therefore be made when the manner in which a framework agreement will operate is itself determined. Although available under the flexible conditions for use of ERAs as a phase in all procurement methods envisaged under the Model Law, ERAs may not always be appropriate, as discussed in paragraphs ** of the general commentary [\[**hyperlink**\]](#) above, particularly where there is a focus on quality and a more complex evaluation of quality aspects than just pass/fail responsiveness criteria. In such cases, it may often be impossible or inappropriate to evaluate the quality aspects automatically through the auction. Since the Model Law requires the auction to be the final stage before the award of a procurement contract, auctions also cannot be used where quality aspects are to be evaluated after the auction (on these issues, see paragraphs ** above of the commentary in the introduction to this Chapter above [\[**hyperlink**\]](#)).

Article 53: Electronic reverse auction as a stand-alone method of procurement

Solicitation in stand-alone ERAs

27. Article 53 sets out, first, the procedures for soliciting participation in procurement by means of a stand-alone ERA, and incorporates the provisions of article 33 (which also govern open tendering) by cross-reference [\[**hyperlink**\]](#). Although there are core procedures that will cover all stand-alone ERAs, the procedures for each procurement will depend on the complexity of the ERA at hand. Some ERAs may be very simple, not even requiring the bidders' qualifications and the responsiveness of their bids to be ascertained before the auction, while other may be more complex and involve the examination and evaluation of initial bids. Pre-qualification is unlikely in the type of procurement concerned, though theoretically available. The subject-matter of the procurement, the examination and evaluation criteria to be used, and whether qualifications are to be assessed before the auction (or, as allowed under article 57(2), only those of the winner are to be assessed after the auction) will determine the complexity of the procedures.

28. For example, for the procurement of off-the-shelf products, there is almost no risk that bids will turn out to be unresponsive and little risk of bidders being unqualified. Hence the need for pre-auction checks is correspondingly low. In such cases, a simple declaration by suppliers or contractors before the auction may be sufficient (for example, that they possess the required qualifications and they understand the nature of, and can provide, the subject matter of the procurement). In other cases, ascertaining responsiveness before the auction may be necessary (for example, when only those suppliers or contractors capable of delivering cars with a pre-determined maximum level of emissions are to be admitted to the auction), and initial bids, as described in the following paragraph, will therefore be required. In some such cases, the procuring entity may wish to rank suppliers or contractors submitting responsive initial bids before the auction (in the given example, suppliers or contractors whose initial bids pass the established threshold will be

ranked on the basis of the emissions levels), so as to indicate their relative position and the extent of improvement that their bids may need during the auction in order to increase a chance to win the auction. In such cases, the auction must be preceded by an evaluation of the initial bids. The article has been drafted to accommodate all these different options.

29. Article 53(1) regulates the solicitation of bids in stand-alone ERAs. By cross referring to the provisions of article 33 [\[**hyperlink**\]](#), it requires open solicitation, reflecting one of the conditions for the use of ERAs as a stand-alone procurement method — the existence of a competitive market (see article 31(1)(b) [\[**hyperlink**\]](#)). By additionally requiring international solicitation as an application of the default rule under the Model Law, the provisions aim at achieving as wide participation in an ERA as possible. The limited exceptions to international solicitation are those that apply to other procurement methods requiring open solicitation and are listed in article 33(4) (domestic procurement in accordance with article 8 and cases of low-value procurement. See the guidance to article 33(4) in Section/paragraphs [** above \[**hyperlinks**\]](#)). Should the auction be preceded by pre-qualification, the provisions of article 18 will apply to the pre-qualification proceedings and to the solicitation of bids from those that have been pre-qualified (noting that those provisions have also been designed to ensure unrestricted and public international solicitation as the default rule).

30. The provisions on solicitation have been designed to fulfil one of the essential conditions for use of stand-alone ERAs — effective competition during the auction (article 31(1)(b) [\[**hyperlink**\]](#)). The importance of fulfilling that condition is underlined in certain other provisions of this chapter: for example by the requirement in article 53 [\[**hyperlink**\]](#) that the minimum number of suppliers or contractors required to register for the auction must be specified in the invitation to the auction (paragraph (1)(j) [\[**hyperlink**\]](#)), and by requiring the cancellation of the auction if the specified minimum of registered suppliers or contractors is not reached. In addition, in accordance with article 55(2) [\[**hyperlink**\]](#), the procuring entity may cancel the auction even if the required minimum has been reached but the procuring entity still considers that the number of registered suppliers or contractors is not sufficient to ensure competition.

31. Paragraph (1) in addition lists all information that must be included in the invitation to the auction. Since, in simple auctions, the invitation is followed by the auction itself and no further information may be provided, the list is intended to cover exhaustively all information that must be provided to suppliers or contractors before the auction. The aim is to enable them to determine whether they are interested and eligible to participate in the procurement proceedings, and if so, how they can participate. The information requirements are similar to those applicable to an invitation to tender (article 37 [\[**hyperlink**\]](#)) and the contents of solicitation documents in open tendering proceedings (article 38 [\[**hyperlink**\]](#)). As discussed in paragraphs [** of the Introduction to this Chapter above \[**hyperlink**\]](#), the Model Law discourages charging entry fees for the use of procurement systems. If there were to be any entry fee for the auctions, consistent with the position for all procurement methods; where one is levied, at a minimum it must be disclosed in the invitation.

32. Additional information has been included in the list (as compared to the open tendering list) reflecting the procedural particularities of this procurement method,

in particular that it is held online and involves the automatic evaluation of bids during the auction. Subparagraph (g) specifically highlights the need to provide to potential suppliers or contractors, alongside the evaluation criteria and procedures, the mathematical formula that will be used in the evaluation procedure during the auction. The automatic evaluation of bids using a mathematical formula, one of the distinct features of ERAs, is possible only where the evaluation criteria are quantifiable and expressed in monetary terms (as required by article 31(1)(c) [\[**hyperlink**\]](#)). Providing the mathematical formula from the outset of the procurement ensures that bids will be evaluated on a transparent and equal basis. This information, coupled with the requirement in paragraph (4)(c) to provide suppliers or contractors submitting initial bids with the result of any pre-auction evaluation, and the requirement in article 56(2) [\[**hyperlink**\]](#) to keep bidders informed of the progress of the auction, allows bidders to establish their status during the auction transparently and independently from the procuring entity and the system. They can thus verify the integrity of the evaluation process.

33. The information to be provided in subparagraph (j) to (p) is also particular to ERAs. Subparagraph (j) refers to the minimum number of suppliers or contractors required to register for the auction to be held. The importance of such information for ensuring effective competition during the auction is highlighted in paragraph [**above \[**hyperlink**\]](#). No single minimum can be stated in the Model Law itself (unlike for other procurement methods, such as request for quotations, where reference is made to a minimum of three quotations). This is because in some ERAs, a minimum of three bidders may fulfil the requirement of ensuring effective competition and may ensure the anonymity of bidders and the avoidance of collusion, while in other cases it may not. The circumstances of each procurement will guide the procuring entity in specifying the appropriate minimum number. To avoid collusion, the minimum should be set as at a high a level as possible, taking into account however that the procuring entity will be obliged to cancel the auction if the minimum is not reached (while it may, under article 55(2) [\[**hyperlink**\]](#), cancel the auction even if the minimum has been reached, for example if collusion among registered suppliers or contractors is suspected or genuine competition even with the established minimum cannot be achieved (see the relevant commentary to article 55(2) in paragraph [... below \[**hyperlink**\]](#)). Objectivity and ensuring fair and equitable treatment of suppliers or contractors should not be overlooked in this context.

34. Subparagraph (k) is an optional provision (accordingly presented in brackets) permitting a maximum number of bidders to be set, and setting out the procedure and criteria that are to be followed in selecting the maximum. As the accompanying footnote explains, the provision should not be enacted by States where local technical conditions do not so require, and in any event should be complemented with paragraph (2) of this article, so as to provide essential safeguards against abuse. UNCITRAL has permitted this measure in ERAs to allow for technical capacity limitations constraining access to the systems concerned (e.g. the software acquired for holding ERAs may accommodate only a certain maximum number of bidders). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision should become obsolete within a short period.

35. Establishing a maximum contradicts the Model Law's general principle of full and open competition; it is therefore permitted only in the exceptional circumstances prescribed. The concept is to limit the number of participants for practical reasons but not the principle of competition, and the restriction is permissible only to the extent justified by the actual technical capacity constraints. Selection of the participants within this established minimum is to be carried out only in accordance with pre-disclosed criteria and procedures, which must be non-discriminatory. In order to select the participants on an objective basis, the procuring entity may use a variety of techniques, as further explained in the commentary in the Introduction to Chapter IV, such as random selection, the drawing of lots or a "first come first served" approach [\[**hyperlink**\]](#), or it may apply other criteria that seek to distinguish among the bidders, provided that they are non-discriminatory.³ This relatively informal approach reflects the fact that where there is a sufficient number of participants, there will be sufficient market homogeneity to allow the best market offers to be elicited. As explained in the commentary in the Introduction to Chapter IV [\[**hyperlink**\]](#), neither pre-qualification nor examination of any initial bids submitted, both of which involve pass/fail tests permits the selection of a pre-determined number of best-qualified suppliers or contractors or best-ranked bids. (For a description of initial bids, see paragraphs [** below \[**hyperlink**\]](#).)

36. Subparagraphs (l) to (p) list the information about the technical aspects of the auction that must be provided to accommodate its online features and to ensure transparency and predictability in the process (such as specifications for connection, the equipment being used, the website, any particular software, technical features and, if relevant, capacity). The Model Law lists only those minimum functional requirements crucial for the proper handling of ERAs, and they are expressed in technologically neutral terms. These requirements should be supplemented by regulations, and further rules or supporting guidance to provide additional detail: for an example, regulations must spell out the permissible criteria governing the closing of the auction referred to in subparagraph (o), such as: (i) when the date and time specified for the closing of the auction has passed; (ii) when the procuring entity, within a specified period of time, receives no more new and valid prices or values that improve on the top-ranked bid; or (iii) when the number of stages in the auction, fixed in the notice of the ERA, has been completed. The regulations or other rules should also make it clear that each of these criteria may entail the prior provision of additional specific information; guidance should expand on the types of information concerned. Examples include that item (ii) above would require the specification of the time that will be allowed to elapse after receiving the last bid before the auction closes. Item (iii) above would require the prior provision of information on whether there will be only a single stage of the auction, or multiple stages (in the latter case, the information provided should cover the number of stages and the duration of each stage, and what the end of each stage entails, such as whether the exclusion of bidders at the end of each stage is envisaged).

37. With reference to subparagraph (p), the regulations should also require the disclosure of: (i) the procedures to be followed in the case of any failure, malfunction, or breakdown of the system used during the auction process; (ii) how

³ The Working Group may wish to consider whether the provisions indeed confer a greater flexibility than those of Chapter IV procurement methods, as this comment indicates.

and when the information in the course of the auction will be made available to the bidders (at a minimum, and to ensure equal treatment, the same information should be provided simultaneously to all bidders); and (iii) as regards the conditions under which the bidders will be able to bid, any minimum improvements in price or other values in any new bid during the auction or limits on such improvements. In the latter, case, the information must explain the limits (which may be inherent in the technical characteristics of the items to be procured). Suppliers or contractors may decide against participation in procurement involving ERAs, for example because of the lack of technical capacity, information technology literacy or confidence in the process, once all these matters are known.

38. This detailed information may be provided in the notice of the ERA itself or, by reference, in the rules for the conduct of the auction, provided that all relevant information is made known to all suppliers or contractors sufficiently in advance before the auction, to allow them to properly prepare for participation in the auction. It should be acknowledged that it may not always be possible to provide all relevant information in the invitation. For example, the deadline for registration to the auction (subparagraph (m)) and the date and time of the opening of auction (subparagraph (n)) in complex auctions involving the examination or evaluation of initial bids (see paragraphs ****16-21**** above) may not be known with certainty before the examination or evaluation is completed. The criteria for closing the auction may need to be determined when the number of suppliers or contractors registered for the auction and other information that affects the structure of the auction (whether it would be held in one round or several subsequent rounds) are known. Where it is not possible to provide all relevant information in precise terms, the invitation must set out at a minimum the general criteria, leaving specific criteria to be defined later in the process but in no case later than the commencement of the auction.

39. Some information listed in paragraph (1) must be interpreted by reference to other provisions of this chapter. For example, subparagraph (f), referring to the criteria and procedure for the examination of bids against the description of the subject matter of the procurement, should be read together with the provisions of article 57(2) **[**hyperlink**]** that allow the examination of the winning bid after the auction in very simple auctions. Subparagraph (f) also includes any criteria that cannot be varied during the auction (such as minimum technical requirements). Subparagraph (s), referring to the name, functional title and address of contact person(s) in the procuring entity for direct communication with suppliers or contractors “in connection with the procurement proceedings before and after the auction”, has to be read together with the provisions of article 56(2)(d) **[**hyperlink**]** that prohibits any communication between the procuring entity and bidders during the auction.

40. Some information required to be provided for other procurement methods is not appropriate in the context of ERAs, and so does not appear in paragraph (1). For example, bids for a portion or portions of the subject matter of the procurement are not permitted (otherwise, separate auctions within the same procurement proceedings would be required). There is no provision permitting a meeting of suppliers or contractors, in order to preserve the anonymity of bidders. Subparagraph (x) on post-auction formalities does not include any reference to approval by an external authority, both to reflect the conditions for the use of

stand-alone ERAs and the type of the subject matter envisaged to be procured through such ERAs under article 31(1) [\[**hyperlink**\]](#) of the Model Law. The execution of a written procurement contract under article 22 [\[**hyperlink**\]](#) of this Law is, however, not excluded, and specific formalities in the context of ERAs, such as the possibility of assessing qualifications or responsiveness after the auction, have been included.

41. Paragraph (2) dealing with the imposition of a maximum number of suppliers or contractors that can be registered for the auction has been discussed in connection with paragraph (1)(k) of the article (see paragraph [** above](#)). Notably, the procuring entity may impose such a maximum number only to the extent that technical capacity limitations in its communication system so require. As is also the case with open framework agreements, enacting States should be aware that technical developments are likely to make this provision obsolete in the short to medium term.

42. Paragraphs (3) and (4) establish additional requirements for the contents of the invitation to the auction and other pre-auction stages in stand-alone ERAs involving initial bids. Although it would normally be the case that a price-only auction does not require initial bids and other pre-auction procedures, the provisions are flexible enough to allow for this eventuality (where, for example, the procuring entity considers that minimum technical requirements are critical). The enacting State may omit these two paragraphs if it decides to provide in its national public procurement law only for very simple auctions, not involving any pre-auction stages beyond the invitation and registration for the auction.

43. In more complex auctions, where the procuring entity wishes to examine qualifications and responsiveness prior to the auction and so calls for initial bids, it must include the information in the invitation to the auction specified in paragraph (3), i.e. additional to that listed in paragraph (1). In such cases, the procuring entity must both request initial bids and provide sufficiently detailed instructions for preparing them, including the scope of the initial bids, the language in which they are to be prepared and the manner, place and deadline for presenting them. Paragraphs (1)(f) and (g) as regards the criteria for examination and evaluation of bids will also be applicable to initial bids, and the information to be provided under those paragraphs will therefore need to cover those steps before and during the auction. Since an overlap will exist between the information to be provided about the initial bids and bids during the auction, the procuring entity must correctly identify which information is relevant to which stage, to avoid confusion (in particular as regards the manner, place and deadline for presenting initial bids as opposed to the manner of accessing the auction and the manner and deadline for registering to the auction, different evaluation criteria and procedures and so on). The information provided as regards preparation, examination or evaluation of initial bids must be carefully drafted to allow suppliers or contractors to prepare initial bids and assure them that their initial bids will be examined or evaluated on an equal basis.

44. Paragraph (4) regulates additional pre-auction steps that are required for an examination or evaluation of initial bids. To allow effective challenge by aggrieved suppliers or contractors, a notice of rejection of any initial bid together with the reasons for rejection must be promptly communicated to the supplier or contractor concerned. The provisions of paragraph (4) do not regulate the reasons for rejection

but the provisions of chapter I of the Model Law will apply, such as article 9 [\[**hyperlink**\]](#) setting reasons for disqualification, article 10 [\[**hyperlink**\]](#) that set out responsiveness criteria, article 20 [\[**hyperlink**\]](#) on the rejection of abnormally low submissions, and article 21 [\[**hyperlink**\]](#) on the exclusion of a supplier or contractor on the ground of inducements, conflicts of interest or unfair competitive advantage. For ease of reference, the enacting State may wish to consider listing all grounds for the rejection of initial bids in the procurement regulations or other rules or guidance.

45. All suppliers or contractors submitting responsive initial bids must be invited to the auction unless the provisions of paragraphs (1)(k) and (2) have been enacted and the number of suppliers or contractors submitting responsive initial bids to be invited to the auction has been limited by the procuring entity in accordance with those provisions. If so, the procuring entity can reject bids in accordance with the criteria and procedure specified in the invitation to the auction for the selection of the maximum number. If the pool of suppliers or contractors submitting responsive initial bids will turn out to be below the minimum established in accordance with paragraph (1)(j), the procuring entity must cancel the auction; if the pool turns out to be above the minimum but still insufficiently large to ensure effective competition during the auction, the procuring entity may decide to cancel the auction, in accordance with article 55(2) [\[**hyperlink**\]](#) (see the relevant commentary to article 54(2) [\[**hyperlink**\]](#)).

46. As stated in paragraph 2 above, some complex auctions may involve an examination and all initial bids that meet the minimum threshold are admitted to the auction. In some others there is an additional evaluation of the initial bids and they may be ranked. In this case, the ranking of suppliers or contractors submitting responsive bids and other information about the outcome of the evaluation must be communicated to them, under paragraph (4)(c), before the auction can commence. In complex auctions, the procuring entity may receive initial bids that significantly exceed the minimum requirements, particularly where suppliers would be permitted to offer items with different technical merits and correspondingly different price levels, and the ranking may have a significant impact on participation in the auction itself, requiring the procuring entity to consider whether there will be effective competition.

47. The information to be communicated to suppliers or contractors on the results of evaluation and any ranking may vary from auction to auction; in all cases, it should be sufficient to allow those suppliers or contractors to determine their status vis-à-vis their competitors in the auction before the auction so that to allow meaningful and responsive bidding during the auction. Together with the mathematical formula to be used during the auction, as disclosed in the invitation to the auction in accordance with paragraph (1)(g), this information should allow suppliers or contractors independently to assess their chances of success in the auction and identify which aspects of their bids they should and could vary and by how much, in order to improve their ranking. Paragraph 3 of the commentary to article 56 below [\[**hyperlink**\]](#) discusses the possible conflict between full transparency and avoiding facilitating collusion in the transmittal of this information to bidders, and provides options on the question for consideration.

48. The provisions of paragraph (4) have been designed with a view to preserving the anonymity of bidders and the confidentiality of information about their initial

bids and the results of any examination or evaluation. Only information relevant to the initial bid is provided to each bidder. To ensure fair and equitable treatment of suppliers and contractors, the information must be dispatched promptly and concurrently to all of them.

(A/CN.9/WGI/WP.79/Add.14) (Original: English)**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session****ADDENDUM**

This addendum sets out a proposal for the Guide text to accompany Chapter VI of the UNCITRAL Model Law on Public Procurement on electronic reverse auctions, comprising commentary on articles 54-57.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT****B. Provisions on electronic reverse auctions to be included in the
article-by-article commentary (*continued*)****Article 54. Electronic reverse auction as a phase preceding the award of the
procurement contract**

1. This article regulates the procedures for soliciting participation in procurement proceedings involving an ERA as a phase. The conditions for use of such ERAs are discussed in the guidance to article 30, at paragraphs ** above [\[**hyperlink**\]](#).
2. Paragraph (1) refers to the minimum information that must be included when the procuring entity first solicits participation of suppliers or contractors procurement proceedings with ERAs as a phase. The provisions of paragraph (1) require that, in addition to all the other information required to be provided to suppliers or contractors, the procuring entity must specify that an ERA will be held, must provide the mathematical formula to be used during the auction and must disclose all other information necessary for participation in the auction. The disclosure of this minimum information at the outset of the procurement is essential in order to allow suppliers or contractors to determine not only their interest but also their ability to participate in the procurement. Suppliers or contractors may decide against participation in procurement involving ERA once the full picture is known, as explained in paragraph ** above [\[**hyperlink**\]](#).
3. Once announced, the ERA will be the method of selecting the successful supplier or contractor, unless the number of suppliers or contractors participating is insufficient to ensure effective competition. In this case, and in accordance with article 55(2) [\[**hyperlink**\]](#), the procuring entity has the right to cancel the ERA. It also has a separate right under article 19 [\[**hyperlink**\]](#) to cancel the procurement proceedings. This right may in particular be appropriate if it is become known to the procuring entity that and there is a risk of collusion, for example if the anonymity of bidders has been compromised at an earlier stage of the procurement proceedings.
4. Paragraph (2) refers to the stage immediately preceding the holding of the auction, after all other steps required to be taken in the procurement concerned have

been completed (such as pre-qualification, examination or evaluation of initial bids) and the only remaining step is to determine the successful bid through the auction. The procuring entity must provide the remaining participants with detailed information about the auction: the deadline by which they must register for the auction, the date and time of the opening of the auction, identification requirements and all rules applicable to the conduct of the auction. The provisions of articles 53 and 54 [\[**hyperlink**\]](#) have been drafted to ensure that equivalent information is provided to participants in stand-alone ERAs and ERAs as a phase. Further discussion of the required information is found in the guidance to article 53 (see paragraphs [** above \[**hyperlink**\]](#)).

Article 55. Registration for the electronic reverse auction and timing of holding of the auction

5. This article regulates the essential aspects of registration for the auction and the timing of the auction, and is intended to ensure the fair and equitable treatment of participating bidders, through the transparency requirements in paragraphs (1) and (2). These requirements are: communicating confirmation of registration and, where relevant, any decision to cancel the auction promptly to each registered supplier or contractor.

6. Paragraph (3) requires that reasonable time be afforded to suppliers or contractors to prepare for the auction, allowing for an effective challenge to the terms of solicitation under chapter VIII. Such a challenge can be made only up to the deadline for presentation of submissions, which in simple auctions (with no pre-auction examination or evaluation of initial bids) means up to the opening of the auction; in other cases, it means up to the presentation of initial bids. The period of time between the issue of the invitation to the auction and the auction itself should therefore be determined by reference to the circumstances (the simpler the auction, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The time requirement is qualified, as stipulated in paragraph (3), by the reasonable needs of the procuring entity, which may in limited circumstances (for example, in cases of extreme urgency following catastrophic events) prevail over the other considerations.

7. Paragraph (2) allows the procuring entity to cancel the auction if the number of suppliers or contractors registered for the auction is insufficient to ensure effective competition. The provisions are not prescriptive: they give discretion to the procuring entity to decide on whether the auction in such circumstances should be cancelled. Since the decision not to cancel may be inconsistent with the general thrust of competition and avoiding collusion, it should be justified only in the truly exceptional cases where the procurement must continue despite the lack of effective competition. The enacting State is encouraged to provide in the procurement regulations or other rules or guidance an exhaustive list of circumstances that would justify the auction to proceed in such cases. There may be other reasons permitting cancellation (for example, suspicion of collusion as explained in paragraph [... above](#)). This flexibility does not apply, however, in situations when the procuring entity must cancel the auction, for example under article 53(1)(j) [\[**hyperlink**\]](#), when any required minimum number of registered suppliers or contractors has not been reached (see paragraphs [... above](#)), or when the procuring entity must

terminate the auction for technical grounds under article 56(5) [\[**hyperlink**\]](#) (see paragraphs [** below](#)).

8. In stand-alone ERAs, the cancellation of the auction means the cancellation of the procurement. The procuring entity, upon analysing the reasons leading to the cancellation, may decide that another ERA would be appropriate, for example if mistakes in the description that caused a failure of sufficient number of suppliers or contractors to register for the auction can be rectified, or may choose another procurement method. Where ERAs as a phase are used, the cancellation of the auction will not necessarily lead to the cancellation of the procurement: the procuring entity may decide to award the contract on the basis of the results of a pre-auction examination and evaluation of bids, provided that this option was specified at the outset of the procurement.¹

9. Where ERAs as a phase are used, the procuring entity should also specify at the outset of the procurement any consequences if suppliers or contractors fail to register for the auction [\[and address issues of tender securities if needed\]](#).²

Article 56. Requirements during the electronic reverse auction

10. This article regulates the requirements during auctions, whether stand-alone ERAs or ERAs as a phase. Paragraph (1) specifies two types of auctions: the first type, simpler auctions, where the winning (lowest) price determines the successful bid; and a second type, where the winning bid is determined on the basis of price and additional non-price criteria. Regardless of the complexity of the criteria, all must be assigned a value, expressed in figures or percentages, as part of a pre-disclosed mathematical formula that makes their automatic evaluation possible. As required under articles 53 and 54 [\[**hyperlink**\]](#), information about each criterion used in evaluation, the value assigned to it and the mathematical formula are to be disclosed at the outset of the procurement proceedings; they cannot be varied during the auction. What can be varied during the auction are prices and other modifiable elements as per the terms of solicitation.

11. Paragraph (2) lists the essential requirements for holding the auction: in this respect, they reflect the features of the auction system under the Model Law and as defined in article 2 (by contrast with some other types of auction that are in use in practice), implement the conditions for use of auctions as set out in article 30 and elaborate on the requirements contained in articles 53 and 54 [\[**hyperlink**\]](#). Subparagraphs (a) and (c), for example, highlight the continuous process of bidding. Subparagraph (a) in addition requires that the bidders are provided with an equal opportunity to bid. In practical terms, this means for example, that the system must record bids immediately upon receipt, regardless of the originator, and must evaluate them and their effect on other bids. The system must promptly communicate the relevant information to all bidders. The latter requirement is elaborated in subparagraph (c), which refers to instantaneous communication to

¹ The text reflects the points made in the Working Group's deliberations on the Model Law; however the option to award the contract on the basis of the results of the pre-auction examination and evaluation of bids, provided that this option was specified at the outset of the procurement, is not explicitly envisaged in the text of the Model Law. The Working Group may therefore wish to revise the commentary.

² See, further, footnote 3 in A/CN.9/WG.I/WP.79/Add.13.

each bidder of sufficient information allowing it to determine the standing of its bid vis-à-vis other bids. The drafting of these provisions indicates that the same information is not necessarily communicated to all bidders, but the information communicated must be sufficient to allow this determination to be made, and it must ensure the fair and equitable treatment of bidders.

12. The Model Law is intentionally silent on the nature of the information that must be disclosed to fulfil this requirement. In deciding on how to regulate this issue, enacting States will need to balance considerations of transparency and promoting rigorous bidding against avoiding collusion and preventing the disclosure of commercially sensitive information. Appropriate options, depending on the auction and reflecting its complexity and other factors, include: (a) disclosing whether or not a bidder was leading the auction or had submitted the leading price; (b) disclosing the leading price; (c) disclosing to each bidder its standing compared with the leading bid (but no information on other bids); and (d) disclosing the spread of all bids. In any event, the procuring entity should be able to see the spread of all bids. Enacting States should be aware that, as experience in some jurisdictions indicates, the disclosure of the leading price could encourage very small reductions in the bid price, and thereby prevent the procuring entity from obtaining the best result; it could also encourage the submission of abnormally low bids. The greater the degree of information provided about other bids, the greater the possible risks of collusion; suppliers may also be able to reverse engineer others' bids in more complex auctions using the mathematical formula provided. Whatever decision is taken by the procuring entity as regards the type of information that is to be disclosed during the auction, this decision must be reflected in the rules for the auction that are made available to potential bidders before the auction commences. In addition, all stages and bids should be recorded and included in the record of the procurement. These provisions supplement the requirement in articles 53(1)(g) [\[**hyperlink**\]](#) and 54(1)(a) [\[**hyperlink**\]](#) to disclose the criteria and procedure that will be used during the auction and the requirement to provide the results of any pre-auction evaluation.

13. Subparagraph (b) reiterates the principle of automatic evaluation of bids during the auction. Together with subparagraph (d), it highlights the importance of avoiding any human intervention during the running of the auction. The auction device collects electronically the bids which are automatically evaluated according to the criteria and processes disclosed in the invitation to the auction. The collection device should ascribe identification tags to each bid that do not compromise anonymity. Online capacity should also exist to allow an immediate and automatic rejection of invalid bids, with immediate notification of the rejection and an explanation of the reasons for rejection. A contact point for urgent communications concerning possible technical problems should be offered to bidders. Such a contact point must be external to the auction device.

14. Paragraphs (3) and (5) of the article reiterate another important principle underlying auctions as provided for in the Model Law — the need to preserve the anonymity of bidders before, during and after the auction. Paragraph (2) reflects this principle by prohibiting the procuring entity from disclosing the identity of any bidder during the auction. Paragraph (5) extends this prohibition to the post-auction stage, including where the auction is suspended or terminated. The provisions should be construed broadly, prohibiting not only explicit disclosure but also

indirect disclosure, e.g. by allowing the identities of the bidders to be disclosed or identified by other bidders. Operators of the auction system on behalf of the procuring entity, including any persons involved, or others involved in the process in other capacities, e.g. the contact point for urgent communications concerning possible technical problems, should be regarded as agents for the procuring entity in that regard, and so subject to the same prohibition. It is clear, however, that there may be practical difficulties in preserving the anonymity of bidders, despite the provisions of this article and the chapter as a whole, in procurement for which a more or less stable pool of providers exists, and in repeated procurement of similar items through ERAs, whether or not framework agreements are used in conjunction with ERAs (see, further, the commentary in the Introduction to this Chapter [\[**hyperlink**\]](#)).

15. Paragraph (4) supplements the requirements in articles 3(1)(o) [\[**hyperlink**\]](#) and 54(2)(c) [\[**hyperlink**\]](#) as regards the need to disclose the criteria governing the closing of the auction at the latest before the auction is held. These rules, which will have been previously disclosed, may not be changed during the auction. Further, under no circumstances may the auction be closed before the established deadline even if no bidding takes place. It is commonly observed in practice that active bidding starts towards the closure of the auction. Giving the discretion to the procuring entity to close the auction before the established deadline would open the door to abuse, for example by allowing pre-auction arrangements between a bidder and the procuring entity to influence the outcome of the auction in favour of that bidder. On the other hand, there is no prohibition against extending the deadline for submission of bids as long as it is done in a transparent manner. This facility may prove useful, for example when the auction had to be suspended for technical reasons (as provided for in paragraph (5) of the article). It is good practice to require the rules of the auction to address the criteria and procedures for any extension of the deadline for submission of bids.

16. Suppliers may withdraw from the ERA before its closure. This should not affect the auction unless the withdrawal occurs for reasons requiring suspension or termination of the auction under paragraph (5) of the article (for example, failures in the procuring entity's communication system). In all other cases, the auction must proceed. Upon the closure of the auction, the procuring entity may need to analyse the reasons for withdrawal, especially if a substantial number of bidders have withdrawn, and any negative effect of such withdrawal on the outcome of the auction. The procuring entity's right to cancel the procurement at any stage of the procurement is reiterated in article 57 [\[**hyperlink**\]](#), which in this respect supplements article 19(1) [\[**hyperlink**\]](#) (for the guidance to article 19 on cancellation of the procurement, see paragraphs ** of the commentary to that article at ** above [\[**hyperlink**\]](#)).

17. Paragraph (5) requires terminating or suspending of the auction in the circumstances it sets out. Apart from failures in the procuring entity's communication system that risk the proper conduct of the auction, there may be other reasons for termination or suspension of the auction. While it would not be possible to list all of them in the procurement law, the Model Law requires setting them all in the rules for the conduct of the auction that are to be made available under articles 53 and 54, as applicable [\[**hyperlinks**\]](#). No further discretion should be given to the procuring entity in this respect since its exercise could lead to

abuse through human intervention in the process. Although in some cases termination or suspension may be unavoidable, such cases must be minimized, and where they arise, should be reviewed as part of monitoring or oversight mechanisms.

18. The rules for the conduct of the auction must also include procedural safeguards to protect the interests of bidders in case of the termination or suspension of the auction, such as: immediate and simultaneous notification of all bidders about suspension or termination; and in the case of suspension, the time for the reopening of the auction and the new deadline for its closure.

19. A termination of the auction, unlike suspension, is likely to lead to the cancellation of the procurement (for the differences between simple and complex auctions in this regard, see paragraph 3 of the commentary to article 55 [\[**hyperlink**\]](#) above).³

Article 57. Requirements after the electronic reverse auction

20. This article regulates steps to be taken after the auction, regardless of whether a stand-alone ERA or an ERA as a phase is involved. The applicable rules are the same since in all cases the auction precedes the award of the procurement contract. No further evaluation or negotiation is allowed after the auction has been held to avoid impropriety, favouritism or corruption. The results of the auction are therefore intended to be the final results of the procurement proceedings. The practical implication is that, where the solicitation documents stipulate that the procurement contract is to be awarded to the lowest-priced bid, the bidder with that bid is to be awarded the procurement contract and the winning price is to figure in the procurement contract. Where the solicitation documents stipulate price and non-price criteria for the award of the procurement contract, the bidder submitting the most advantageous bid as determined through the application of the pre-disclosed mathematical formula is to be awarded the procurement contract and the terms and conditions of the winning bid are to figure in the procurement contract. The limited exceptions to these rules are spelled out in paragraphs (2) and (3).

21. Paragraph (2) is applicable to simple stand-alone ERAs (that is, those that are not preceded by initial bids). In such auctions, assessments of qualification and responsiveness are carried out after the auction, and only with respect to the winner and the winning bid. This approach saves time and cost. If the winner turns out to be unqualified or its bid unresponsive, the procuring entity has two options: either to cancel the procurement proceedings or award the procurement contract to the next winning bidder, provided that the latter is qualified and its bid is responsive. This approach proceeds on the assumption that all bidders responding to the invitation can deliver the requested products or services at more or less the same level of quality; where the procurement involves simple, off-the-shelf goods or services, the risk to the procuring entity is low, because alternative sources of supply will be readily available. Guidance to suppliers that will participate in auctions should

³ The Working Group may consider that further explanation as to how termination of the auction could not lead to cancellation in stand-alone ERAs is needed. If so, further guidance to the Secretariat is required.

underscore this possibility, so that they are not lured into presenting unsustainable bids at later stages of the auction.

22. Paragraph (3) is applicable to any type of auction, and addresses the situation in which the winning bid appears to the procuring entity to be abnormally low (for an explanation of this term, see the guidance to article 20 in paragraph ** of the commentary to that article above [**hyperlink**]). It should be noted that in ERAs procuring simple, off-the-shelf goods or services, a performance risk may be unlikely for the reasons given in the preceding paragraph. The provisions of this paragraph are also subject to the general rules on the investigation of abnormally low submissions contained in article 20, including the safeguards to ensure an objective and transparent assessment. If all conditions of article 20 for rejecting the abnormally low bid have been fulfilled, the procuring entity may reject the bid and choose either to cancel the procurement proceedings or award the procurement contract to the next winning bidder (see the guidance to that article on the appropriate procedures). This exception to the general rule requiring the award of the procurement contract to the winning bidder as determined at the end of the auction is included, in particular, to prevent dumping. The provisions of the Model Law have been drafted to allow greater flexibility to the procuring entity, but subject to the safeguards against abuse provided for in article 20 [**hyperlink**].

23. In deciding which option to follow under paragraph (2) or (3) — to cancel the procurement proceedings or award the procurement contract to the next winning bidder — the procuring entity should assess the consequences of cancelling the auction, in particular whether holding a second auction in the same procurement proceedings would be possible and the costs of an alternative procurement method. In particular, the anonymity of the bidders may have been compromised and any re-opening of competition may also be jeopardized. This risk, however, should not encourage the procuring entity always to opt for the next winning bid, in particular where collusion between the winning bidder and the next winning bidder is suspected. The provisions of paragraph (2) and (3) are drafted with the intention of avoiding the imposition of any particular step on the procuring entity.

24. In either case under paragraph (2) or (3), prompt action must be taken after the auction, in strict compliance with the applicable provisions of the Model Law, so as to ensure that the final outcome should be determined as soon as reasonably practical. These steps should not be treated as an opportunity to undermine the automatic identification of the winning bid.⁴

⁴ The provision of the guidance to the Secretariat is required on the following points raised in the Working Group: on the practical implications of each option described in paragraphs (2) and (3); on the appropriate explanation of the nature of bids (binding/non-binding and under which conditions); and on the use of standstill periods and review in the auction context (including whether this guidance should be under article 22 and chapter VIII with a cross-reference here, or vice versa).

(A/CN.9/WG.I/WP.79/Add.15) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for a section in the Guide to accompany Chapter VII of the UNCITRAL Model Law on Public Procurement on framework agreements, comprising an introduction, and commentary on related provisions of Chapter II (article 32).

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

Part II. Article-by-article commentary

**Chapter VII: Procedures for the use of
framework agreements**

A. Introduction

1. Executive Summary

1. Framework agreement procedures can be described as two-stage procurement methods, undertaken over a period of time, which involve:

(a) The solicitation of submissions against pre-determined terms and conditions;

(b) The assessment of suppliers' or contractors' qualifications and the examination of their submissions against those terms and conditions, and, commonly (see ** below), the evaluation of those submissions;

(c) Selected supplier(s) or contractor(s) and the procuring entity entering into a framework agreement on the basis of the submissions. The framework agreement sets out the terms and conditions of future purchases, and is concluded for a given duration (steps (a)-(c) are the "first stage" of the procurement); and

(d) Subsequent and/or periodic awards of procurement contracts with the supplier(s) or contractor(s) under the terms of the framework agreement, as particular requirements arise (which may involve the placement of purchase orders with a particular supplier or contractor or a further round of competition. This is the "second stage" of the procurement).

2. Framework agreement procedures are often used to procure subject-matter for which a procuring entity has a need over a period of time or at a time in the future, but does not know the exact quantities, nature or timing of its requirements. In essence, the framework agreement establishes the terms upon which purchases will be made (or establishes the main terms and a mechanism to be used to establish the

remaining terms or refine the initially established terms: they may include the quantities to be delivered at any particular time, the time of deliveries, the overall quantity of the procurement and the price). Examples include commodity-type purchases, such as stationery, spare parts, information technology supplies and maintenance, and where there will normally be regular or repeat purchases for which quantities may vary and the market may be highly competitive. They are also suitable for the purchase of items from more than one source, such as electricity and for that of items for which the need is expected to arise in the future on an urgent or emergency basis, such as medicines (where a significant objective is to avoid the excessively high prices and poor quality that may result from the use of single-source procurement in urgent and emergency situations). These types of procurement may require security of supply, as may also be the case for specialized items requiring a dedicated production line, for which framework agreements are also suitable tools.

3. There is a variety of terminology in practical use for the type of procedures described above, including supply arrangements, indefinite-delivery/indefinite-quantity contracts or task-order contracts, catalogue contracts and umbrella contracts. Some such procedures are very close to the UNCITRAL procedures; others have more significant differences. The extent to which the first stage of the procurement includes all the steps set out in paragraph 1(a)-(c) above also varies; where there is no examination of the qualifications and responsiveness, then the arrangement is better classified as a suppliers' list. Suppliers' lists are not provided for in the Model Law, as UNCITRAL considers that the very flexible provisions on framework agreements set out in Chapter VII of the Model Law allow for the benefits of suppliers' lists to be achieved, without running the elevated risks to transparency and competition that suppliers' lists are considered to raise.

2. Enactment: Policy considerations

4. The main policy objective in providing for framework agreements procedures is to allow for the potential benefits of framework agreement procedures to be attained. Those potential benefits can be summarized as follows:

(a) Administrative efficiency: Where the procedure is used for repeat procurements, it can be administratively efficient because of the effective aggregation of a series of procurement proceedings. Many steps that would otherwise be taken for each of a series of procurements are undertaken once: they include drafting terms and conditions, advertising, assessing suppliers' or contractors' qualifications, and examining, and in some forms of framework agreements evaluating, submissions. As a result, purchases can be made with lower transaction costs and shorter delivery times than would be the case were each purchase procured separately;

(b) Reducing the need for urgent procedures: The shorter times for completing procurement procedures once the initial steps described above have been undertaken can reduce the need for urgent procedures, which are often conducted in non-transparent ways and without effective competition;

(c) Better outcomes for smaller procurements: these procurements are considered at risk of abuse or failure to achieve value for money because they are often conducted in procedures lacking in transparency and competition;

(d) Better transparency in smaller procurements: The framework agreement procedure can amortize advertising and other costs as purchases are grouped for that purpose, so that they no longer fall below thresholds exempting them from transparency measures, for example as discussed in the commentary to articles 23 and 29 [\[**hyperlinks**\]](#); the grouping can also facilitate oversight, either by oversight agencies or by suppliers or contractors themselves;

(e) Enhancing SME participation: placing smaller orders within the framework agreement may allow smaller suppliers or contractors to participate;

(f) Ensuring security of supply through binding a supplier or contractor to supply future purchases;

(g) Achieving further costs savings: Centralized purchasing, which involves a central unit of one procuring entity or a specialized independent entity making purchases for a number of units, or one entity or consortium making purchases on behalf of several entities may reap economies of scale;

(h) Better supply chain management: the results can include reducing the costs of one-off bulk purchasing (which has been a characteristic of some central procurement) and consequential warehousing expenses;

(i) Process efficiencies: centralized purchasing can also promote better quality tender and other documents, higher uniformity and standardization across government, and better supplier understanding of procuring entities' needs can improve the quality of submissions. Centralized purchasing agencies, as discussed in Section [**](#) of the general commentary above [\[**hyperlink**\]](#), can conduct the procurement on behalf of procuring entities, and their coordinating role can further enhance the benefits of centralized purchasing.

5. It will be clear from the above list that many benefits arise from the use of framework agreements for repeated purchases. This is the most common use of the tool, for which they are particularly appropriate but, as is further explained below, not the only use. As with all procurement methods under the Model Law, the framework agreement can be used in all procurement — whether of goods, construction, services or a combination thereof.

6. Enacting States should be aware of concerns about the use of framework agreement procedures, some of which are inherent in the technique, and some that arise from its inappropriate use. First, the administrative efficiency that supports the use of the technique may compromise other procurement objectives, such as value for money, if procuring entities use framework agreements where they are not in fact the appropriate tool for the procurement concerned, simply to achieve those administrative efficiencies. The result may be that the procuring entity's real needs are simply not met, or are not met with the appropriate quality or at the appropriate price. Secondly, there is evidence in practice of framework agreements leading to reduced competition and transparency, collusion, and contract awards based on relationships between procuring entities and suppliers or contractors, rather than on the competitive procedures mandated under the Model Law, reducing value for money. Thirdly, and particularly in the longer term, the scale of framework agreements can reduce overall participation and competition as suppliers that are not parties to the framework agreement leave the market. The suppliers or contractors that are parties to the framework agreement will be aware of each

other's identities, and so ensuring competition once the framework agreement is in place can also be difficult in practice. As suppliers or contractors that are not parties to the framework agreement cannot participate in the award of procurement contracts, there is in fact restricted competition at the second stage of a framework agreement procedure. The negative consequences of restricted competition will be exacerbated where the effect of the framework agreement is to create a monopolistic or oligopolistic market. These matters require assessment before a decision is taken to use a framework agreement procedure, since addressing them once it is in operation is unlikely to be effective.

7. The approach to the provisions enabling the use of framework agreement procedures under the Model Law has therefore been designed to facilitate the appropriate and beneficial use of the technique in repeat purchases and the other circumstances above (such as to provide in advance for urgent procurement and for security of supply), to discourage their inappropriate use, and to mitigate or minimize the risks raised in the preceding paragraph. The provisions consequently contain both controls over the use of framework agreements procedures, in the form of conditions for their use in article 32 [\[**hyperlink**\]](#), and mandatory procedures for conducting them in articles 58-63 [\[**hyperlinks**\]](#), in very broad terms, requiring the use of open tendering or an equivalent procedure unless another procurement method is justified.

8. Under the Model Law (see article 2(e) [\[**hyperlink**\]](#)), the framework agreement procedure can take one of three types [\[check for consistency\]](#):

(a) A “closed” framework agreement procedure without second-stage competition, involving a framework agreement concluded with one or more suppliers or contractors, and in which all terms and conditions of the procurement are set out in the framework agreement. The submission at the first stage is final, and there is no further competition between the suppliers or contractors at the second stage of the procurement. The only difference of this type of framework agreement procedure as compared with traditional procurement procedures is that the item(s) is or are purchased in the future, often in batches over a period of time. These framework agreements are “closed” in that no new suppliers or contractors can become parties to the agreement after it has been concluded;

(b) A “closed” framework agreement procedure with second-stage competition, involving a framework agreement concluded with more than one supplier or contractor, and which sets out some of the main terms and conditions of the procurement. The submission at the first stage is “initial”, because although each such submission will be evaluated, a further competition among the suppliers or contractors that are parties to the framework agreement is required at the second stage. They submit a final submission at this second stage, on the basis of which procurement contract is awarded to the most advantageous submission, or lowest-priced submission, or equivalent, as identified at that point. These framework agreements are also “closed” in the sense described above, but can be concluded only with more than one supplier or contractor;

(c) An “open” framework agreement procedure, involving a framework agreement concluded with more than one supplier or contractor, and which again sets out some of the main terms and conditions of the procurement. The submission at the first stage is “indicative”, because it will not be evaluated but will be used to

assess responsiveness, and a further competition among the suppliers or contractors is required at the second stage. An “indicative” submission is, to that extent, not binding. They submit a final submission at this second stage, on the basis of which procurement contract is awarded to the most advantageous submission, or lowest-priced submission, or equivalent, as identified at that point, as in closed framework agreements with second-stage competition. These framework agreements remain “open” to new suppliers or contractors, meaning that any supplier or contractor may become a party at any time during the operation of the agreement if it is qualified and its indicative submission is responsive. These agreements are required to operate electronically, as is explained in the commentary to article 60 [\[**hyperlink**\]](#) below.

9. These different types of framework agreement cater to different circumstances, meaning that the decision to engage in procurement using a framework agreement can be a relatively complex one, requiring decisions on the appropriate procurement method and the appropriate type of framework agreement. For example, open framework agreements are intended to provide for commonly used, off-the-shelf goods or straightforward, recurring services that are normally purchased on the basis of the lowest price. The commentary below explains the link between the procurement circumstances and the appropriate type of framework agreement, and other issues that may inform regulations, rules and guidance to assist in the implementation and use of framework agreements. In this regard, it should be noted that both stages of the framework agreement procedures are subject to the challenge and appeal mechanisms of chapter VIII of the Model Law [\[**hyperlink**\]](#).

10. The Model Law does not provide for a further type of framework agreement that is sometimes encountered in practice, and under which suppliers or contractors (or a single supplier or contractor) can unilaterally improve their offers (or its offer). The reason for excluding this type of framework agreement is that there would be no mechanism for preventing the entity from passing information to favoured suppliers or contractors to assist them in improving their relative position, or for monitoring improved offers. Consequently, such frameworks would be incompatible with the overall policy objectives of the Model Law.

3. Issues of implementation and use

11. The most significant issue of implementation and use is to promote the appropriate use of framework agreements, which involves issues considerably more complex than an assessment of whether the conditions for use are satisfied, as explained below. The technique is relatively new, and consequently the issues discussed may need to be updated as experience in their use is gained. Enacting States may also wish to monitor publications from the MDBs and other organizations and bodies on the use of framework agreements that are similar in type to those provided for in the Model Law.¹

12. Although the technique cannot be used unless the conditions for use are satisfied, discussed in detail in [\[**\] \[**hyperlink**\]](#), those conditions for use, as all conditions for use of procurement methods under the Model Law, describe where they are available (and by implication, where they are not available). The conditions

¹ Note to the Working Group: a cross-reference will be inserted to any document published by the time the Guide is issued, e.g. World Bank Standard Bidding documents or similar publications.

for use of framework agreements in article 32 [\[**hyperlink**\]](#) are considerably more flexible than other conditions for use, as the commentary below indicates. Considerable elaboration in regulations, rules and guidance will be required in order to guide the procuring entity in reaching the optimal decision, recalling that it must be included and justified in the record of the procurement concerned (see article [**\[**hyperlink**\]](#)). The rules regulations or other guidance should explain the link between the main circumstances for which the Model Law encourages the use of framework agreements, and the conditions for use themselves; in this regard, enacting States should be aware that the capacity required to operate framework agreements effectively can be higher than for other procurement methods, and training and other capacity-building measures will be key to ensuring successful use.

13. The first circumstance arises where the procuring entity's need is "expected" to arise on an "indefinite or repeated basis" (article 32(1)(a) [\[**hyperlink**\]](#)).² The regulations, rules or guidance should explain that these conditions need not be cumulative, though in practice they will commonly overlap. In this regard, the reference to an indefinite need, meaning that the time, quantity or even the procurement itself is or are not known, can allow the framework agreement to be used to ensure security of supply, as well as anticipated repeat procurements. The rules or guidance should also address the term "expectation", and how to assess the extent of likelihood of the anticipated need arising in an objective manner. The administrative costs of the two-stage procedure will be amortized over a greater number of purchases; i.e. the more the framework agreement is used in the case of repeat procedures. For indefinite purchases, those costs must be set against the likelihood of the need arising and the security that the framework agreement offers (for example, setting prices and other conditions in advance).

14. The second circumstance arises where the need for the subject-matter of the procurement "may arise on an urgent basis". The same considerations apply as for indefinite purchases noted immediately above.

15. Consequently, complex procurement for which the terms and conditions (including specifications) vary for each purchase, such as large investment or capital contracts, highly technical or specialized items, and more complex services procurement, would not be suitable for procurement through framework agreements: such projects will also not generally fall within either condition for use above.

16. The link between the type of framework agreement to be used and the circumstances of the given procurement should also feature in rules or guidance. The first issue is how to choose among the three types of framework agreements identified above, given the different ways in which competition operates in each type. Closed framework agreements, which involve the evaluation of initial submissions, involve significant competition at the first stage (and may or may not involve competition at the second stage). Open framework agreements, on the other hand, do not involve the evaluation of indicative submissions at the first stage — only qualifications and responsiveness are checked — so all the competition in those framework agreements takes place at the second stage.

² Note to the Working Group: these terms may be discussed in the Glossary.

17. How narrowly the procurement need can and should be defined at the first stage will dictate the extent of competition that is possible and appropriate at that stage. Where what is to be purchased can be precisely defined and will not vary during the life of the framework agreement, a framework agreement without second-stage competition, in which the winning supplier(s) or contractor(s) for all or some items is or are identified at the first stage, will maximize competition at the first stage and should produce the best offers. However, this approach is inflexible and requires precise planning: rigid standardization may be difficult or inappropriate, especially in the context of centralized purchasing where the needs of individual purchasing entities may vary, where refinement of the requirements may be appropriate so needs are expressed with lesser precision [i.e. at first stage], and in uncertain markets (such as future emergency procurement). Where the procuring entity's needs may not vary, but the market is dynamic or volatile, second-stage competition will be appropriate unless the volatility is addressed in the framework agreement (such as through a price adjustment mechanism). The greater the extent of second-stage competition, the more administratively complex and lengthy the second-stage competition will be, and the less predictable the first-stage offers will be of the final result; this can make effective budgeting more difficult. Where there will be extensive second-stage competition, there may also be little benefit of engaging in rigorous competition at the first stage; assessing qualifications and responsiveness may be sufficient. The public procurement agency or similar body should therefore provide guidance on effective planning for both stages, and assessing the relative merits of standardization and accommodating different needs for individual procurements and across sectors of the overall government procurement market.

18. A second, and related issue, is the scope of the framework agreement. Where several requirements are bundled together under one framework agreement, the effect will be to provide flexibility for the procuring entity to finalize or refine its statement of needs when the needs themselves arise. The description of the procuring entity's or entities' needs in the initial solicitation will therefore be less precise or will be diverse as explained in the preceding paragraph, and so generally imply competition at the second stage (i.e. so that the relevant components from the bundle are identified for the procurement at issue), so the approaches suggested in that paragraph will also be relevant. More generally, however, is the risk that such bundling may restrict market access, particularly to SMEs, who may not be able to supply the full — and probably larger — scope of the framework agreement. In addition to the general concern that some suppliers may consequently leave or be driven out of the market concerned, a situation requiring monitoring as discussed in paragraphs ** below [\[**hyperlink**\]](#), the regulations or rules or guidance should encourage procuring entities to consider whether to allow for partial submissions in the solicitation documents, as discussed in the commentary to article ** above [\[**hyperlink**\]](#), particularly where SME promotion is a socio-economic policy of the government concerned. (For a discussion of socio-economic policies, see Section ** of the general commentary above [\[**hyperlink**\]](#).)

19. A third issue for consideration is the number of suppliers or contractors to be parties to the framework agreement. A single-supplier framework agreement has the potential to maximize aggregated purchase discounts given the likely extent of potential business for a supplier or contractor, particularly where the procuring entity's needs constitute a significant proportion of the entire market, and provided

that there is sufficient certainty as to future purchase quantities (through binding commitments from the procuring entity, for example). This type of agreement can also enhance security of supply to the extent that the supplier concerned is likely to be able to fulfil the total need. Multi-supplier framework agreements, which are more common, are appropriate where it is not known at outset who will be the best supplier at the second stage, especially where the needs are expected to vary or to be refined at the second stage during the life of the framework agreement, and for volatile and dynamic markets for the reasons set out above. They also allow for centralised purchasing, and can also enhance security of supply where there are doubts about the capacity of a single supplier to meet all needs.

20. Fourthly, the guidance from the public procurement agency or similar body should address the use of centralized purchasing agencies. As discussed in the commentary in the introduction to Chapter VI on electronic reverse auctions above [\[**hyperlink**\]](#), the outsourcing of any aspect of procurement can raise organizational conflicts of interest and related issues: such centralized purchasing entities may have an interest in increasing their fee earnings by keeping prices high and promoting purchases that go beyond the needs of the procuring entity. In addition, and in the context of framework agreements, the agency may undertake planning for future procurement, in which case the quality of information from procuring entities will be critical, not least covering the anticipated needs from the perspectives discussed above: the needs of individual ministries or agencies may themselves not be identical, with the result that some obtain better value for money than others if those needs are standardized without sufficient analysis. Interaction with the likely users of a framework agreement before the procedure commences can allow for a better decision on the appropriate extent of standardization and accommodating varying needs.

21. Where enacting States consider that these issues may require capacity that needs to be developed, they may wish to introduce framework agreements in a phased manner. For example, framework agreements may be restricted initially to repeat procurement. In addition, the regulations, rules and/or supporting guidance should emphasize good procurement planning is vital to set up an effective framework agreement: framework agreements are not alternatives to procurement planning.

22. Enacting States are also encouraged to set up a monitoring mechanism to oversee the establishment and use of framework agreements, both to ensure that the relevant rules are followed, and to monitor whether the anticipated benefits in terms of administrative efficiency and value for money in fact materialize; this monitoring mechanism can also indicate where guidance and capacity-building are needed. As regards the establishment of a framework agreement, the terms of the framework agreement itself may limit commercial flexibility if guaranteed minimum quantities are set out as one of its terms, or if the framework agreement operates as an exclusive purchasing agreement, though this flexibility should be set against the better pricing from suppliers or contractors. Two ways of addressing this issue are (a) to use estimated (non-binding) quantities in the solicitation documents so that framework agreement can facilitate realistic offers based on a clear understanding of the extent of the procuring entity's needs, and so that the procuring entity will be able to purchase outside the framework agreement if market conditions change and (b) using binding quantities, which could be expressed as minima or maxima. There

may be markets in which one solution appears to be better than the other; the monitoring mechanism can inform appropriate guidance, or can use examples from practice where the choice needs to be made by the procuring entity.

23. The centralized purchasing agency, or the public procurement agency or similar body, should also monitor the performance of individual procuring entities using the framework agreement and the performance of framework agreement in terms of prices as compared with market prices for single procurements, in case of increasing prices or other reductions in the quality of offers accordingly, which may arise from inappropriate or poor use of the framework agreement by one or two procuring entities also.

24. Once the framework agreement is set up, its potential benefits will be maximized to the extent that it is in fact used to satisfy the procuring entity's needs for the subject-matter of the procurement, rather than conducting new procurements for the subject-matter concerned; the credibility of procuring entity in this regard will also be important for future procurements. A further aspect of best practice is for procuring entities to assess on a regular basis whether a framework agreement continues to offer value for money and continues to allow access to the best that the market can offer at that time, and to consider the totality of the purchases under the framework agreement to assess whether their benefits exceed their costs. Where such optimal use is observed, suppliers and contractors should have greater confidence that they will receive orders to supply the procuring entity, and should give their best prices and quality offers accordingly. Ways of assessing whether the technical solution or product proposed remain the best that the market offers may include market research, publicising the scope of the framework agreement, etc. Where the framework agreement no longer offers good commercial terms to the procuring entity, a new procurement procedure (classical or a new framework agreement procedure) will be required.

25. A second main concern to be addressed in the use of framework agreements is to ensure transparency, competition and objectivity in the process. In addition to imposing conditions for use as discussed in paragraphs ** above, the Model Law does so by requiring that a procuring entity that wishes to use a closed framework agreement is required to follow one of the procurement methods of the Model Law to select the suppliers or contractors to be parties to the closed framework agreement (i.e. at the first stage). Thus all the safeguards applicable to the selected procurement method, including conditions for its use and solicitation methods, will apply. The equivalent safeguard for an open framework agreement is that it must be established following specifically-designed open procedures, mirroring those of open tendering to a large extent. Rules and guidance to procuring entities should stress these safeguards, and the matters discussed in the following paragraphs.

26. The provisions regulating the award of procurement contracts under framework agreements have been drafted to ensure sufficient transparency and competition where a second-stage competition is envisaged, based on the rules governing open tendering, as further explained in the commentary to article ** below [\[**hyperlink**\]](#). The provisions of article 22 [\[**hyperlink**\]](#) governing the award of the procurement contract, including on the standstill period where there is second-stage competition, ensures transparency in decision-taking at the second stage. More generally, however, and given the risks to competition over the longer-term as discussed in paragraph ** above, the public procurement agency or

similar body should monitor the effect of the framework agreement on competition in the market concerned, particularly where there is a risk of a monopolistic or oligopolistic market. As noted in respect of other procurement methods and in Section ** of the general commentary above, this monitoring can usefully be undertaken in conjunction with the competition authorities in the enacting State concerned. [\[**hyperlinks**\]](#)

27. Whereas an open framework agreement is required under the Model Law to be operated electronically, the procuring entity has flexibility in this regard as regards closed framework agreements. Enacting States may wish to emphasize the advantages of an online procedure in terms of increased efficiency and transparency (for example, the terms and conditions can be publicized using a hyperlink; a paper-based invitation to the second-stage competition could be unwieldy and user-unfriendly. See further Section ** of the general commentary above [\[**hyperlink**\]](#). Where the enacting State requires or encourages (or intends to encourage) that all framework agreements be operated electronically, the regulations or other rules may require that all of them be maintained in a central location, which further increases transparency and efficiency in their operation.

28. A third main control measure in the Model Law is designed to limit the potentially anti-competitive effect of framework agreements, both at the individual procurement procedure and the overall market level should suppliers leave the market as discussed in paragraphs ** above [\[**hyperlink**\]](#). At the individual level, and as no supplier or contractor may be awarded a procurement contract under a framework agreement without being a party to the agreement, framework agreements have a potentially anti-competitive effect.

29. As regards closed framework agreements, ensuring full competition for the purchases envisaged on a periodic basis, by limiting their duration and requiring subsequent purchases to be re-opened for competition is generally considered to assist in limiting this anti-competitive potential. A maximum duration is also considered to assist in preventing attempted justifications of excessively long framework agreements. On the other hand, excessively restricting the duration can compromise the administrative efficiencies of framework agreements. UNCITRAL considers that there is no one appropriate maximum duration, because of differing administrative and commercial circumstances, and so the enacting State is invited to set the appropriate limit in the procurement regulations.

30. For this reason, under article 59(1)(a) [\[**hyperlink**\]](#) of the Model Law, the procuring entity is to set out the maximum duration of a closed framework agreement within the maximum established by the enacting State in the procurement regulations (i.e. no stated limit is set out in the Model Law itself). The regulations, or accompanying rules or guidance, should state that the maximum includes all possible extensions to the initially established duration for the framework agreement concerned. This aspect is a key one in avoiding abuse in extensions and exceptions to that initially established duration. Practical experience in those jurisdictions that operate closed framework agreements indicates that the potential benefits of the technique are generally likely to arise where they are sufficiently long-lasting to enable a series of procurements to be made, such as a period of 3-5 years. Thereafter, greater anti-competitive potential may arise, and the terms and conditions of the closed framework agreement may no longer reflect current market conditions. As some procurement markets may change more rapidly, especially

where technological developments are likely, for example in ITC and telecommunications procurement, or the procuring entity's needs may not remain the same for a sustained period, the appropriate period for each procurement may be significantly shorter than the maximum. The regulations, rules or guidance should also discuss internal controls to address the award of procurement contracts at the end of a budget period or near the end of the duration of the framework agreement, again to avoid observed abuse in such awards.

31. Enacting States may also consider that different periods of time might be appropriate for different types of procurement, and that for some highly changeable items the appropriate period may be measured in months. Shorter durations within the legal maximum contained in article 59 [\[**hyperlink**\]](#) can be set out in regulations; if this step is taken, clear guidance must be provided to procuring entities to ensure that they consult the appropriate source. Such guidance should also address any external limitations on the duration of framework agreements (such as State budgeting requirements). It should also encourage procuring entities themselves to assess on a periodic basis during the currency of a closed framework agreement whether its prices, and terms and conditions remain current and competitive, because they tend to remain fixed rather than varying with the market. In this regard, there is a risk that procuring entities may decide to procure through an existing framework agreement, even though its terms and conditions do not quite meet their needs or reflect the current market conditions, to avoid having to commence new procurement proceedings (and to draft new terms and conditions of the procurement, to issue a procurement notice, to ascertain the qualifications of suppliers or contractors, to conduct a full examination and evaluation of initial submissions and so on). As a result, procuring entities may fail to assess price and quality sufficiently when placing a particular purchase order. Experience also indicates that they will tend to overemphasize specifications over price; guidance should therefore discuss the need to ensure an appropriate balance. [remove repetition]

32. As regards open framework agreements, there is a lesser risk to competition because the framework agreement remains open to new joiners. The duration of the open framework agreement is therefore not subject to a statutory maximum; the duration is established at the discretion of the procuring entity (see article 61(1)(a) [\[**hyperlink**\]](#)). The safeguards applied are that the existence of the open framework agreement must be publicized and the provisions require the swift assessment of applications to join it (see articles 60(1) and 61(2), and 60(4) and (5) [\[**hyperlinks**\]](#)).

33. The framework agreement itself contains the terms and conditions of the envisaged procurement contracts (other than those to be established through the second-stage competition). The regulations or rules and guidance should emphasize that the agreement itself should be complete in recording all terms and conditions, the description of the subject matter of the procurement (including specifications), and the evaluation criteria, both to enhance participation and transparency, and because of the restrictions on changing the terms and conditions during the operation of the framework agreement (see also the commentary to articles 58 to 63 below [\[**hyperlink**\]](#)).

34. In summary, therefore, the effective use of framework agreements procedures will require the procuring entity or other operator of the agreement to consider the

type of framework agreement that is appropriate by reference to the complexity of the subject-matter to be procured, its homogeneity or otherwise, and the manner in which competition is to be ensured. The Enacting State will wish to ensure that appropriate capacity-building is in place in order to allow for optimal decision-making.

B. Provisions on framework agreements procedures

Article 32. Conditions for use of a framework agreement procedure

35. The purpose of the article is to set out the conditions for use of a framework agreement procedure (paragraph (1)) and provide for the record and justification requirements in resort to the procedure (paragraph (2)). While taking account of the need to ensure appropriate use of framework agreements, UNCITRAL has taken care to avoid limiting their usefulness through overly restrictive conditions.

36. Paragraph (1) lists conditions for use of framework agreement procedures, regardless of whether the procedure will result in a closed or open framework agreement. The conditions are based on the notion that framework agreement procedures can offer benefits for procurement notably in terms of administrative efficiency where the procuring entity has needs that are expected to arise in the short to medium term, but where not all terms and conditions can be set at the outset of the procurement. (For a description of the benefits, see paragraphs ** above.) Paragraph (1) permits the use of framework agreement procedures to reflect two situations where these circumstances may arise: first, where the need is expected to be “indefinite”, meaning its extent, timing and/or quantity are unknown, or it is expected to be repeated, and, secondly, where the need is expected to arise on an urgent basis. The first set of circumstances may arise for repeat purchases of relatively standard items or services (office supplies, simple services such as janitorial services, maintenance contracts and so forth). The second set of circumstances may arise where a government agency is required to respond to natural disasters, pandemics, and other known risks; this condition will normally, but need not, be cumulative with the first condition. Security of supply is usually a concern in this type of situation but also may become in the first type of situation where indefinite need for repeat purchases will arise with respect to the items requiring specialist production. (See the general discussion of the types of procurement for which framework agreements are suitable in paragraphs ** of the Introduction to this Chapter, above [**hyperlink**]). Where the procedure will result in a closed framework agreement, the conditions for use applicable to the procurement method intended to be used for the award of the agreement are also to be satisfied. This is because, in accordance with article 58(1) of the Model Law [**hyperlink**], a closed framework agreement is to be awarded by means of open tendering proceedings unless the use of another procurement method is justified.

37. The conditions for the use of framework agreement procedures are considerably more flexible than the conditions for use of the procurement methods listed in article 27(1) [**hyperlink**]: they do not require the procuring entity to state definitively that the needs will arise indefinitely or on an urgent basis, but merely that the need is expected to arise. The inherent subjectivity of the conditions means that it is more difficult to enforce compliance with them than with the

conditions for use of the procurement methods listed in article 27(1). Paragraphs ** of the Introduction to Chapter VII sets out measures that will enhance objectivity in taking such decisions, and so facilitate the monitoring of whether decisions are reasonable in the circumstances of a given framework agreement. In this manner, the conditions, when accompanied by appropriate regulations, rules and guidance will facilitate accountability and promote best practice.

38. As is noted above (paragraphs ...), the costs of establishing and operating framework agreement procedures, which involve two stages, will normally be higher than those for one single-stage procurement, and so whether framework agreement procedures are appropriate will depend on whether the potential benefits will exceed these higher costs. Where the need is expected to be repeated, the administrative costs of setting up and operating the framework agreement can be amortized over a series of repeat procurements; where the need is expected to arise urgently or indefinitely, the administrative costs are to be considered against the value-for-money benefits that the earlier setting of the terms and conditions of the procurement may bring by comparison with the procedures otherwise available. The procuring entity, therefore, will need to conduct a cost-benefit analysis based on probabilities before engaging in a framework agreement procedure. Paragraphs ** of the Introduction to this Chapter will assist enacting States in deciding on the appropriate guidance and training to ensure that the procuring entity has the necessary tools to do so. The above considerations are relevant particularly in the context of closed framework agreements.

39. In addition, the use of framework agreements should not be considered to be an alternative to effective procurement planning. In the context of a closed framework agreement in particular, unless realistic estimates for the ultimate procurement are determined and made known at the outset of a framework agreement procedure, potential suppliers will not be encouraged to submit their best prices at the first stage, meaning that a closed framework agreement may not yield the anticipated benefits, or that the administrative efficiency may be outweighed by price and/or quality concerns that compromise value for money.

40. A further reason for including conditions for use is to address the potential restriction on competition that the use of the technique, in particular a closed framework agreement, involves (see paragraphs ** above). The conditions are supported by the limited duration provided for closed framework agreements in article 59(1)(a) [[**hyperlink**](#)], and the defined duration required by article 61(1)(a) [[**hyperlink**](#)], which require the needs concerned to be reopened to full competition after the duration of the agreement expires.

41. The conditions for use should be read together with the definition of the term “procuring entity”, which allows for more than one purchaser to use the framework agreement. If enacting States wish centralized purchasing agencies to be able to act as agents for one or more procuring entities, so as to allow for the economies of scale that centralized purchasing can offer, they may wish to promulgate regulations or issue guidance to ensure that such arrangements can operate in a transparent and an effective fashion.

42. Paragraph (2) requires the procuring entity to justify the use of the framework agreement procedure in the procurement record; the intention is that the cost-benefit analysis referred to in the preceding paragraphs be included. In the case of the

award of a closed framework agreement, the paragraph will be supplemented by article 28(3) of the Model Law [\[**hyperlink**\]](#) that requires the procuring entity to put on the record a statement of the reasons and circumstances upon which it relied to justify the use of the procurement method other than open tendering in the award of the agreement. Given the observed risks of overuse of framework agreements because of their perceived administrative efficiency (see paragraphs ** of the Introduction to this Chapter above [\[**hyperlink**\]](#)), and the broad conditions for use, timely and appropriate oversight of the justification in the record will be important (also to facilitate any challenge to the use of the framework agreement procedure by suppliers and contractors). Effective oversight will involve the scrutiny of the extent of purchases made under the framework agreement to identify over- or under-use as described above (see paragraphs** of the Introduction to this Chapter above [*\[hyperlink**\]](#)).

(A/CN.9/WG.I/WP.79/Add.16) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for the Guide text to accompany Chapter VII of the UNCITRAL Model Law on Public Procurement on framework agreements, comprising commentary on articles 58-59 of chapter VII (Framework agreements procedures).

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

...

B. Provisions on framework agreements procedures (*continued*)

Article 58. Award of a closed framework agreement

1. The purpose of the article is to set rules for the award of a closed framework agreement. Provisions apply to both framework agreement procedures with second-stage competition and framework agreement procedures without second-stage competition, both of which, as explained in ... above, may lead to the award of a closed framework agreement.

2. Paragraph (1), by referring in its subparagraph (b) to chapter II of the Model Law [\[**hyperlink**\]](#), requires the procuring entity to follow the provisions of chapter II of the Model Law in selecting the procurement method appropriate for the award of a closed framework agreement, and the procedures applicable to the procurement method selected. Neither the conditions for use nor this paragraph limit the procurement methods that can be used to award a closed framework agreement, on the condition, however, that the use of open tendering must be considered first and the use of any other method of procurement must be justified. The choice takes account of both the circumstances of the procurement(s) concerned and the need to maximize competition as required by article 28 [\[**hyperlink**\]](#). However, the importance of rigorous competition at the first stage of closed framework agreements means that the application of exceptions to open tendering should be carefully scrutinized, particularly in the light of the competition risks in framework agreements procedures and types of purchases for which framework agreements are appropriate (as to which, see paragraphs [**](#) of the Introduction to this Chapter above [\[**hyperlink**\]](#)).

3. Examples of when procurement methods alternative to open tendering may be appropriate include the use of framework agreements for the swift and cost-effective procurement of low-cost, repeated and urgent items, such as maintenance or cleaning services (for which open tendering procurements may not be

cost-effective), and specialized items such as drugs, energy supplies and textbooks, for which the procedure can protect sources of supply in limited markets. The use of competitive negotiations or single-source procurement may be appropriate for the award of a closed framework agreement in situations of urgency. If the procuring entity is unable to draft specifications or define the main terms and conditions of the procurement at the outset, such as in more complex services or construction procurement, framework agreements are less likely to be appropriate because the uncertainties involved may diminish participation, but there are examples in practice of effective framework agreements concluded through dialogue-based request for proposals methods.¹ (See, also, the guidance to conditions for use of procurement methods in Sections ** above [**hyperlinks**].) The linked decisions to use a framework agreement procedure and the choice of the procurement method and type of solicitation, which involve discretion and require appropriate capacity, are such that guidance and regulations to enhance decision-making will be crucial to allow for the potential benefits of the technique to accrue, as discussed in paragraphs ** of the Introduction to this Chapter above [**hyperlink**].

4. Paragraph (1) also envisages derogations from the procedures for the procurement method chosen as required to reflect a framework agreement procedure, such as that references to “tenders” or other submissions are to be construed as references to “initial” tenders or submissions where there will be second-stage competition involving second-stage tenders or submissions, and references to the selection of the successful supplier or contractor and to the conclusion of a procurement contract are to be construed as references to the admission of supplier(s) or contractors(s) to the framework agreement and the conclusion of that agreement. Enacting States may wish to provide guidance on the possible derogations, noting that the flexibility required to provide for closed framework agreements with and without second-stage competition and with one or more supplier or contractor parties means that the extent of the derogations will vary from case to case.

5. Paragraph (2) sets out the information that should be provided when soliciting participation in the framework agreement procedure. The solicitation documents must follow the normal rules for the procurement method chosen: that is, they must set out the terms and conditions upon which suppliers or contractors are to provide the subject matter of the procurement and the procedures for the award of procurement contracts (which will take place under the framework agreement). The two-stage nature of framework agreement procedures, which end with the award of procurement contract(s), means that the information provided to potential suppliers or contractors at the outset should cover both stages of the procurement. Hence the provisions regulate information pertaining to both stages, while making allowance for the fact that some terms and conditions of the procurement, disclosed in the solicitation documents in “traditional” procurement, will be refined or established at the second stage of the procedure.

6. The chapeau to paragraph (2) requires the normal solicitation information to be set out in full “mutatis mutandis”, meaning that information should be adapted to

¹ The statement reflects the results of consultations with experts. If the Working Group wishes to include this comment, the provision of guidance to the Secretariat on specific examples is requested.

particularities of any given framework agreement procedure. This information must be repeated in the framework agreement itself, or, if it is feasible and would achieve administrative efficiency, and the legal system in the jurisdiction concerned treats annexes as an integral part of a document, the solicitation documents can be annexed to the framework agreement. In other words, the solicitation documents must set out the terms and conditions upon which suppliers or contractors are to provide the subject matter of the procurement, the criteria that will be used to select the successful suppliers or contractors, and the procedures for the award of procurement contracts under the framework agreement. This information is required to enable suppliers or contractors to understand the extent of the commitment required of them, which itself will enable the submission of the best price and quality offers. Thus, the normal safeguard that all the terms and conditions of the procurement (including the specifications and whether the selection of suppliers or contractors will be based on the lowest-priced or most advantageous submission) must be pre-disclosed also applies.

7. Deviations from the requirement to provide exhaustive information about the terms and conditions of the procurement at the time of solicitation of participation in the framework agreement procedure are permitted only so far as needed to accommodate the procurement concerned. For example, the procuring entity is unlikely to be able to fulfil the requirement of article 39(d) [\[**hyperlink**\]](#) for the solicitation documents to set out “the quantity of the goods; services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided”. However, the extent of the necessary deviation will vary: the procuring entity may know the dates of each intended purchase, but not the quantities, or vice versa; alternatively, it may know the total quantity but not the purchase dates; or it may know none or all of these things.

8. Details, which are normally required to be provided when soliciting participation in a single-stage procedure, and which will be omitted in a framework agreement procedure will vary from procedure to procedure. Any failure to provide information that goes beyond the permissible deviations will be susceptible to challenge. Consequently, if the total quantity and delivery details regarding the purchases envisaged under the framework agreement are known at the first stage of the procurement, they must be disclosed. If the total quantity is not known at the first stage of the procurement, minimum and maximum quantities for the purchases envisaged under the framework agreement should be included, to the extent that they are known, failing which estimates should be provided.

9. Paragraph (2)(b) requires disclosure of whether there will be one or more supplier or contractor parties to the agreement. The administrative efficiencies of framework agreements tend to indicate that multiple-supplier framework agreements are more commonly appropriate, but the nature of the market concerned may indicate that a single-supplier framework agreement is beneficial (for example, where confidentiality or security of supply is an important consideration, or where there is only one supplier or contractor in the market).

10. There is no requirement for either a minimum or a maximum number of suppliers or contractors parties to a framework agreement. A minimum number may be appropriate to ensure security of supply; where second-stage competition is

envisaged, there need to be sufficient suppliers or contractors to ensure effective competition, and the terms of solicitation may require a minimum number, or a sufficient number to ensure such effective competition. Where the stated minimum is not achieved, the procuring entity [may/must] cancel the procurement using the provisions of article 19 [\[**hyperlink**\]](#).²

11. A maximum number may also be appropriate where the procuring entity envisages that there will be more qualified suppliers or contractors presenting responsive submissions than can be accommodated. This situation may reflect the administrative capacity of the procuring entity, notably in that more participants may defeat the administrative efficiency of the procedure. An alternative reason for limiting the number of participants is to ensure that each has a realistic chance of being awarded a contract under the framework agreement, and to encourage it to price its offer and to offer the best possible quality accordingly.

12. Where a minimum and/or a maximum of suppliers or contractors is or are to be imposed, the relevant number(s) must be notified in the solicitation documents. The procurement record should, as a matter of best practice, include a justification of the procuring entity's decision(s) — and recording such information is an example of the additional information that the enacting State may wish to include under article 25(1), or in supporting regulations under article 25(1)(w) [\[**hyperlinks**\]](#). Where a maximum is stated, the criteria and procedures for selecting the participants should be to identify the relevant number of lowest-priced or most advantageous submissions. This approach involves ranking to select the suppliers or contractors to become parties to the framework agreement; although a defined maximum may be administratively simple, it has been observed, identifying a strictly defined number in advance could invite challenges from those whose submissions are ranked just below the winning suppliers or contractors' (i.e. where there is very little to choose between successful and unsuccessful suppliers or contractors). A statement that a number within a defined range may be an appropriate alternative approach, provided that its intended use is clearly set out in the solicitation documents.

13. Paragraph (2)(d) requires that the form, terms and conditions of the framework agreement including, for example, whether there is to be second-stage competition, and evaluation criteria for the second stage, are to be provided in the solicitation documents. These transparency provisions are an application of the general principle of the Model Law that all terms and conditions of the procurement are to be determined in advance, as also reflected in the chapeau provisions of paragraph (2) (see paragraphs [** above](#)).

14. There is no exemption regarding the qualification and evaluation criteria and procedures for their application both for admission to the framework agreement and for any second-stage competition, save that the evaluation criteria to be applied at the second stage can vary within a pre-determined range, as explained in the commentary to article 59(1)(d) [\[**hyperlink**\]](#), below. If this flexibility is to be used, the applicable range must be disclosed in the solicitation documents.

² The provision of guidance to the Secretariat is requested on consequences of the failure to achieve the minimum required number, for example where it was intended to have a multi-supplier framework but only one supplier or contractor is qualified and responsive.

15. One feature of selection that is more complex in the context of framework agreements than traditional procurement is the relative weight to be applied in the selection criteria for both stages of the procurement, if any. Particularly where longer term and centralized purchasing are concerned, there may be benefits in terms of value for money and administrative efficiency in permitting the procuring entity to set the relative weights and their precise needs only when making individual purchases (that is, at the second stage of the procedure). On the other hand, transparency considerations, objectivity in the process, and the need to prevent changes to selection criteria during a procurement are central features of the Model Law designed to prevent the abusive manipulation of selection criteria, and the use of vague and broad criteria that could be used to favour certain suppliers or contractors. Permitting changes to relative weights during the operation of a framework agreement might facilitate non-transparent or abusive changes to the selection criteria. The Model Law seeks to address these competing objectives by providing that relative weights at the second stage can be varied within a pre-established range or matrix set out in the framework agreement and thus also in the solicitation documents, and provided that the variation does not lead to a change in the description of the subject matter of the procurement (see article 63 [\[**hyperlink**\]](#)).

16. Further guidance on the form, terms and conditions of the framework agreement is provided in the commentary to article 59 below [\[**hyperlink**\]](#).

17. Paragraph (3) provides that the provisions of article 22 [\[**hyperlink**\]](#) on the acceptance of the successful submission and entry into force of the procurement contract apply to the award of a closed framework agreement, adapted as necessary to the framework agreement procedure (see the commentary to article 21 at [**above \[**hyperlink**\]](#)). This provision is necessary because article 22 addresses the conclusion of a procurement contract and, as the definitions of the framework agreement and relevant procedures in article 2 make clear, the framework agreement itself is not a procurement contract (see, further, paragraphs ... above).

18. The suppliers or contractors that will be parties to the framework agreement are selected on the basis set out in the solicitation documents, i.e. those submitting the lowest-price or most advantageous submission(s). The selection is made on the basis of a full examination of the initial submissions (where there is to be second-stage competition) or of the submissions (where there is no second-stage competition), and assessment of the suppliers' or contractors' qualifications. The responsive submissions are then evaluated, applying the evaluation criteria disclosed in the solicitation documents, and subject to any applicable minimum or maximum number of suppliers or contractors parties as set in the solicitation documents.³

19. Thereafter, the notification provisions and standstill period required by article 22 apply to the procedure through a cross reference in paragraph (3) (the exemptions envisaged to the standstill period under article 22(3)

³ With reference to paragraph (2) (c) of article 58 of the draft Model Law, should the regulations require a maximum number (under the ML wording the procuring entity has the discretion to establish either a maximum or minimum)? Otherwise, all suppliers or contractors presenting responsive submissions must be accepted and there would be no real evaluation at the first stage.

[\[**hyperlink**\]](#) either do not or are most unlikely to apply to the award of a closed framework agreement). The award of the closed framework agreement may also be made subject to external approval; where framework agreements are being used across government ministries and agencies, ex ante control mechanisms of this type may be considered appropriate. If so, additional wording can be included in paragraph (3) or elsewhere in article 58 [\[**hyperlink**\]](#) or in supporting regulations, based on the optional wording found in article 30(2) [\[**hyperlink**\]](#).

20. In order to forestall concerns that the normal publicity mechanisms under procurement systems may not apply to framework agreements (because they are not procurement contracts) and to some procurement contracts under them (if they are under the publication threshold), article 23 [\[**hyperlink**\]](#) of the Model Law requires the publication of a notice where a closed framework agreement is made in the same manner as the award of a procurement contract. (Article 22 also applies in full to procurement contracts concluded under a framework agreement.)

21. As the definitions of the framework agreement and relevant procedures in article 2 [\[**hyperlink**\]](#) make clear, the framework agreement is not a procurement contract as defined in the Model Law, but it may be an enforceable contract in enacting States. States may therefore wish to issue guidance on the implications of binding the Government through the first stage of the procedure. Suppliers' or contractors' submissions may be binding under the law of the enacting State; under a closed framework agreement without second-stage competition, the terms and conditions of the procurement are set and the first-stage submissions will be enforceable in the normal manner. Where there is to be second-stage competition, however, States may wish to provide guidance to ensure that the extent to which suppliers or contractors can vary their first-stage (initial) submissions at the second stage is clear, where the result is less favourable to the procuring entity (e.g. by increasing prices if market conditions change).

22. The framework agreement, depending on its terms and conditions and the law that governs agreements by procuring entities in the enacting State concerned, may be a binding contract. Nonetheless, the definition of the "procurement contract" under article 2(k) of the Model Law [\[**hyperlink**\]](#) does not include a framework agreement. The procurement contract for the purposes of article 2(k) of the Model Law is concluded at the second stage of the procedure, when the procuring entity awards a procurement contract under the framework agreement. Technically, the award occurs when the procuring entity issues an acceptance notice accepting the supplier's or contractor's second-stage submission in accordance with article 22 [\[**hyperlink**\]](#) of the Model Law. This means that the safeguards and procedures under the Model Law apply throughout the framework agreement procedure.

Article 59. Requirements of closed framework agreements

23. The purpose of the article is to set out the terms and conditions of the closed framework agreement and the award of contracts under that agreement. As some terms and conditions of the procurement are not set at the outset of a framework agreement procedure (by contrast with "traditional" procurement), it is important for transparency reasons to require all those determined at the first stage, and the mechanism for determining the remainder to be contained in the framework agreement itself. This safeguard will ensure that the terms and conditions of the procurement are known and consistent throughout the procedure. The framework

agreement will therefore contain the terms and conditions that will apply to the second stage of the framework agreement procedure, including how the terms and conditions that were not established at the first stage will be settled: this information being important to encourage participation and transparency, it is also to be disclosed in the solicitation documents under article 58 [\[**hyperlink**\]](#).

24. The law of the enacting State will address such issues as the enforceability of the agreement in terms of contract law, as discussed in the commentary in the introduction to this Chapter [\[**hyperlink**\]](#).

25. The chapeau provisions of paragraph (1) require the framework agreement to be in writing, in order to support the safeguards in paragraph (1) described above. They are supplemented by paragraph (2) of the article that allows under certain conditions to conclude individual agreements between the procuring entity and each supplier or contractor that is a party (see further paragraph [** below](#)).

26. Paragraph (1)(a) refers to the limited duration of all closed framework agreements to the maximum set out in the procurement regulations, as discussed in paragraphs [**](#) of the introduction to this Chapter [\[**hyperlink**\]](#). The main reason for imposing such a statutory maximum is that the potentially anti-competitive effect of these agreements is considered to increase as their duration increases. It is important to note that the limit is the maximum duration, and not the average or appropriate duration: the latter may vary as market conditions change, and in any event should reflect the nature of the procurement concerned, financial issues such as budgetary allocations, and regional or developmental differences within or among States.

27. The Model Law does not provide for extensions to concluded framework agreements or exemptions from the prescribed maximum duration: allowing such variations would defeat the purpose of the regime contemplated by the Model Law. If enacting States wish to provide for extensions in exceptional circumstances, clear regulations or guidance will be required to ensure that any extensions are of short duration and limited scope. For example, new procurements may not be justified in cases of a natural disaster or restricted sources of supply, when the public may be able to benefit from the terms and conditions of the existing framework agreement. Guidance should also address the issue of a lengthy or sizeable purchase order or procurement contract towards the end of the validity of the framework agreement, not only to avoid abuse, but to ensure that procuring entities are not purchasing outdated or excessively priced items. If suppliers or contractors consider that procuring entities are using framework agreements beyond their intended scope, future participation may also be compromised: the efficacy of the technique in the longer term will depend, among other things, upon whether or not the terms are commercially viable for both parties.

28. Paragraph (1)(b) requires the terms and conditions of the procurement to be recorded in the framework agreement (and under article 58 [\[**hyperlink**\]](#) will have been set out in the solicitation documents). These terms and conditions will include the description of the subject-matter of the procurement, which should fulfil the requirements of article 10 [\[**hyperlink**\]](#), and the evaluation criteria in accordance with the requirements of article 11 [\[**hyperlink**\]](#). (For guidance on the evaluation criteria in framework agreements procedures, see paragraphs [** below](#).) These terms and conditions should also be set in the light of the

considerations that underpin the procuring entity's decision on the type of framework to be selected, as discussed in paragraphs ** of the commentary in the Introduction to this Chapter [\[**hyperlink**\]](#). Where the subject-matter of the procurement is highly technical but may require customization, for example, an overly narrow approach to drafting the description and the use of detailed technical specifications may limit the usefulness of the framework agreement. The use of functional descriptions may enhance the efficacy of such a procedure, also by allowing for technological development and variations to suit the precise need at the time of the procurement contract. On the other hand, a precise technical description can enhance first-stage competition where no second-stage competition is to take place, should needs not be expected to vary. In addition, the procuring entity must ensure that the description is as accurate as possible both for transparency reasons and to encourage participation in the procedure, and the guidance referred to in the commentary in the Introduction to this Chapter [\[**hyperlink**\]](#) may assist in this process.

29. Paragraph (1)(c) requires setting out in the framework agreement estimates of the terms and conditions that cannot be established with precision at the outset of the procedure. They are usually to be refined or established through second-stage competition, such as the timing, frequency and quantities of anticipated purchases, and the contract price. To the extent the estimates are known, they must be set out (see paragraph ** above). Providing the best available estimates, where firm commitments are not possible, will also encourage participation. Naturally, the limitations on estimates should also be recorded, or a statement that accurate estimates are not possible (for example, where emergency procurement is concerned).

30. Maximum or minimum aggregate values for the framework agreement may be known; if so, they should be disclosed in the agreement itself, failing which an estimate should be set out. An alternative approach is, where there are multiple procuring entities that will use the framework agreement, to allow each procuring entity to set different maxima depending on the nature and potential obsolescence of the items to be procured; in such cases, the relevant values for each procuring entity should be included. The maximum values or annual values may be limited by budgetary procedures in individual States; if so, guidance to these provisions should set out other sources of regulation in detail.

31. The contract price may or may not be established at the first stage. Where the subject-matter is subject to price or currency fluctuations, or the combination of service-providers may vary, it may be counter-productive to try to set a contract price at the outset. A common criticism of framework agreements of this type is that there is a tendency towards contract prices at hourly rates that are generally relatively expensive, and task-based or project-based pricing should therefore be encouraged, where appropriate.

32. It will generally be the case that the agreement will provide that suppliers or contractors may not increase their prices or reduce the quality of their submissions at the second stage of the procedure, because of the obvious commercial disadvantages and resultant lack of security of supply that would ensue, but in certain markets, where price fluctuations are the norm, the framework agreement may appropriately provide a price adjustment mechanism to match the market.

33. Paragraph (1)(d) requires the framework agreement to identify whether or not second-stage competition will be used to award the procurement contracts under the framework agreement, and if it will be used, to define terms and conditions of such second-stage competition. Paragraphs (1)(d)(i) and (ii) require the substantive rules and procedures for any second-stage competition to be set out in the framework agreement. The rules and procedures are designed to ensure effective competition at the second stage: for example, all suppliers or contractors parties to the framework agreement are, in principle, entitled to participate at the second stage, as is explained further in the commentary to article 62 below [\[**hyperlink**\]](#). The framework agreement must also set out the envisaged frequency of the competition, and anticipated time frame for presenting second-stage submissions — this information is not binding on the procuring entity, and is included both to enhance participation through providing to suppliers or contractors the best available information and to encourage effective procurement planning.

34. A key determinant of whether second-stage competition will be effective is the manner in which evaluation criteria will be designed and applied. A balance is needed between evaluation criteria that are so inflexible that there may be effectively only one supplier or contractor at the second stage, with consequential harm to value for money and administrative efficiency, and the use of such broad or vague criteria that their relative weights and the process can be manipulated to favour certain suppliers or contractors. The rules in paragraph (1)(d)(iii) therefore provide that the relative weight to be applied in the evaluation criteria during the second-stage competition should be disclosed at the first stage of the procedure. However, they also provide for limited flexibility to vary or give greater precision to the evaluation criteria at the second stage, reflecting the fact that multiple purchasers might use a framework agreement, with different relative weights to suit their individual evaluation criteria, and that some framework agreements may be of long duration. This flexibility will also be useful for centralized purchasing agencies, and to avoid the negative impact on value for money if one common standard must be applied to all users of the framework agreement.

35. The mechanism in paragraph (1)(d)(iii) therefore allows for relative weights of the evaluation criteria at the second stage to be varied within a pre-established range or matrix set out in the framework agreement and the solicitation documents. This flexibility has to be read together with the qualification provided in article 63 [\[**hyperlink**\]](#) that the variation must be authorized by the framework agreement but in any event may not lead to a change to the description of the subject matter of the procurement. Thus even if within the permitted scope of variations under the framework agreement, a change would not be acceptable if it effectively leads to the change in the description of the subject matter of the procurement (for example, if the minimum quality requirements were waived or altered).⁴

36. Flexibility in applying evaluation criteria should be monitored to ensure that it does not become a substitute for adequate procurement planning, does not distort purchasing decisions in favour of administrative ease, does not encourage the use of broad terms of reference that are not based on a careful identification of needs, and does not encourage the abusive direction of procurement contracts to favoured

⁴ The Working Group may consider that further relevant examples should be provided, to underscore that this flexibility should be the exception rather than the rule. If so, the provision of guidance to the Secretariat is requested.

suppliers or contractors. These latter points may be of increased significance where procurement is outsourced to a fee-earning centralized purchasing agency, which may use framework agreements to generate income (see, further, the discussion of outsourcing in paragraphs ** of the commentary in the Introduction to Chapter VII, above [**hyperlink**]). Oversight processes may assist in avoiding the use of relatively flexible evaluation criteria in framework agreements to hide the use of inappropriate criteria based on agreements or connections between procuring entities and suppliers or contractors, and to detect abuse in pre-determining the second-stage results that would negate first-stage competition, the risks of which are elevated with recurrent purchases. Transparency in the application of the flexibility, and the use of a pre-determined and pre-disclosed range both facilitates such oversight and ensures that the mechanism complies with the requirement of the United Nations Convention against Corruption that requires the evaluation criteria to be set and disclosed in advance (article 9(1)(b) of the Convention). Enacting States will wish to provide that their oversight regimes examine the use of a range of evaluation criteria, in order to ensure that the range set out in the framework agreement is not so wide as to make the safeguards meaningless in practice.

37. Paragraph (1)(e) notes that the framework agreement must also set out whether the award of the procurement contract(s) under the framework agreement will be made to the lowest-priced or most advantageous submission (for a discussion of those terms, see the commentary to ** above [**hyperlink**]). The basis of the award will normally, but need not necessarily, be the same as that for the first stage; for example, the procuring entity may decide that among the highest-ranked suppliers or contractors at the first stage (chosen using the most advantageous submission), the lowest-priced responsive submission to the precise terms of the second-stage invitation to participate will be appropriate. Where the enacting State has issued laws on competition policy, or there are provisions on that policy in the procurement regulations, the evaluation criteria, subject to the normal transparency requirements, can include the effect on the market for the subject-matter of the procurement concerned. While such policies will not permit rotation among suppliers or contractors, they may allow the awards of procurement contracts to take account of competition policy. On the question of socio-economic policies generally, see section ** of the general commentary at ** above [**hyperlink**].

38. Paragraph (2) provides limited flexibility to the procuring entity to enter into separate agreements with individual suppliers or contractors that are parties to the framework agreement. General principles of transparency and fair and equitable treatment indicate that each supplier or contractor should be subject to the same terms and conditions; the provisions therefore limit exceptions to minor variations that concern only those provisions that justify the conclusion of separate agreements; those justifications are to be put on the record. An example may be the need to execute separate agreements to protect intangible or intellectual property rights and to accommodate different licensing terms or where suppliers or contractors have presented submissions for only part of the procurement. Nonetheless, the result should not involve different contractual obligations for different suppliers or contractors parties to the framework agreement.

39. Paragraph (3) requires all information necessary to allow for the framework agreement to operate effectively, in addition to the above requirements, to be set out in the agreement itself. This approach is also intended to ensure transparency and

predictability in the process. Such information may include technical issues such as requirements for connection to a website if the framework agreement is to operate electronically, particular software, technical features and, if relevant, capacity. These requirements can be supplemented by detailed regulations to ensure that the technology used by the procuring entity does not operate as a barrier to access to the relevant part of the procurement market, applying the principles set out in article 7 [\[**hyperlink**\]](#) (see commentary to that article, at [** above \[**hyperlink**\]](#)).

40. In multi-supplier framework agreements, each supplier or contractor party will wish to know the extent of its commitment both at the outset and periodically during operation of the framework agreement (such as after a purchase is made under the framework agreement). Enacting States may therefore wish to encourage procuring entities to inform the suppliers or contractors about the extent of their commitments.

(A/CN.9/WGI/WP.79/Add.17) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for the Guide text to accompany Chapter VII of the UNCITRAL Model Law on Public Procurement on framework agreements, comprising commentary on articles 60-63 of chapter VII (Framework agreements procedures).

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

...

B. Provisions on framework agreements procedures (*continued*)

Article 60. Establishment of an open framework agreement¹

1. The purpose of the article is to set out the procedure for the first stage of an open framework agreement procedure. By comparison with the provisions for closed framework agreements, which are concluded through the use of a procurement method under chapter III, IV or V of the Model Law **[**hyperlinks**]**, an open framework agreement procedure is a self-contained one, and this article provides for the relevant procedures. An open framework agreement is described in paragraphs ****** of the commentary in the Introduction to this Chapter above **[**hyperlink**]**, and the guidance to this and the following article of the Model Law makes cross-reference to that description where necessary.

2. Paragraph (1) records the requirement that the agreement be established and maintained online. This provision is a rare exception to the approach of the Model Law in that its provisions are technologically neutral, and is included because seeking to operate an open framework agreement in traditional, paper-based format would defeat the administrative efficiency that lies at the heart of open framework agreement procedures, in that it relies on the use of Internet-based, electronic means of communication. The procedure is designed to involve a permanently open web-based procurement opportunity, which suppliers or contractors can consult at any time to decide whether they wish to participate in the procurements concerned, without necessarily imposing the administrative burden of providing individual information to those suppliers or contractors, with consequent delays in response

¹ The Working Group may wish to consider whether these open framework agreements should be discussed as a tool for the use of electronic catalogues, and how they could operate as a forum for request for quotations. Although electronic catalogues are increasingly used as a procurement technique, there is no express provision on the Model Law permitting such use, which would be feasible within an open framework agreement. If commentary on these matters is desired, appropriate guidance on the contents is requested.

times, as is further explained in paragraphs ... below. Responses to opportunities and requests to participate are intended to be provided in a time frame that only online procurement can accommodate.

3. Paragraph (2) provides the mechanism for solicitation of participation in the open framework agreement procedure. It applies the provisions of article 33 [\[**hyperlink**\]](#) by reference; it is self-evident that solicitation to become a party to an open framework agreement must itself be open. The solicitation must also be international, unless the exceptions referred to in article 33(4) [\[**hyperlink**\]](#) and article 8 [\[**hyperlink**\]](#) by cross-reference apply (guidance for which is found in [** above \[**hyperlink**\]](#)). It is recommended that the invitation also be made permanently available on the website at which the framework agreement will be maintained (see, also, the guidance to article 61(2) [\[**hyperlink**\]](#) below, regarding ongoing publicity and transparency mechanisms, including periodic republication of the initial invitation).

4. Paragraph (3) sets out the requirements of the invitation that solicits participation in the procedure, and tracks the requirements for an invitation to tender in open tendering proceedings, with certain deviations necessary to accommodate the conditions of an open framework agreement. The provisions are also consistent, so far as possible, with those applicable to closed framework agreements. Thus, the commentary to solicitation in closed framework agreements should be consulted on the provisions equivalent to those contained in paragraphs (3)(b) and (3)(e) (subparagraph (b) is intended to make it clear that the procedure involves an open framework agreement) and the commentary to solicitation in open tendering proceedings should be consulted on the provisions equivalent to those in paragraphs (3)(d)(i), (3)(f) and (3)(g). Guidance on issues particular to open framework agreement procedures appears in the following paragraphs.

5. Paragraph (3)(a) requires the names and addresses of the procuring entities that will be parties to the open framework agreement or that otherwise can place orders (procurement contracts) under it to be recorded.² The provision is therefore flexible in terms of allowing procuring entities to group together to maximize their purchasing power, and in allowing the use of centralized purchasing agencies, but the framework agreement is not open to new purchasers. The reason for both the flexibility and the limitation is to provide adequate transparency and to support value for money: suppliers or contractors need to know the details of the procuring entities that may issue procurement contracts if they are to be encouraged to participate and to present submissions that meet the needs of the procuring entity, and the efficacy of the procedure is to be ensured. In addition, the requirements of contract formation in individual States will vary; some may not permit procuring entities to join the framework agreement without significant administrative procedures, such as novation. The provision should be read together with the definition of “procuring entity”, in article 2(1), which allows more than one purchaser in a given procurement to be the “procuring entity” for that procurement. In the context of framework agreements, the entity that awards a procurement contract is by definition the procuring entity for that procurement; the

² This commentary reflects the points made when the Working Group was considering the provisions of the Model Law. Guidance to the Secretariat on how this flexibility could operate in practice is requested.

framework agreement itself allows for several potential purchasers at the second stage. However, one agency will be responsible for establishing and maintaining the framework agreement, and it will be identified as the “procuring entity” for that purpose, as provided for in paragraph (3)(a).

6. Paragraph (3)(c) requires the languages of the framework agreement to be set out in the invitation, and includes other measures to promote transparency and consequently to enhance access to the framework agreement once it has been concluded. The website at which the open framework agreement is located should be easy to locate, as an example of the general considerations regarding effective transparency in electronic procurement (see the commentary on e-procurement in Section ** of the general commentary above [\[**hyperlink**\]](#)). The invitation is also required to set out any specific requirements for access to the framework agreement; guidance on ensuring effective market access to procurement is provided in the commentary to article 7 above [\[**hyperlink**\]](#).

7. Paragraph (3)(d) contains a mixture of provisions of general applicability, and provisions concerning framework agreement procedures alone, which together provide the terms and conditions under which suppliers or contractors can become parties to the framework agreement. Paragraph (3)(d)(i) requires the standard declaration as to whether participation is to be restricted on the basis of nationality in the limited circumstances envisaged by article 8 [\[**hyperlink**\]](#). Paragraph (3)(d)(ii) is an optional provision (accordingly presented in brackets) permitting a maximum number of suppliers or contractors parties to the framework agreement to be set. As the accompanying footnote explains, the provision need not be enacted by States where local technical constraints do not so require, and in any event should be read in conjunction with the limited scope of this permission in paragraph (7) of this article (as explained in the commentary to that paragraph of the article below), so as to provide essential safeguards against abuse and undesirable consequences. The paragraph requires the non-discriminatory procedure and criteria that are to be followed in selecting any maximum to be disclosed. In order to select the participants on an objective basis, the procuring entity may use a variety of techniques, as further explained in the commentary in the Introduction to Chapter IV, such as random selection, the drawing of lots or a “first come first served” approach [\[**hyperlink**\]](#), or it may apply other criteria that seek to distinguish among the bidders, provided that they are non-discriminatory.³ This relatively informal approach reflects the fact that where there is a sufficient number of participants, there will be sufficient market homogeneity to allow the best market offers to be elicited.

8. Paragraph (3)(d)(iii) addresses the manner in which applications to become parties to the framework agreement are to be presented and assessed, and it tracks the information required for tendering proceedings under article 39 [\[**hyperlink**\]](#). The provision refers to “indicative submissions”, a term used to reflect that there will always be second-stage competition under an open framework agreement, so that the initial submissions are merely, as their name suggests, indicative. Moreover, while the qualifications of suppliers or contractors are assessed, and their submissions are examined against the relevant description to assess responsiveness

³ The Working Group may wish to consider whether the provisions indeed confer a greater flexibility than those of Chapter IV procurement methods, as this comment indicates.

(see paragraphs (5) and (6) of the article), by comparison with initial submissions in closed framework agreements, there is no evaluation of indicative submissions (i.e. no competitive comparison of submissions, such as is provided for in article 43 [\[**hyperlink**\]](#)). Also by contrast with the position in closed framework agreements, and as is explained in the guidance to paragraph (6) of the article below, all suppliers or contractors presenting responsive submissions are eligible to join the framework agreement, provided that they are qualified.

9. Paragraph (3)(d)(iv) requires the invitation to include a statement that the framework agreement remains open to new suppliers or contractors to join it throughout its duration (see paragraph (4) of the article for the related substantive requirement), unless the stated maximum of suppliers or contractors parties to the agreement is exceeded and unless the potential suppliers or contractors are excluded under limitations to participation imposed in accordance with article 8 of the Model Law [\[**hyperlink**\]](#). The invitation should also set out any limitations to new joiners (which might arise out of capacity constraints, as described above, or as a result of imposition of limitations under article 8 of the Model Law), plus any further requirements, for example as regards qualifications of parties to the agreement and responsiveness of their indicative submissions.

10. Paragraph 3(f) requires all the terms and conditions of the framework agreement (themselves governed by article 61 [\[**hyperlink**\]](#)) to be set out in the invitation, to include, among other things, the description of the subject-matter of the procurement and evaluation criteria. The requirements for those terms and conditions are discussed in the commentary to article 61 [\[**hyperlink**\]](#) below.

11. Paragraph (4) sets out the substantive requirement that the framework agreement be open to new suppliers or contractors throughout the period of its operation. As is noted in paragraphs ** of the commentary in the Introduction to this Chapter, this provision is a key feature of open framework agreements.

12. Paragraph (5) requires indicative submissions received after the establishment of the framework agreement to be assessed promptly, in order that the framework agreement remains open to new joiners in reality; this is a critical feature in the context of an online open framework agreement, which may be designed for small-scale and regular purchases. All responsive submissions from qualified suppliers or contractors must be accepted and the suppliers or contractors concerned admitted to the framework agreement, as provided for in paragraph (6), subject to any capacity constraints justifying rejection imposed under paragraphs (3)(d)(ii) and (7) as set out in the invitation to become a party to the agreement, or other restrictions (where the procurement is domestic, for example; see the relevant discussion above).

13. Paragraph (7) is linked to paragraph (3)(d)(ii), both of which are put in brackets as an optional text to be considered for inclusion in the law by an enacting State. They concern imposition of the maximum number of suppliers or contractors parties to the agreement because of technical constraints. In addition to the considerations raised in connection with the similar provisions appearing in the context of ERAs (see commentary to article 53(1)(k) and (2) in [** above \[**hyperlink**\]](#)), there are additional considerations that an enacting State should keep in mind when considering enacting these provisions. Because the salient difference between closed and open framework agreements is that the latter remain

open to new suppliers or contractors throughout their operation, any imposition of a maximum number of suppliers or contractors parties may effectively turn the framework into a closed agreement. This situation may be exacerbated in that the benefits of a fluctuating pool of suppliers or contractors may be lost if suppliers or contractors that cease to participate in second-stage competition remain, from a technical point of view, parties to the framework agreement and block new joiners. Paragraph (7) therefore permits such a maximum number of supplier or contractors parties only where technical capacity constrains access to the systems concerned (e.g. the software for the framework agreement may accommodate only a certain maximum number). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision is likely to become obsolete within a short period.

14. Even though a maximum number, where needed, is likely to be of a reasonable size, the procuring entity is required to be objective in the manner of selecting the suppliers or contractors parties up to that maximum. See, further, the discussion of ensuring objectivity in paragraphs ** above, and the commentary in the introduction to Chapter IV [\[**hyperlink**\]](#). The procurement regulations, or other applicable rules, should provide guidance on these matters to procuring entities (noting, in particular, the risk, albeit limited, of a challenge under Chapter VIII [\[**hyperlink**\]](#)).

15. Enacting States will observe that there is no evaluation of the indicative submissions provided for in this article. The nature of an open framework agreement is that, as is explained in paragraph ** above, all responsive submissions from qualified suppliers or contractors are accepted. As is further explained in the guidance to article 62 [\[**hyperlink**\]](#) below, price competition is largely absent at the first stage, and so ensuring genuine competition at the second stage is critical.

16. The provisions of paragraph (8) are designed to provide transparency in decision-making and to allow a supplier or contractor to challenge the decision of the procuring entity not to accept the supplier or contractor in the framework agreement procedure if desired. The inclusion of such provision in the context of the open framework agreement is justified because safeguards of the standstill period notification would not be applicable to indicative submissions but only to submissions presented in response to the specific purchase orders placed under the agreement (the second-stage submissions). It is therefore essential for the supplier or contractor to know whether it is the party to the agreement without which it would not be able to learn about purchase orders placed under the agreement and present second-stage submissions. However, in the case of the challenge of the procuring entity's decision, the policy considerations regarding delaying the execution of a procurement contract to allow an effective challenge and allowing the procurement contract to proceed are different in the open framework agreement context from the norm (the general policy considerations are set out in the guidance to article 22 above [\[**hyperlink**\]](#)). In the case of open framework agreements, any aggrieved supplier or contractor whose submission was rejected as non-responsive or that was not admitted because of disqualification will be able to be admitted to the framework agreement for future purchases if a challenge is resolved in its favour, the harm occasioned by the delay in participation was considered as unlikely to override the interest in allowing an effectively limited portion of procurement contracts in open framework agreements to proceed.

Article 61. Requirements of open framework agreements

17. This article mirrors article 59 [\[**hyperlink**\]](#) regarding closed framework agreements, and governs the terms and conditions of the open framework agreement and the award of contracts under it. As was also the case for closed framework agreements, the law of the enacting State will address such issues as the enforceability of the agreement in terms of contract law. These issues are therefore not addressed in the Model Law. Suppliers or contractors that join the framework agreement after its initial conclusion will need to be bound by its terms; they may be so bound automatically upon joining the agreement, and so enacting States should ensure that the law makes appropriate provision in this regard.

18. Paragraph (1) records the requirement that the award of procurement contracts under the open framework agreement must be carried out through a competition at the second stage of the framework agreement procedure. Subparagraphs (c) to (f) set out the terms and procedures of the second-stage competition. They are similar to the provisions in paragraph (1)(d) of article 59 [\[**hyperlink**\]](#), guidance for which is found at paragraphs [** above \[**hyperlink**\]](#). The differences reflect the nature of the possible subject-matter to be procured through open framework agreements (i.e. simple standardized items, as explained in [** above \[**hyperlink**\]](#)).

19. Paragraph (1)(a) requires the duration of the framework agreement to be recorded in that agreement. By comparison with closed framework agreements, there is no reference to any maximum duration imposed under the procurement regulations: the fact that the agreement is open to new suppliers or contractors throughout its period of operation lessens the risks of choking off competition as described in the context of closed framework agreements in paragraph [** above \[**hyperlink**\]](#). However, in order to allow for new technologies and solutions, and to avoid obsolescence, the duration of an open framework agreement should not be excessive, and should be assessed by reference to the type of subject-matter being procured. (See, also, the general guidance at paragraph [** above](#) on the importance of a periodic reassessment of whether the framework agreement continues to reflect what is currently available in the relevant market.) In addition, suppliers or contractors may be reluctant to participate in an agreement of unlimited duration.

20. Paragraph 1(b) requires the terms and conditions of the procurement that are known at the stage when the open framework agreement is established to be recorded in the framework agreement (and under article 60 [\[**hyperlink**\]](#) will have been provided in the invitation to become a party to the open framework agreement). This provision is similar to article 59(1)(b) [\[**hyperlink**\]](#) regarding closed framework agreements, but as noted above, some deviations are justified in the light of the nature of subject-matter intended to be procured through the open framework agreements. Their nature would not require establishing any terms and conditions of the procurement at the second stage but only the refinement of the established ones, for example as regards the quantity, place and time frame of the delivery of the subject-matter. Although the nature of an open framework agreement tends to indicate that the description of the procurement will be framed in functional and broad terms so as to allow refinement to the statement of the procuring entity's needs at the second stage, it is important that it is not so broad that the open framework agreement becomes little more than a suppliers' list. If that were the case, the procuring entity or entities using the framework agreement would be

required to conduct or re-conduct stages of the procurement at the second stage (fuller reconsideration of qualifications and responsiveness as well as the evaluation of second-stage submissions), thus defeating the efficacy of the procedure. In addition, the extent of the change in the initial terms of solicitation at the second stage is subject to limitations of article 63 [\[**hyperlink**\]](#). On the other hand, sufficient flexibility is required to allow for changes in the regulatory framework, such as regarding environmental requirements or those pertaining to sustainability.

21. Paragraph (2) requires the periodic re-advertising of the invitation to become a party to the open framework agreement. The invitation must be published, at a minimum, once a year, in the same place as the initial invitation. Nonetheless, enacting States may consider that more frequent publication will encourage greater participation and competition. The electronic operation of the open framework agreement implies purely online publication, including at the first stage under article 33,⁴ thus keeping the costs of publication to a reasonable level. The invitation must contain all information necessary for the operation of the framework agreement (including the relevant website, and supporting technical information). The paragraph also requires the procuring entity to ensure unrestricted, direct and full access to the terms and conditions of the framework agreement; the agreement operates online, which means that such information must be available at a website indicated in the invitation. It should also include the names of all suppliers or contractors parties to the framework agreement and, as noted above, all procuring entities that may use the framework agreement. Second-stage competitions should also be publicized on that website, as further explained in paragraphs ... below.

Article 62. Second stage of a framework agreement procedure

22. This article governs second-stage competition under both closed and open framework agreements. Some of its provisions, such as in paragraph (3) are intended to accommodate differences in the award of procurement contracts under closed framework agreements without second-stage competition and closed framework agreements with second-stage competition.

23. As paragraph (1) notes, the framework agreement sets out the substantive criteria and certain procedures governing the award of procurement contracts under the framework agreement, and the provisions of this article record the other elements of the award procedures. Thus there is a requirement for full transparency as regards both the award criteria and the procedures themselves.

24. The procedures are aimed at allowing effective competition at this second stage of the procedure, while avoiding excessive and time-consuming requirements that would defeat the efficiency of the framework agreement procedures. These considerations are particularly important in open framework agreements, in which there have been indicative, rather than initial, submissions at the first stage and there has been no evaluation of those submissions.

⁴ The provision of guidance to the Secretariat is requested on whether this understanding is correct, or whether, once the open framework agreement is established, the notice may also be required to be published in paper-based media should procurement notice generally still be so published in the enacting State concerned.

25. Paragraph (2) records that a procurement contract can be awarded only to a supplier or contractor that is a party to the framework agreement. This may be self-evident as regards closed framework agreements, but in the context of open framework agreements, the provision underscores the importance of swift examination of applications to join the framework agreement itself, and the utility of relatively frequent and reasonable-sized second-stage competitions to take advantage of a competitive and dynamic market. In practice, a second-stage competition will probably be announced on the website for the framework agreement itself, with a relatively short period for presenting final submissions in the second-stage competition. New joiners may wish to present their indicative submissions in time to be considered for the second-stage competition but may be able to participate only in subsequent competitions. The interaction between final submission deadlines, the time needed to assess indicative submissions and the frequency and size of second-stage competitions should be carefully assessed when operating the framework agreement.

26. Paragraph (3) records that article 22 on the award of the procurement contract applies to closed framework agreements without second-stage competition, save as regards the application of a standstill period required under paragraph (2) of that article.⁵

27. Paragraph (4) sets out the procedures for the second-stage competition. Subparagraph (a) requires the issue of an invitation to the competition to all parties of the framework agreement or only those then capable of meeting the needs of the procuring entity in the subject-matter of the procurement. This invitation is provided in accordance with the terms and conditions of the framework agreement which may, for instance, allow for automated invitations for efficiency reasons. Best practice is also to provide notice or a copy of the invitation on the website at which the framework agreement itself is located; this may also encourage new suppliers or contractors to participate in the procedure where possible (i.e. in open framework agreements). The use of electronic notices keeps the costs of so doing to a minimum; as communications methods improved over time, there may be opportunities to publicize the second-stage competition further, without additional costs implications.

28. The provisions of subparagraph (a) require all suppliers or contractors parties to the framework agreement to be invited to participate or, where relevant, only those “capable” of fulfilling the procuring entity’s requirements. The latter should be understood in a very narrow sense, in the light of the terms and conditions of the framework agreement and terms and conditions of initial or indicative submissions, to avoid allowing much discretion on the procuring entity as regards the pool of suppliers or contractors to be invited, which may lead to abuse, such as favouritism. For example, the framework agreement may permit suppliers or contractors to supply up to certain quantities (at each second-stage competition or generally); initial or indicative submissions may state that certain suppliers or contractors cannot fulfil particular combinations or certain quality requirements. The assessment of suppliers or contractors that are “capable” in this sense is therefore objective; all suppliers or contractors parties to the agreement must be presumed to

⁵ The Working Group is requested to provide an explanation for this decision. The explanation will also need to be included in the commentary to article 22(3)(a).

be capable unless the framework agreement or their initial or indicative submissions provide to the contrary. The objectives of this provision are two-fold: first, to avoid abuse or misuse in the award of contracts to favoured suppliers or contractors and, secondly, to limit submissions to those that are capable of fulfilling them to enhance efficiency. The procuring entity should include an explanation in the record of the procurement as to why any suppliers or contractors parties to the agreement are not invited to participate in the second-stage competition; the publication of the invitation on the relevant website will allow for any such exclusion to be challenged. While such publication is not mandatory under the Model Law, it should assist in avoiding late challenges; similarly, rules or guidance for the public procurement agency or similar body should discuss that the procuring entity may avoid being confronted by a large number of challenges related to its assessment of suppliers' or contractors' capability to supply, if the framework agreement clearly sets out procedures and criteria that would clearly identify which suppliers or contractors will be considered capable. These safeguards and supporting guidance are considered critical to ensure that second-stage competition is effective, recalling that experience in the use of framework agreements indicates that this stage of the process is a vulnerable one from the perspective of participation and competition. Vulnerability increases even further since the provisions on the standstill period (article 22(2) [\[**hyperlink**\]](#)) will apply in the case of framework agreements with second-stage competition only to suppliers or contractors that presented second-stage submissions (but not to all parties of the framework agreement).

29. Paragraph (4)(b) regulates the content of the second-stage invitation. Subparagraphs (iii) to (xi) repeat provisions from article 39 [\[**hyperlink**\]](#) on the contents of solicitation documents, guidance on which is found in Section [** above \[**hyperlink**\]](#). In the context of framework agreements, it is important to provide a suitable deadline for presenting submissions: in the context of open framework agreements, for example, it may be expressed in hours or a day or so. Otherwise, the administrative efficiency of the procedure will be compromised, and procuring entities will not avail themselves of the technique. The period of time between the issue of the invitation to present second-stage submissions and the deadline for presenting them should be determined by reference to what sufficient time to prepare second-stage submissions will be in the circumstances (the simpler the subject-matter being procured, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The time requirement will be in any event qualified by the reasonable needs of the procuring entity, as explicitly stipulated in article 14(2) of the Model Law [\[**hyperlink**\]](#), which may in limited circumstances prevail over the other considerations, for example, in cases of extreme urgency following catastrophic events. (See also the relevant considerations in paragraph [** above](#).)

30. Enacting States will observe, however, that there is no requirement to issue a general notice of the second-stage competition, reflecting the presumption that the first stage of the framework agreement will have included an open invitation since the default rule under articles 28 [\[**hyperlink**\]](#) and 58(1) [\[**hyperlink**\]](#) is to use open tendering, and the desire to avoid imposing too many procedural steps on the process that might compromise its efficiency. This presumption may be however displaced when alternative methods of procurement involving direct solicitation are used for the award of the framework agreement. An advance notice of purchase orders placed under framework agreements to all parties of the framework

agreement should be considered as a significant safeguard against abuse; such a notice would make the safeguards in the context of framework agreements consistent with those applicable in restricted tendering, for example (in which an ex ante notice of procurement is required to be made public under article 34 (5) of the Model Law), and with other methods involving direct solicitation [\[**hyperlinks**\]](#). As noted above, such a notice enables suppliers or contractors to challenge their exclusion from the procurement proceedings on the basis of, for example, an assumption on the part of the procuring entity that the limited number of suppliers or contractors capable of delivering the subject-matter at the second stage does not include the challenging supplier or contractor. Enacting States are therefore encouraged to consider including a requirement for an advance notice in the procurement regulations, or to encourage such a notice in other rules or guidance.

31. Subparagraph (i) requires the information that sets the scope of the second-stage competition to be included in the invitation, a vital transparency requirement. Where the invitation is issued electronically (which must be, for example, in open framework agreements), procuring entities may wish to incorporate the required restatement of the existing terms and conditions of the framework agreement by hyperlink (i.e. by cross-reference), provided that the link is adequately maintained. The invitation must also include both the terms and conditions of the procurement that are the subject of the competition and further details thereof where necessary. This provision should be read together with articles 59(1)(d)(i) [\[**hyperlink**\]](#) and (61)(1)(c) [\[**hyperlink**\]](#), which require the framework agreement to set out the terms and conditions that may be established or refined through second-stage competition. The flexibility to engage in such refinement is limited by application of article 63 [\[**hyperlink**\]](#) which provides that there may be no change to the description of the subject-matter of the procurement that is governed by article 10, and that other changes may be made only to the extent permitted in the framework agreement. Where modifications to the products, or technical substitutions, may be necessary, they should be foreshadowed in the framework agreement itself, which should also express needs on a sufficiently flexible and functional basis (within the parameters of article 10 [\[**hyperlink**\]](#)) to allow for such modifications. Other terms and conditions that may be refined include combinations of components (within the overall description), warranties, delivery times, and so forth. The balance of allowing sufficient flexibility to permit the maximization of value for money and the need for sufficient transparency and limitations to avoid abuse should form the basis of guidance to procuring entities in this aspect of the use of framework agreements.

32. Subparagraph (ii) requires a restatement of the procedures and criteria for evaluation of submissions, as originally set out in the framework agreement. Again, this provision is aimed at enhancing transparency, and should be read together with articles 59(1)(d)(iii) [\[**hyperlink**\]](#) and 61(1)(f) [\[**hyperlink**\]](#), which allow the relative weights of the evaluation criteria (including sub-criteria) to be varied within a range set out in the framework agreement itself. Appropriate evaluation criteria and procedures at this second stage are critical if there is to be effective competition, objectivity and transparency, and their importance and application are explained in the guidance to article 59 above (see paragraphs [** \[**hyperlink**\]](#)).

33. Paragraph (4)(c) is derived from the general requirements in article 11(6), requiring objectivity and transparency in the evaluation of submissions by not permitting any previously undisclosed criteria or procedures to be applied during the evaluation.

34. Paragraph (4)(d) recalls the requirements of article 22 [\[**hyperlink**\]](#) regarding notices and associated formalities when the successful submission is accepted (for guidance on those provisions, see ... above). The notice provisions would require that the price of each purchase be disclosed to the suppliers or contractors that presented second-stage submissions, so as to facilitate any challenge by unsuccessful suppliers or contractors. It is considered to be good practice to give notice to unsuccessful parties to the framework agreement, such as by individual notification in electronic systems or, in paper-based closed framework agreements without large numbers of participants, as well as by a general publication. In the context of framework agreements, this manner of notification is not only efficient, but can be effective where repeated procurements can benefit from improved submissions, particularly when the notices are accompanied by explanations of why the submissions were unsuccessful or by debriefing procedures. The requirements of article 22, requiring publication of the award, also apply (allowing smaller purchases to be grouped together for publicity purposes, as set out in that article and discussed in the accompanying guidance).

Article 63. Changes during the operation of the framework agreement

35. This article is intended to ensure objectivity and transparency in the operation of the framework agreement. It first provides that there can be no change in the description of the subject-matter of the procurement, because allowing such a change would mean that the original call for participation would no longer be accurate, and a new procurement would therefore be required. The need for flexibility in the operation of framework agreements, such as permitting refinements of certain terms and conditions of the procurement during second-stage competition, means that changes to those terms and conditions (including to the evaluation criteria) must be possible. The article therefore provides that such changes are permitted, but only to the extent that they do not change the description of the subject-matter of the procurement, and with the transparency safeguard that changes are possible only to the extent permitted in the framework agreement. (This policy objective — ensuring objectivity and transparency in the procurement process — also underlies the provisions of article 15(3) [\[**hyperlink**\]](#), which require a re-advertisement of the procurement and an extension of the submission deadline where the solicitation documents are modified to the extent that there is a material inaccuracy in the original advertisement.)

36. As a result, the description of the subject-matter of the procurement will commonly be framed in a functional or output-based way, with minimum technical requirements, so as to allow for product modifications or technical substitutions as described in the guidance to the previous articles of this chapter [\[**hyperlinks**\]](#). Whether this approach is appropriate will depend on the nature of the procurement itself, as explained in paragraphs ** of the commentary in the Introduction to this Chapter [\[**hyperlink**\]](#) and in the commentary to article 59 above [\[**hyperlink**\]](#). There is a risk of abuse in both allowing broad and generic specifications, and in permitting changes; the framework agreement may be used for

administrative convenience beyond its intended scope, allowing non-transparent and non-competitive awards of procurement contracts. Furthermore, this lack of transparency and competition will also have the potential significantly to compromise value for money in those awards. The regulations, or rules and other guidance should therefore address these risks and appropriate measures to mitigate them in some detail.

(A/CN.9/WGI/WP.79/Add.18) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum sets out a proposal for the Guide text to accompany chapter VIII (Challenges proceedings) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

Part II. Article-by-article commentary

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CHAPTER VIII. CHALLENGE PROCEEDINGS
[**hyperlink**]

A. Introduction

Executive Summary

1. A key feature of an effective procurement system is the existence of mechanisms to monitor that the system's rules are followed and to enforce them if necessary. Such mechanisms include challenge procedures, in which suppliers and contractors are given the right to challenge decisions and actions of the procuring entity that they allege are not in compliance with the rules contained in the applicable procurement legislation, audits and investigations, and prosecutions for criminal offences. Challenge procedures are provided for in Chapter VIII of the Model Law; the other mechanisms involve broader questions of oversight of administrative decision-making than arise in the procurement context alone, and consequently are not provided for in the Model Law.

2. An effective challenge mechanism helps to make the Model Law to an important degree self-policing and self-enforcing, since it provides an avenue for suppliers and contractors that have a natural interest in monitoring procuring entities' compliance with the provisions of the Model Law in each procurement procedure. It also helps foster public confidence in the procurement system as a whole. An additional function of a challenge mechanism is to act as a deterrent: its existence is designed to discourage actions or decisions knowingly in breach of the law. For these reasons, a challenge mechanism is an essential element of ensuring the proper functioning of the procurement system and can promote confidence in that system.

3. Furthermore, article 9(1)(d) of the United Nations Convention against Corruption [\[**hyperlink/reference**\]](#) requires procurement systems to include an effective challenge mechanism, termed a system of domestic review and including a system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures required by article 9(1) of the Convention are not followed. UNCITRAL, in seeking to ensure that the Model Law addresses the Convention's requirements, requires in the Model Law that enacting States provide all rights and procedures necessary (both at first instance and in appeals) for such an effective challenge mechanism. Similarly, and applying its general approach to the international context of the Model Law, the Model Law has been designed to be consistent, so far as practicable, with the approach to challenge procedures under the WTO GPA [\[**hyperlink/reference**\]](#).

4. Chapter VIII of the Model Law contains the provisions aimed at ensuring an effective challenge mechanism, and enacting States are encouraged to incorporate all the provisions of the chapter to the extent that their legal system so permits. They comprise a general right to challenge (and to appeal a decision in a challenge proceeding), an optional request to the procuring entity to reconsider a decision taken in the procurement process; a review by an independent body; and/or an application to the Court. However, the Model Law does not impose a specific structure on the system, as further explained in [** below \[**hyperlink**\]](#). In addition, there are various mechanisms to ensure the efficacy of the procedure. The Model Law seeks to decrease the need for challenges through its procedures for each procurement process. For example, Article 15 [\[**hyperlink**\]](#) provides a mechanism for clarifying and modifying the solicitation documents, so as to reduce the likelihood of challenges to the terms and conditions set out in those documents; the clarification mechanism in article 16 is designed to reduce the likelihood of challenges to decisions on qualifications, responsiveness and on the evaluation of submissions.

5. Other branches of law and other bodies in the enacting State may have an impact on the challenge mechanism envisaged under chapter VIII, if, for example a challenge is triggered by allegations of fraud or corruption, or breaches of competition law. In such cases, appropriate guidance should be provided to procuring entities and to suppliers, including requiring that this information is publicly available, to ensure that relevant authorities are alerted and so that appropriate action is taken.

2. Enactment: Policy considerations

6. The requirements of the Convention against Corruption and the Model Law are founded on the recognition that legislation for challenge procedures needs to be drafted in a manner consistent with the legal tradition in the enacting State concerned. It is recognized that there exist in most States mechanisms and procedures for the challenge of acts of administrative organs and other public entities (often called a review function). In some States, such mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts. States do, however, differ significantly in their approach to enforcement: in some countries, there is a long-standing system of review before

specialist authorities and courts; in others there is no general legislative provision for such review (except to the extent required by international obligations and subject to judicial review procedures). In some systems there are administrative sanctions for breaches of procurement law by organs of the State, and proceedings are brought before an administrative tribunal, while in others there is a combination of administrative review, or independent review, and/or judicial review of procurement decisions through the ordinary courts (accompanied by special criminal proceedings for violations of procurement laws by procuring entities).

7. In view of the above, and in order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems and systems of State administration throughout the world, the provisions in chapter VIII set out the principles and main procedures to be followed in order to constitute an effective challenge mechanism. Continuing the general approach of the Model Law as a framework text, they are intended to be supplemented by regulations and detailed rules of procedure to ensure that the challenge mechanisms operate effectively, expeditiously and in a cost-effective manner.

8. In general terms, an effective mechanism involves the possibility of intervention without delay; the power to suspend or cancel the procurement proceedings and to prevent in normal circumstances the entry into force of a procurement contract while the dispute remains outstanding; the power to implement other interim measures, such as giving restraint orders and imposing financial sanctions for non-compliance; the power to award damages if intervention is no longer possible (e.g. after the contract is awarded); and the ability to proceed swiftly within a reasonably short period of time, which should be measured in terms of days and weeks in the normal course. The mechanism, in order to be effective, must include, at least, one body to hear a challenge as a first step and a further body to hear an appeal as a second step.

9. The Model Law's provisions require enacting States to provide for all the above elements of an effective mechanism, in a manner consistent with their legal tradition. They establish in the first place that suppliers and contractors have a right to challenge an act or decision of a procuring entity: there are no acts or decisions in a procurement procedure that are exempt from the mechanism. As to the body to hear the challenge (i.e. the first step), the Model Law provides for three alternatives.

10. As a first alternative, a challenge may be presented to the procuring entity itself under article 66 [\[**hyperlink**\]](#), provided that the procurement contract is yet to be awarded. The purpose of providing for this procedure is to allow the procuring entity to correct defective acts, decisions or procedures.

11. Significantly, this system is an option for suppliers or contractors, and not a mandatory first step in the challenge process. The system has been included so as to facilitate a swift, simple and relatively low-cost procedure, which can avoid unnecessarily burdening other forums with applications and appeals that might have been resolved by the parties at an earlier, less disruptive stage, and with lower costs. Speedy remedies that can be granted without significant time and cost are features that are highly desirable in a procurement challenge mechanism, and the fact that the procuring entity will be in possession of the facts relating to and in control of the procurement proceedings concerned, and may be willing and able to correct

procedural errors of which it may perhaps not have been aware, contribute to achieving them. These features are important not only to the challenging supplier, but also in order to minimize disruption to the procurement process as a whole. Such a voluntary system may also lessen the perceived risk of jeopardizing future business through a legal procedure, which has been observed to operate as a disincentive to challenges. On the other hand, it is sometimes observed that procuring entities simply ignore the request, and submitting one operates in practice merely to delay a formal application in another forum. Enacting States are encouraged therefore to include the system, given its potential benefits, but to take steps to ensure that it functions in practice (matters of such implementation and use are considered in the following section).

12. The second alternative is for an independent, third-party review of the decision or action of the procuring entity that the supplier alleges is not in compliance with the law. This independent review may operate as an administrative procedure. It is broader in scope than the peer system outlined above, because challenges can be submitted after the entry into force of the procurement contract (or framework agreement). The independent body receiving the challenge may grant a wide range of remedies, and the commentary to the provisions concerned highlights those remedies that may not traditionally be available in certain legal systems. Those remedies are considered important features of the system envisaged under the Model Law, so enacting States are encouraged to enact them, subject to ensuring consistency between the independent review system and equivalent mechanisms before their courts. The length of time for disputes to be resolved in traditional court proceedings, and the potential benefits that can accrue with the acquisition of specialist expertise within the independent bodies, are also grounds for providing for the independent review system.

13. The third alternative an application before a competent court. The Model Law does not provide procedures for such proceedings, which will be governed by applicable national law. Enacting States that provide only for judicial review of the decisions of the procuring entity are required to put in place an effective system for first instance applications and appeals, to ensure adequate legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in order to be compliant with the requirements of the Convention against Corruption [\[**hyperlink**\]](#).

14. As to the body to hear the appeal, enacting States may limit such applications to the court, or may provide that they can be submitted to the independent body, or both, to reflect the legal system in the jurisdiction concerned. Where the State wishes to provide for appeal before the independent review body under article 67 [\[**hyperlink**\]](#), that article will need to be adapted to confer an appellate jurisdiction: in the form it is provided in the Model Law, article 67 confers a first-instance competence only.

15. Enacting States may also wish to use the provisions of the Model Law to assess the effectiveness of challenge mechanisms already in operation in their country. Where a system of effective and efficient court review is already present, there may be little benefit in introducing a new independent body, and, on the other hand, there may be equally little benefit in promoting procurement specialization in the courts if there is a well-functioning alternative forum. The importance of individuals with specialist expertise within any forum that will hear challenges

should be emphasized, given the demanding decisions required and extensive procedures under the Model Law.

16. In this regard, enacting States are encouraged to review the scope of all forums available, to ensure that the system put in place indeed confers effective legal recourse and remedies (including appeals) as required by the Convention against Corruption [\[**hyperlink**\]](#) and as is acknowledged to constitute best practice.

17. Chapter VIII does not deal with the possibility of dispute resolution through arbitration or alternative forums, since the use of arbitration in the context of procurement proceedings is relatively infrequent, and given the nature of challenge proceedings, which generally involves the characterization of acts or decisions of the procuring entity as compliant or not compliant with the requirements of the Model Law. Nevertheless, the Model Law does not intend to suggest that the procuring entity and the supplier or contractor are precluded from submitting, a dispute relating to the procedures in the Model Law to arbitration, in appropriate circumstances, and notably as regards disputes during the contract management phase of the procurement cycle.

3. Issues of implementation and use

18. A key characteristic of an effective challenge mechanism is that it strikes the appropriate balance between, on the one hand, the need to preserve the interests of suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process (particularly in the light of the general prohibition in article 65 [\[**hyperlink**\]](#) that prohibits the entry into force of the procurement contract or framework agreement while a challenge remains unresolved (with limited exceptions)). The provisions limit the right to challenge to suppliers and contractors (including potential suppliers and contractors that have, for example, been disqualified); provide time limits for filing of applications and appeals, and for disposition of cases; and provide discretion in deciding in some circumstances whether a suspension of the procurement proceedings may apply. Regulations and rules or other guidance should elaborate on these aspects of the provisions and achieving the appropriate balance between the interests of suppliers and the needs of the procuring entity. The discretion conferred regarding suspension of the procurement procedure (which is additional to the prohibition under article 65 referred to above) is critical in this regard; considerations relating to when suspension may or may not be appropriate are considered in paragraphs ** below.

19. A second factor contributing to the efficient resolution of disputes and limiting the disruption of the procurement process is encouraging early and timely resolution of issues and disputes, and enabling challenges to be addressed before stages of the procurement proceedings would need to be undone, of which the most significant is the entry into force of the procurement contract (or, where applicable, the conclusion of a framework agreement). There are several provisions in the Model Law to this end, first, the procedures for an application for reconsideration before the procuring entity; secondly, the imposition of time limits for filing and, thirdly, the imposition of time limits for the issue of the decision.

20. A supporting element is the use of a standstill period (provided for in article 22(2) [\[**hyperlink**\]](#)). The aim of imposing a standstill period is to require

a short delay between the identification of the successful submission and the award of the procurement contract (or framework agreement), so that any challenges to the proposed award can be dealt with before the additional complications and costs of addressing an executed contract arise, as further explained in the commentary to that article, above [\[**hyperlink**\]](#).

21. The rules and procedures set out in chapter VIII are also intended to be sufficiently flexible that they can be adapted to any legal and administrative system, without compromising the substance of the challenge mechanism itself or its efficacy. For example, certain important aspects of challenge proceedings, such as the forum where an application or appeal is to be filed and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of state administration in every country; the enacting State will need to adapt the provisions of Chapter VIII in this regard.

22. Where States enact the optional system of requests for reconsideration to the procuring entity, they are encouraged to take steps to ensure that the benefits of this mechanism and its manner of operation (which includes formal procedures as the commentary to article 66 [\[**hyperlink**\]](#) explains) are widely disseminated and understood, so that effective use can be made of it. In this regard, there is often confusion between a request for reconsideration and a debriefing. The objective of debriefing is to explain a procuring entity's decision to the supplier or contractor affected, so that its rationale is clear, with the hope that its compliance with the provisions of the law becomes clear, or that a mistake can be corrected. It is thus an informal mechanism to support procurement procedures and, while encouraged by UNCITRAL in appropriate circumstances, is not expressly provided for in the Model Law. (For a further discussion of debriefing, see Section ** of the general commentary above [\[**hyperlink**\]](#)). In order to avoid such confusion, the key differences, in terms of the objectives, procedures and possible outcomes of both procedures should be highlighted. In addition, enacting States should monitor and oversee the response to requests submitted, so as to ensure that they are treated seriously and the potential benefits obtained.

23. A further issue to be highlighted in the guidance to users is to emphasize that the request for reconsideration is not available where the procurement contract has entered into force. The reason for this restriction is that, thereafter, there are limited corrective measures that the procuring entity could usefully require: its powers cease when the contract comes into force. The restriction of the procuring entity's competence to pre-contract disputes is also intended to avoid granting excessive powers to the procuring entity, and is also consistent with the exclusion from the Model Law of the contract management stage. Thereafter, the challenge will fall instead within the purview of independent or judicial review bodies — that is, the independent body or the court. Ensuring that the notice and standstill provisions under article 22 [\[**hyperlink**\]](#) are respected should also help limit the potential for post-contract disputes.

24. As regards the system of review before an independent body under article 69 [\[**hyperlink**\]](#), the structure will need to reflect the legal tradition in the enacting State. Some legal systems provide for challenge or review of acts of administrative organs and other public entities before an administrative body, which exercises hierarchical authority or control over the organ or entity. In legal systems that provide for this type of review, the question of which body or bodies are to exercise

that function in respect of acts of particular organs or entities depends largely on the structure of the state administration. This type of body would not be independent in the sense required by the Model Law. The notion of “independence” in the context of Chapter VIII means independence from the procuring entity rather than independence from the Government as a whole and protected from political pressure. For the same reasons as apply to hierarchical administrative review in the previous paragraph, an administrative body that, under the Model Law as enacted in the State, has the competence to approve certain actions or decisions of, or procedures followed by, the procuring entity, or to advise the procuring entity on procedures, will not fulfil the requirement for independence. In addition, States will wish to consider in particular whether the body should include or be composed of outside experts, independent from the Government. Independence is also important as a practical matter: if decision-taking in review proceedings lacks independence, a further challenge to the court may result, causing lengthy disruption to the procurement process.

25. Enacting States are therefore encouraged, within the scope of their national systems, to provide the independent body with as much autonomy and independence of action from the executive and legislative branches as possible, in order to avoid political influence and to ensure rigour in decisions emanating from the independent body. The need for an independent mechanism is particularly critical in those systems in which it is unrealistic to expect that reconsideration by the procurement entity of its own acts and decisions will always be impartial and effective.

26. An enacting State that wishes to set up a mechanism for independent review will need to identify the appropriate body in which to vest the review function, whether in an existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State, a relevant body whose competence is not restricted to procurement matters (e.g., the body that exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters.

27. Guidance will also be required on the operating procedures of the independent body, as further discussed in the commentary to article 67 [\[**hyperlink**\]](#). Particular importance should be given to the question of evidence, confidentiality and hearings, so as to ensure that all parties to the proceedings are fully aware of their rights and obligations in this regard, to ensure that there is consistency in all proceedings, and to allow an effective and efficient appeal from a decision of an independent body. Finally, it may be desired to allow civil society representatives or others to observe challenge proceedings, and, if so and unless other laws already so permit, the regulations or rules and guidance will need to provide for the required facility, in accordance with the legal tradition in the enacting State concerned. These questions fall outside the scope of the Model Law and Guide, along with other issues discussed in this introduction to Chapter VIII of the Model Law. As there is therefore a risk of fragmented information, the role of the public procurement agency or similar body discussed in Section [**](#) of the general commentary in ensuring that the guidance directs the reader to all appropriate locations will be vital. [\[**hyperlink**\]](#)

28. A substantive issue that arises in challenge proceedings generally is the question of whether the procurement proceedings should be suspended when a challenge application is filed. Although article 65 [\[**hyperlink**\]](#) prohibits the entry into force of the procurement contract until the application has been disposed of, a suspension of the procurement proceedings may also be necessary where without a suspension, a supplier or contractor submitting a complaint may not have sufficient time to seek and obtain interim relief. Suspension of the procurement proceedings is a broader notion than the prohibition under article 65: it stops all actions in those proceedings. The availability of suspension also enhances the possibility of settlement of applications at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement. Both the procuring entity when considering an application for reconsideration of its own decision or action and the independent body when considering an application for review are therefore required to decide whether or not to suspend the procurement proceedings.

29. As regards the decision by a procuring entity in applications for a reconsideration, UNCITRAL, was mindful that an automatic suspension would involve a cumbersome and rigid approach, and might allow suppliers to submit vexatious requests that would needlessly delay the procurement proceedings, and might cause serious damage to the procurement proceedings. This possibility would allow suppliers to pressure the procuring entity to take action that might, albeit unwittingly, inappropriately favour the supplier concerned. Another possible disadvantage of an automatic suspension approach might be an increase in challenge mechanisms generally, resulting in disruption and delay in the procurement process.

30. Under article 66 [\[**hyperlink**\]](#), the procuring entity is therefore given discretion to decide on whether or not to suspend the procurement proceedings. That decision on suspension will be taken in the light of both the nature of the challenge and its timing, as well as the facts and circumstances of the procurement at issue. For example, a challenge to certain terms of the solicitation made early in the proceedings may not have the type of impact that requires suspension even if some minor corrective action is ultimately required; a challenge to some other terms might warrant a suspension, where there is a possibility that corrective action might mean undoing steps taken and wasting costs; at the other extreme, a challenge to such terms a few days before the submission deadline would require quite different action and a suspension would be likely to be appropriate. The supplier concerned will have the burden of establishing why a suspension should be granted, though in this regard it is important to note that the supplier may not be necessarily in possession of the full record of the procurement proceedings, and may be able only to outline the issues involved.

31. This approach confers significant discretion on a procuring entity whose decision is being challenged. Enacting States may be concerned to minimize the risks of abuse of that discretion. An alternative approach, particularly where the procuring entity might lack experience in challenge proceedings, where decisions in the procurement proceedings concerned have been taken by another body, or where it is desired to promote the early resolution of disputes by strongly encouraging any challenge to be presented to the procuring entity in the first instance, would be to regulate the exercise of the procuring entity's discretion in deciding whether or not

to suspend the procurement proceedings. If such an approach is desired, more prescriptive regulation may be considered.

32. The suspension provisions in applications for review before an independent body are more directed in that there are two situations in which the procurement proceedings must be suspended (unless the independent body decides that urgent public interest considerations require the procurement contract or framework agreement to proceed, as the guidance to article 67 [\[**hyperlink**\]](#) explains). The two situations concerned are considered to represent particularly serious risks to the integrity of the procurement process, and are first, where the application is received prior to the deadline for presenting submissions (in which case it is likely to refer to the terms of the procurement, or to the exclusion of a supplier in pre-qualification proceedings). The second is where no standstill was applied and a challenge is received after the submission deadline (where a suspension may allow a potentially abusive award to be prevented). The reason for requiring the suspension reflects the need to prevent other suppliers or contractors, or the procuring entity, from continuing down a non-compliant path, risking wasting time and probably costs.¹ In other circumstances, the suspension is discretionary as in the case of applications for reconsiderations above.

33. Whatever solution is adopted, regulations, rules and guidance explaining the policy considerations will be key to ensuring good decision-taking in the question of suspensions.

34. As regards a system of applications to the court, many national legal systems provide for a judicial review of acts of administrative organs and public entities, either in addition to the independent body outlined above, or instead of its function. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for other challenges have been exhausted; in other systems the two means of challenge or review are available as options. Some States concerned may already provide rules that will guide those involved in challenge procedures on these matters. If not, the State may wish to establish them and to provide for the desired approach through law or regulations, as supported by other rules and guidance. The Model Law, which does not regulate court procedures, does not address this issue of sequencing. In addition, commencing parallel proceedings is not encouraged.

35. The Model Law does not address such issues in proceedings before a court as powers to award compensation for anticipatory losses (such as lost profits) or to grant interim measures, including under a contract that has been executed and where performance has commenced. Nonetheless, UNCITRAL encourages all remedies available in proceedings before the independent body to be available before the court.

36. Challenges can address breaches of rules and procedures only at the instigation of suppliers, and so the other oversight mechanisms outlined in the Executive Summary above should be in place to deal with (a) non-compliance where a supplier chooses not to take action and (b) systemic issues. Suppliers may not wish to take action for many reasons: where the contract is of low value, larger suppliers may

¹ The Working Group is requested to advise how to explain why the considerations in the procuring entity's case do not apply here.

consider that losses may not justify the costs concerned; smaller suppliers may consider that the time and costs of any challenge are unaffordable; and all suppliers may be unwilling to challenge discretionary decisions because of the higher risk of failure, and may be concerned that a challenge will risk future relationships with the procuring entity.

(A/CN.9/WGI/WP.79/Add.19) (Original: English)

**Note by the Secretariat on the revised Guide to Enactment to accompany the
UNCITRAL Model Law on Public Procurement, submitted to the Working Group on
Procurement at its twenty-first session**

ADDENDUM

This addendum continues the proposal for the Guide text to accompany chapter VIII (Challenges and appeals) of the UNCITRAL Model Law on Public Procurement.

**GUIDE TO ENACTMENT OF THE UNCITRAL
MODEL LAW ON PUBLIC PROCUREMENT**

Part II. Article-by-article commentary

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CHAPTER VIII. CHALLENGES AND APPEALS

B. Provisions on Challenges and appeals

Article 64. Right to challenge and appeal

1. The purpose of article 64 is to establish the basic right to challenge an act or a decision of the procuring entity in the procurement proceedings concerned, and the right to appeal a finding in a challenge procedure. These requirements are designed to satisfy the provisions of the Convention against Corruption, which itself requires such a two-tier system [\[**hyperlink**\]](#).
2. Under paragraph (1), the right to challenge is based on a supplier or contractor's claim that it has sustained loss or injury from non-compliance with the procurement law. The right is also given only to suppliers and contractors (the term includes potential suppliers or contractors as explained in the commentary to article 2 [\[**hyperlink**\]](#), such as those excluded through pre-qualification), and not to members of the general public. Sub-contractors are also omitted from the ambit of the right to challenge provided for in the Model Law. These limitations are designed to ensure that challenges relate to the decisions or actions of the procuring entity in a particular procurement procedure, and to avoid an excessive degree of disruption to the procurement process through challenges that are based on policy or speculative issues, or based on nominal breaches, and also reflecting that the challenge mechanism is not the only oversight mechanism available.
3. In addition, the article does not address the ability of a supplier or contractor to present a challenge or the requirements under domestic law that a supplier or contractor must satisfy in order to be able to proceed with a challenge or obtain a remedy. Those and other issues, such as whether State bodies may have the right to

pursue challenge applications, are left to be resolved in accordance with the relevant legal rules in the enacting State.

4. Paragraph (2) enables challenges under articles 66 and 67 [\[**hyperlinks**\]](#) to the procuring entity and independent body respectively, and to the court. The enacting State is required to insert the names of these two entities when transposing this provision into domestic law. The nature of the independent body should be discussed in the regulations or rules and supporting guidance for procuring entities, and may draw upon the issues discussed in paragraphs ** of the commentary in the Introduction to this Chapter. A challenge filed with the court — often termed a judicial review — will be made under the relevant authority and court procedures, reflecting the fact that those procedures are matters of general administrative law in the State concerned. Appropriate references to the location of those procedures should also be provided in this guidance. As is noted in paragraphs ** of the commentary in the Introduction to this Chapter, enacting States are encouraged to ensure that all the powers of the independent body set out in article 67 (and discussed in the commentary to that article) [\[**hyperlinks**\]](#) can be exercised by the courts with the competence to entertain procurement-related applications.

5. Paragraph (3) permits appeals from decisions made in challenge proceedings under articles 66 and 67 [\[**hyperlinks**\]](#), though only through court proceedings and following the court procedures concerned. This provision is in square brackets, because it may not be necessary where this authority already exists in other law. Enacting States may wish to make specific reference to the appropriate authority if transposing this provision into their domestic legislation, and to support it with guidance to ensure that all participants in procurement proceedings are fully acquainted with this mechanism. If the authority exists elsewhere, the public procurement agency or similar body should ensure that guidance to that authority is available to users of the procurement system.

6. The enacting State may add provisions in the law or regulations addressing the sequence of applications, if desired, and to allow an independent body or court to hear an appeal from an application for review; the application for reconsideration can be followed by an application for review or for judicial review, according to the domestic enactment of the Model Law.¹

7. As noted in the commentary in the introduction to this Chapter [\[**hyperlink**\]](#), enacting States should ensure that the provisions of article 64 are consistent with its legal and administrative structure, and to complement this framework with detailed guidance on their operation.

Article 65. Effect of a challenge

8. The purpose of article 65 is to prevent the entry into force of a procurement contract or framework agreement while a challenge or an appeal remains pending. This ensures that the challenge or appeal cannot be nullified by making an award a *fait accompli*. The reference to “take any step that would bring [the procurement contract] into force” is drafted broadly, so as to avoid any implication that only the

¹ The Working Group may wish to consider whether this paragraph, inserted as per the instructions of the Commission, accurately reflects the provisions in article 64 themselves.

signature of the contract or despatch of the award notice under article 22 [\[**hyperlink**\]](#) is covered.

9. The procuring entity is therefore prohibited from taking any step to bring a procurement contract (or framework agreement) into force where it receives an application for reconsideration or is notified of a challenge or an appeal by the independent body or courts. The prohibition provided for in this article, which arises where the notification is received within prescribed time limits, continues for a short period after a challenge or appeal has been decided and participants have been notified, as provided for in paragraph (2), in order to allow any disaffected party to appeal to the next forum. Enacting States are to set the time in accordance with local circumstances — there is no minimum or maximum period prescribed in the Model Law. In this regard, they will wish to ensure that this period is as short as their systems will permit, so as to avoid excessive disruption to the procurement process, the public procurement agency or similar body should ensure that this and other relevant time limits, which are set by reference to submission deadlines and the standstill period referred to under article 22 [\[**hyperlink**\]](#), are clearly known and understood.

10. The “participants in the challenge proceedings” referred to in paragraph (2) comprise only the procuring entity and the supplier(s) or contractor(s) presenting the challenge (and, where relevant, an approving body), as further explained in the commentary to article 68 below [\[**hyperlink**\]](#). They are generally a narrower group than the participants to the procurement proceedings, but the notice referred to in paragraph (2) may lead to more suppliers or contractors seeking to join the proceedings under the right conferred by article 68 [\[**hyperlink**\]](#), or to launch their own challenge, where they assert loss or damage arising from the same circumstances. Their participation might include a request to lift a suspension that has been applied, and other steps that may be provided for under the applicable regulations or procedural rules. The possibility of broader participation in the challenge proceedings is provided for since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible. The enacting State should provide rules and procedures to support this approach, to ensure that the proceedings can continue with appropriate dispatch and that suppliers or contractors can participate effectively; it may also wish to provide suitable nomenclature to identify the various participants more accurately.

11. The prohibition provided for is not absolute: there may be urgent public interest considerations that indicate that the better course of action would be to allow the procurement proceedings to continue and the procurement contract or framework agreement to enter into force, even while the challenge is still outstanding. An independent body may therefore order that the proceedings and contract or framework agreement may proceed. An option is provided in paragraph (3)(b) for enacting States to specify that an independent body may take a decision on this question without a request from a procuring entity. This option may be appropriate in systems that operate on an inquisitorial, rather than an adversarial, basis, but in other States, it may be less so. When drafting rules of procedure and guidance for the operations of the independent body, States will also wish to ensure that there are clear rules and procedures as regards the elements and supporting evidence that a procuring entity would need to adduce as regards urgent public interest considerations where it makes such an application, and how applications to

permit the procurement to continue should be filed (including whether the application is to be made by the procuring entity *ex parte*, or *inter partes*).

12. The need for timely resolution of procurement disputes and an effective challenge mechanism should be balanced with the protection of urgent public interest considerations. This is particularly important in jurisdictions where court systems in the enacting State do not allow for injunctive and interim relief and summary proceedings. Paragraph (3)(b) is drafted to ensure that any decision to permit the procurement contract or framework agreement to proceed in such circumstances can itself be challenged (by application of the general rights conferred under article 64 [\[**hyperlink**\]](#)). The procuring entity, on the other hand, should also be given the opportunity to request the competent court to allow it to proceed with the procurement contract or framework agreement on the grounds of urgent public interest considerations where the independent body has ruled against allowing the procurement contract or framework agreement to enter into force.

13. An important requirement in this regard contained in paragraph (3)(b) is to ensure that prompt notice of the decision taken by the independent body is provided to all participants concerned, including the procuring entity. The provisions require disclosure of the decision and its reasons, which is essential to allow any further action (such as an appeal from the decision concerned). By the nature of an application under paragraph (3), there may be need for the protection of confidential information, the public disclosure of which will be restricted under article [68]. This however does not exempt the independent body from the obligation to notify all concerned (as listed in the provisions) of its decision and provide reasons therefor; any confidential information will have to be excluded to the extent and in the manner required by law.

Article 66. Application for reconsideration before the procuring entity

14. Article 66 provides that a supplier or contractor that wishes to challenge a decision or act of the procuring entity may, in the first instance, request the procuring entity to reconsider the decision or action concerned. This application is optional, because its effectiveness will vary both according to the nature of the challenge at issue and the willingness of the procuring entity to revisit its steps in the procurement process. The procedure under this article is to be contrasted with a debriefing procedure as described in Section ** of the commentary in the introduction to this Chapter [\[**hyperlink**\]](#). Enacting States may consider that it is desirable to promote the early resolution of disputes by promoting the use of the optional challenge mechanism envisaged by this article, in that so doing might also enhance efficiency and the long-term relationship between the procuring entity and suppliers or contractors.

15. Nonetheless, the application for reconsideration is a formal procedure, and in this regard it is important for the scope of the application and the issues it raises to be clearly delineated at the outset (both to ensure their effective consideration and to avoid other issues being raised during the proceedings). The application must therefore be in writing. There are no rules presented in the Model Law as regards supporting evidence: the applicant will wish to present its best case to demonstrate why a reconsideration or corrective action is the appropriate course, but how that may be done will vary from case to case. Regulations and procedural rules, as noted above, should address evidentiary gathering where it is necessary. A general

approach that permits the submission of a statement of application with any supporting evidence being filed later may defeat the aim of requiring prompt action on the application by the procuring entity (provided for under paragraph (3)), and accordingly these supporting rules and regulations should encourage the early submission of all available evidence.

16. The purpose of the two time limits in paragraph (2) is, in general terms, to ensure that grievances are promptly filed so as to avoid unnecessary delay and disruption in the procurement proceedings, and to avoid actions or decisions being unwound at a later stage. There are, broadly speaking, two types of challenges contemplated by the article: first, challenges to the terms of solicitation and to pre-qualification or pre-selection, which must be filed prior to the deadline for submissions for the reasons set out immediately above. In this context, the “terms of solicitation” encompass all issues arising from the procurement proceedings before the deadline for presenting submissions (including those arising in pre-qualification or pre-selection, separately mentioned in the subparagraph), such as the selection of a method of procurement or a method of solicitation where the choice between open and direct solicitation exists, and the limitation of participation in the procurement proceedings in accordance with article 8. It thus excludes issues arising from examination and evaluation of submissions. The terms of the solicitation, pre-qualification or pre-selection include the contents of any addenda issued pursuant to article 15 [\[**hyperlink**\]](#). The use of the term “prior to” the submission deadline is crafted in broad terms, so as to allow enacting States to provide in applicable regulations for a filing deadline that is a defined, short, period before the submission deadline (and there may be the need for different periods for different procurement methods: the appropriate period for electronic reverse auctions would normally be shorter than for procurement methods with dialogue or negotiations). The reason for this approach is that there may be a need to prevent highly disruptive (and perhaps vexatious) challenges being filed immediately before the submission deadline. Enacting States may also set deadlines based on knowledge for very lengthy procurement proceedings (i.e. within the overall requirement to file a challenge before the submission deadline), to ensure that challenges to the terms of solicitation are filed as early as is practicable.

17. The second type of challenge is likely to relate in some manner to the award, or proposed award, of the procurement contract (or framework agreement) and here the main aim is to ensure that the challenge is addressed before the additional complications of an executed contract (or an operating framework agreement) arise. The issues will commonly arise from the examination and evaluation of submissions, a step in the procurement process that may also include the assessment of qualifications of suppliers (but not pre-qualification). The deadline for submission of these challenges is the expiry of the standstill period where one applies, or the entry into force of the procurement contract (or framework agreement) as applicable. Reference in the text is made to the entry into force of the procurement contract, rather than to the despatch of the notice of acceptance, in order to allow for situations in which signing a written procurement contract or receiving approval of another body for entry into force of the procurement contract is required (possibilities envisaged under article 22 [\[**hyperlink**\]](#) and the articles throughout the Model Law describing the content of the solicitation documents).

18. The provisions do not refer to the procuring entity's competence to consider challenges to decisions to cancel the procurement. Although a decision to cancel the procurement is, in principle, no different from any other decision in the procurement process, the Model Law is drafted on the basis that the issues involved are such that they should more appropriately be considered by an independent body (either the independent body, where it has such authority to review any challenges related to procurement that had been cancelled or, where the enacting State considers it appropriate, before the courts only. See, further, the commentary to article 67(6)(b)(ii) [\[**hyperlink**\]](#) on the considerations that will assist the enacting State in deciding whether to confer such authority on the independent body.

19. Should an application be filed out of time, the procuring entity has no competence and should dismiss the application under paragraph (3)(a) of the article. Where a standstill period has been applied and approval of another authority is required for the entry into force of the procurement contract, the provisions mean that a challenge initiated after the expiry of the standstill period but before approval is granted is out of time.

20. The interaction of articles 66 and 65 [\[**hyperlinks**\]](#) means that upon the filing of an application for reconsideration, no procurement contract may be awarded (or framework agreement concluded) unless a request by the procuring entity for an exemption from the prohibition on the grounds of urgent public interest is granted by the independent body under article 65(3) [\[**hyperlink**\]](#) or by the court.

21. Paragraph (3) requires the procuring entity to take several steps. First, promptly after receipt of the application, it must publish a notice of the application. There is no fixed time limit given for this step; the appropriate time will depend on the manner of publication and availability of the relevant forum. In the electronic environment, for example, the most effective place for publication to take place is the website where the initial notice of the procurement was published. The aim is to ensure that all participants in the procurement process (whose contact details may or may not be known to the procuring entity) are informed that the application has been filed.

22. In addition to this publication requirement, within three working days of receipt of the application, the procuring entity must notify all participants in the procurement proceedings known to it (i.e. whose contact details are made known to the procuring entity) about the submission of the application and its substance. Providing notice of the substance of the application permits the procuring entity to avoid the disclosure of potentially confidential information without the need for reviewing the entire application to redact confidential information.

23. The purpose of the publication and notification provisions is to make the suppliers or contractors aware that an application has been submitted concerning procurement proceedings in which they have participated or are participating and to enable them to take steps to protect their interests. Those steps may include intervention in the challenge proceedings under article 68 [\[**hyperlink**\]](#), as discussed in paragraph ** of the commentary to article 64 above [\[**hyperlink**\]](#) and in the commentary to article 68 itself [\[**hyperlink**\]](#).

24. Within the same period (three working days of receipt of the application), the procuring entity, must take further steps, which amount to an initial review of the

application for reconsideration. It must first decide whether it will entertain the application. Paragraph (3)(a) identifies the types of situation in which the procuring entity may decide not to entertain the application. The procuring entity will consider such issues as whether the application has been filed within the prescribed time limits; whether or not the applicant has standing to file its application (as noted in paragraph ** of the commentary to article 64 above [**hyperlink**](#)), sub-contractors and members of the general public, as opposed to potential suppliers, do not have standing); whether the application is based on an obviously erroneous understanding of the facts or applicable law and regulations; or whether the application is frivolous or vexatious. These issues may be particularly pertinent in those systems in which challenge mechanisms are in their infancy and where suppliers may be unsure about the extent of their rights to file a challenge. Permitting early dismissal is important to minimize disruption to the procurement process and to minimize the costs of all concerned.

25. A decision on dismissal can be challenged under the competence granted by article 64 [**hyperlink**](#), because, as paragraph (3)(a) of the article notes, the dismissal constitutes a decision on the application. This provision also allows the prohibition against entry into force of the procurement contract or framework agreement to lapse after the time period specified in article 65 [**hyperlink**](#), unless a further challenge or an appeal against the dismissal is made. To allow further challenge or appeal in a timely fashion, the provisions require the procuring entity to notify the applicant about its decision on dismissal and reasons therefor not later than three days upon receipt of the application.

26. If the procuring entity decides to entertain the application, it must consider whether to suspend the procurement proceedings and, if so, the period that is required. Although article 65 [**hyperlink**](#) prohibits the entry into force of the procurement contract until the application has been disposed of, a suspension of the procurement proceedings may also be necessary: suspension of the procurement proceedings is a broader notion than the prohibition under article 65: it stops all actions in those proceedings. The purpose of suspension is to enable the interests of the applicant to be preserved pending the disposition of the proceedings. The approach taken with regard to suspension — that is, to allow the procuring entity to decide on the matter — is designed to strike a balance between the right of the supplier or contractor to have a challenge reviewed and the need of the procuring entity to conclude a contract in an economic and efficient way, without undue disruption and delay of the procurement process. For the general policy issues relating to decisions on suspension, and the guidance that the public procurement agency or similar body should issue, see section ** of the commentary in the Introduction to this Chapter [**hyperlink**](#).

27. The procuring entity's decision on suspension will be taken in the light of both the nature of the challenge and its timing, as well as the facts and circumstances of the procurement at issue. The supplier concerned will have the burden of establishing why a suspension should be granted, though in this regard it is important to note that the supplier may not be necessarily in possession of the full record of the procurement proceedings, and may be able only to outline the issues involved. For examples that may assist in assessing whether a suspension is appropriate, which should form part of the guidance from the public procurement

agency or similar body to assist procuring entities in this regard, see paragraphs ** of the commentary in the Introduction to this Chapter [[**hyperlink**](#)].

28. The period of three working days given to decide on suspension, and on the length of any suspension applied, and to notify the applicant and all participants in the procurement process of its decision, is designed to ensure swift decisions on whether or not to apply a suspension. Where the procuring entity decides to suspend the proceedings, it need not give reasons for that decision, because it is not one that the applicant will wish to challenge. Under paragraph (3)(c)(ii), the procuring entity must advise the applicant of the reasons for any decision not to suspend the procurement and, secondly, it must put on the record all decisions in relation to suspension and the reasons for them. These safeguards against abusive failures to suspend through transparency measures ensure that the procuring entity's decision can itself be challenged and scrutinized (for example, by the independent body provided for in article 67 [[**hyperlink**](#)], or by the courts).

29. Where a procuring entity decides not to grant a suspension, the applicant may consider that this decision is a likely predictor of the eventual decision on the application, and accordingly that its best course would be to terminate its application before the procuring entity and commence proceedings before an independent body or court (rather than appealing the decision not to suspend). Paragraph (4) confers this right. While a procuring entity may consider that this option operates as a disincentive to treat applications with the seriousness the system is intended to confer, a subsequent challenge before another forum or action by another oversight body, which should be considered a probable consequence, should demonstrate that any such approach is unwise. Paragraph (4) also provides that a failure to abide by the three-day notification requirement permits the applicant to recommence proceedings with an independent body or court, a measure also intended to discourage dilatory conduct on the part of the procuring entity. Where proceedings before an independent body or court are commenced, the competence of the procuring entity to entertain further the application ceases.

30. Paragraphs (5) to (7) regulate the procuring entity's steps as regards the application that it entertains. Paragraph (5) confers a wide discretion on the procuring entity when deciding on the application. Possible corrective measures might include the following: rectifying the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rules; if a decision has been made to accept a particular submission and it is shown that another should be accepted, refraining from issuing the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other submission; or cancelling the procurement proceedings and commencing new proceedings.

31. The decision of the procuring entity on an application that it entertains is to be issued and communicated to the applicant, and to all participants in the challenge and procurement proceedings, as required by paragraph (6). The enacting State is invited to specify the appropriate number of working days within which the decision must be issued. The period of time so specified should balance the need for a thorough review of the issues concerned and the need for an expeditious resolution of the application for reconsideration, in order to allow the procurement proceedings to continue.

32. If the application cannot be disposed of expeditiously, independent review or judicial review may be the more appropriate course. To that end, in the absence of a timely decision, or if the decision is unsatisfactory to the applicant, paragraph (7) entitles the supplier or contractor that submitted the application to commence review proceedings under article 67 [\[**hyperlink**\]](#) or proceedings before the court, as appropriate.

33. Paragraph (8) provides additional transparency mechanisms. All decisions of the procuring entity must be recorded in writing, state action(s) taken and include reasons, both to enhance understanding and thereby assist in the prevention of further disputes, and to facilitate any further challenge or appeal. Although in some systems silence by the procuring entity to an application can be deemed to be a rejection of such an application, the provisions require a written decision as an example of good practice. The application and all decisions must also be included in the record. The implication of this provision is that these documents (subject to confidentiality restrictions of article 25 [\[**hyperlink**\]](#)), will be made available to the public in accordance with the requirements of article 25.

34. Where the enacting State provides that certain actions of the procuring entity are to be subject to the decision of an approving authority, as discussed in section [**](#) of the general commentary, and in the commentary to articles 30(5) and 49 [\[**hyperlinks**\]](#), the enacting State will need to ensure that appropriate provision is included in this article to allow that authority to receive an application for reconsideration and all information pertinent to the relevant challenge proceedings.

Article 67. Application for review before an independent body

35. Article 67 regulates review proceedings before an independent body. The system envisaged by the Model Law is based on the premise that the independent body should be granted all the powers set out in this article, subject to the ability to take action once the procurement contract has entered into force, as further discussed in paragraphs [**](#) below. These powers are required as a package in order to ensure the effectiveness of the system.

36. States may choose to omit this article and provide only for judicial review in addition to the request for reconsideration under article 66 [\[**hyperlink**\]](#). This flexibility is granted on the condition that the enacting State provides an effective system of judicial review, including an effective system of appeal, to ensure that a challenge can be made in compliance with the requirements of the Convention against Corruption [\[**hyperlink**\]](#). In those States in which effective independent review is already achieved through the court system, there may also be little advantage in introducing another layer of review; the application to the procuring entity may, nonetheless, provide a useful mechanism to assist in the early resolution of disputes.

37. Paragraph (1) is drafted to ensure broad competence on the part of the independent body. In addition to bringing an application for review as an original application to the independent body, a supplier that is dissatisfied with a decision of the procuring entity under article 66 [\[**hyperlink**\]](#) can appeal that decision to the court, or commence new proceedings before the independent body or the court; the supplier can take either step if the procuring entity does not issue its decision as required by article 66(3), (6) or (8) [\[**hyperlinks**\]](#). The paragraph is therefore

one of the key provisions intended to give effect to the requirements of the Convention against Corruption for an effective system of review including an appeal mechanism.

38. Paragraph (2) establishes time limits for the commencement of review applications. Paragraph (2)(a) addresses challenges to the terms of solicitation and pre-submission matters, and provides the same time limits as apply in challenge proceedings before the procuring entity, guidance as to which is set out in paragraph [**] of the commentary to article 66 [**hyperlink**] above.

39. Under paragraph (2)(b)(i), applications regarding other decisions or steps in the procurement proceedings should be submitted within the standstill period prescribed in article 22(2) [**hyperlink**], where a standstill period has been applied. Under paragraph (2)(b)(ii), where a standstill period was not applied (either because the procuring entity was permitted not to apply a standstill period under the provisions of article 22(3) [**hyperlink**], or failed to respect the requirements of a standstill period), a challenge must be filed within a specified number of working days from the point of time when the supplier became aware or should have become aware of the circumstances in question. To avoid an indefinite period during which applications for review can be filed under such circumstances, the provisions also refer to the absolute maximum — the application cannot be filed upon expiry of a certain number of days after the entry into force of the procurement contract. Such a final deadline is required in order to provide a balance between the rights of suppliers to enforce the integrity of the process and the need for the procurement contract to continue undisrupted. The absolute maximum period may be expressed in weeks or months rather than working days, where it would be more appropriate to do so. Enacting States are invited to specify these two time limits in the light of their local needs.

40. As regards the first time limit in paragraph (2)(b)(ii), the WTO GPA [**hyperlink**] specifies a minimum 10-day period; and enacting States may wish to be guided by that provision in considering the appropriate time period for their domestic legislation.² As regards the second time limit in paragraph (2)(b)(ii), although in many cases the notice of the procurement contract award to be published under article 22 [**hyperlink**] will probably alert the supplier or contractor submitting the application to the circumstances concerned, it will not necessarily be always the case. For example, the reasons for not applying a standstill period may also justify an exemption from the obligation to advertise the procurement contract award — such as where confidentiality is invoked for the protection of essential national interests of the State. Accordingly, it was decided not to refer to the publication of the notice of the award as the starting point for calculating the absolute maximum, since the publication will not take place in all cases, but to refer instead to the entry into force of the procurement contract.

41. Paragraph 2(b)(ii) does not expressly confer competence on the independent body to consider challenges to decisions to cancel the procurement. This is

² The Chapter of the Guide explaining the changes from the 1994 text will explain that the 1994 text specified a period of 20 days for equivalent time limits; modern communication methods should mean that such a long period is no longer needed.

presented as an option for enacting States to consider (the alternative being to confer exclusive competence to the court). [**]³

42. Paragraph (2)(c) envisages that a supplier may request the independent body to entertain an application after the expiry of the standstill period applied pursuant to article 22(2) [**hyperlink**], on the grounds that the application raises significant public interest considerations. The absolute deadline for submission of such late applications is to be established by enacting States, which should be aligned with the final deadline to be established in paragraph (2)(b)(ii). It is up to the independent body to decide whether significant public interest considerations are indeed present and justify entertaining such late applications. As regards the type of issues that should permit entertaining applications after the standstill period, enacting States may consider that the most common will be the discovery of fraudulent irregularities or instances of corruption. The enacting State will wish to provide rules or guidance on these matters. The discretionary element of this provision does not bar entirely the independent body to consider this type of application. Within the normal limitation period in the jurisdiction concerned, such applications can also be submitted directly to the courts. This provision is in particular important in situations in which the normal transparency safeguards of the Model Law do not apply.

43. Paragraph (2)(d) provides the time limit for the submission of appeals against the absence of decisions under article 66 [**hyperlink**]. When setting this time limit, enacting States are, again, left to determine the relevant number of working days from the point of time when the supplier became aware or should have become aware of the circumstances in question. States will wish to ensure that all relevant time limits left to their determination are effectively aligned, both within chapter VIII and as regards the standstill period in article 22(2).

44. Paragraphs (3) and (4) address issues of suspension. The main policy issues surrounding suspensions, discussed in paragraphs [**] of the commentary in the Introduction to this Chapter, apply here. In summary, the suspension provisions complement the prohibition against the entry into force of the procurement contract while a challenge remains unresolved (itself explained in the commentary to article 65 above [**hyperlink**]).

45. Paragraph (3) delineates the general discretion that is to be granted to the independent body to order the suspension of the procurement proceedings. This discretion is subject to the requirement to suspend the procurement proceedings under certain circumstances referred to in paragraph (4). In all other cases not covered by paragraph (4) where suspension is mandatory, the independent body may order a suspension for so long as it considers it necessary to protect the interests of the supplier presenting the application for review; it may also lift or extend any suspension so granted, and these powers may be exercised at any time during the challenge proceedings before the independent body. Recognizing that in some jurisdictions, the independent body may have limited powers as regards the procurement contracts or framework agreements that entered into force, the provisions of subparagraph (b) (like all other provisions throughout the article referring to procurement contracts or framework agreements that entered into force) are accompanied by a footnote indicating the optional nature of the provisions.

³ The Working Group may wish to provide additional commentary on this decision.

46. Paragraph (4) sets out two situations in which the procurement proceedings must be, as a general rule, suspended. Those are the situations considered to pose particularly serious risks to the integrity of the procurement process.

47. Under paragraph (4)(a), the suspension for a period of ten working days must be applied where the application is received prior to the deadline for presenting submissions. The reason for this approach is to ensure to a large extent that such challenges are addressed before the submissions are received, when corrective action is easier to achieve. In such circumstances, the independent body may wish to take such steps as to extend the deadline for submission of tenders, and correct other actions as regards the terms of solicitation, pre-qualification or pre-selection.

48. Paragraph (4)(b) covers situations where no standstill was applied and a challenge is received after the submission deadline. No fixed period is provided for in the text, because circumstances may indicate different periods are appropriate. As the challenge may be received after the entry into force of the procurement contract, the optional power is given to suspend performance of a procurement contract or operation of a framework agreement, as the case may be.

49. In each case covered by paragraphs (3) and (4), the suspension is presumptive and not automatic, in that the independent body may decide that urgent public interest considerations may justify that the procurement contract or framework agreement should proceed. This is the same test as applies in article 65(3) [\[**hyperlink**\]](#) (under which a procuring entity may seek to lift the prohibition to enter into the procurement contract or framework agreement), and enacting States should ensure that appropriate guidance is given on the circumstances that may so justify. Examples when this might be the case include natural disasters, emergencies, and situations where disproportionate harm might otherwise be caused to the procuring entity or other interested parties. The rules of procedure for the independent body may provide permission for the body to make enquiry of the procuring entity if its decision on suspension must be taken before the full record of the procurement proceedings is provided to it (as required by paragraph (8) of this article).

50. In any event, the independent body should bear in mind that a suspension might ultimately prove less disruptive of the procurement process because it may avoid the need to undo steps taken in the procurement process if a decision is taken to overturn or to correct a decision of the procuring entity. In addition, the appropriate degree of incentive for suppliers to submit challenges should be ensured, in which the availability of suspension is an important consideration.

51. In order to mitigate the potentially disruptive effect of an application for review, paragraphs (5) and (6) together operate to require the independent body to undertake an initial consideration of the application filed, akin to that set out in paragraph (3) of article 65 [\[**hyperlink**\]](#), guidance as to which is set out in the commentary to that paragraph (paragraphs [\[**\]](#) of the guidance to article 66 [\[**hyperlink**\]](#)). This initial review of the application is intended to permit the independent body to assess the application swiftly and on a prima facie basis, so as to determine whether it should be entertained.

52. Paragraph (5) requires the independent body promptly to notify the procuring entity and all participants in the procurement proceedings whose identities are known to the independent body of the application for review, and of its substance. It

is not required to notify other entities whose interests might be affected by the application (such as other government entities), but is required to publish a notice of the application so that such entities can take steps to protect their interests, as appropriate. As was discussed in the context of the challenge proceedings before the procuring entity, such steps may include intervention in the challenge proceedings under article [67], might include a request to lift a suspension that has been applied, and such other steps that may be provided for under applicable regulations or procedural rules.

53. It must also take a decision on suspension, and notify all concerned about its decision (including, where relevant, the period of suspension). The independent body must also provide reasons for a decision not to suspend to the applicant (so as to facilitate any appeal against that decision) and to the procuring entity.

54. Paragraph (4) contains text in square brackets for the enacting State to incorporate in its domestic law, or not, as it chooses. The text in square brackets will be necessary where the independent body has competence after the entry into force of the procurement contract: for a discussion of issues that arise in deciding whether or not to grant such competence, see the commentary to paragraph (9) in paragraphs ** below [**hyperlink**].

55. The powers to dismiss the application for review under paragraph (6) track those given to the procuring entity under article 66 [**hyperlink**], as discussed in paragraph [**] of the commentary to that article [**hyperlink**]. The same transparency safeguards as regards the notification of the decision and reasons therefor as in article 66 [**hyperlink**] are also applicable.

56. Under paragraph (7), notices of the actions taken under paragraphs (5) and (6) must be given within three working days after the application was received, as is the case with applications for reconsideration to the procuring entity. The effect of the notices will vary with the decisions they notify, but notably the independent body may require the procuring entity to suspend the procurement proceedings.

57. Paragraph (8) requires the procuring entity to provide immediate access to all documents relating to the procurement proceedings in its possession to the independent body; this obligation is subject to the confidentiality provisions in articles 24 and 25 [**hyperlink**], in particular restrictions on disclosure of certain information, which however may be lifted by competent authorities identified by enacting States in those provisions. Enacting States may wish to provide rules or guidance to avoid excessive disruption of both procurement and review proceedings by providing secure and efficient means of transfer of such documents; noting that the use of ICT tools in procurement (themselves discussed in Sections ** of the general Commentary above [**hyperlink**]) will facilitate this task. Such guidance should discuss the manner of access to documents in practice (e.g. physical or virtual), and that the relevant documents could be provided in steps (for example, a list of all documents could be provided to the independent body first so that the independent body could identify those documents relevant to the proceedings before it).

58. Paragraph (9) lists the remedies that the independent body can grant with respect to the application for review. Paragraph (9) acknowledges that differences exist among national legal systems with respect to the nature of the remedies that bodies exercising quasi-judicial review are competent to grant. In enacting the

Model Law, States are encouraged to enact all remedies that, under its legal system, can be granted to an independent body undertaking such a review, so as to ensure an effective system of review as required by the Convention against Corruption [\[**hyperlink**\]](#). The thrust of the provisions is to ensure that an appropriate decision on the application is taken (including, where circumstances so dictate, that the application is dismissed or rejected); as part of that exercise, any suspension existing when the application is disposed of must also be lifted or extended where the independent body considers it necessary.

59. Some provisions in this paragraph appear in parentheses, indicating their optional nature and possibility of their variation in accordance with the local circumstances of the enacting State. For example, subparagraphs (c) and (e) permit the independent body to overturn acts and decisions of the procuring entity, including the award of a procurement contract. The term “overturn” has been chosen as a neutral one, as the Model Law is not designed to imply any particular legal consequences, so that the enacting State may provide for the consequences appropriate in the light of the legal tradition in the jurisdiction concerned. Nonetheless, where an independent body cannot be granted the power to overturn a procurement contract or to substitute its own decision for that of a procuring entity, an alternative formulation would be to permit the independent body to annul the decision of the procuring entity, so that the procuring entity is then required to take another decision in the light of the decision of the independent body.⁴

60. Corrective action should be regarded as the primary and most desirable remedy. This approach is reflected in the WTO GPA [\[**hyperlink**\]](#). The early resolution of disputes through corrective action will reduce the need for financial compensation. Financial compensation may, however, be part of the appropriate remedy in a given case, for example where a contract has entered into force but it is not considered appropriate to interfere in the contract. A system without provision for any financial compensation (beyond the costs of filing a complaint) may therefore fail to provide adequate remedies in all situations, and the question of financial compensation should therefore be a part of the broader perspective of putting in place an effective remedies system.

61. Paragraph (9)(h) therefore makes provision for financial compensation, and sets out two alternatives for the consideration of the enacting State. Where the text in parenthesis is retained, compensation may be required in respect of any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of the unlawful act, decision or procedure. Those costs do not include profit lost because of non-acceptance of a tender, proposal, offer or quotation of the supplier or contractor submitting the complaint. The types of losses compensable under the second alternative (i.e. where provisions are enacted without the text in parenthesis) are broader, and might include lost profit, in appropriate cases. Enacting States will wish to consider how purely economic loss is addressed in their domestic legal systems, so as to ensure consistency in the measure of financial compensation throughout the jurisdiction concerned (including the extent to which financial compensation is contingent on the complainant proving that it would have won the

⁴ The Working Group may wish to provide additional commentary to explain why the provisions allowing post-contract remedies are optional.

procurement contract concerned but for the non-compliance of the procuring entity with the provisions of this Law). Since the possibility of receiving financial compensation can raise the risk of encouraging speculative applications and disrupting the procurement process, it may be useful when a quasi-judicial system is in its infancy, to ensure that there is adequate incentive for suppliers to bring applications, but the mechanism should be reviewed as systems mature. In addition, the enacting State may wish to monitor the risk of abuse if the power to award financial compensation lies in a small entity or the hands of a few individuals.⁵

62. Paragraph (10) provides for a maximum period within which the decision on the application that the independent body decided to entertain must be taken. It also provides for the requirement of prompt notification of that decision to all concerned. Together with paragraph (11) that requires all decisions taken by the independent body during the review proceedings to be in writing, complete, reasoned and put on the record, paragraph (10) sets out important transparency safeguards that also aim at ensuring efficient and effective review proceedings and possible further action by aggrieved suppliers in courts if need be. Paragraphs (10) and (11) are similar to paragraphs (6) and (8) of article 66 [\[**hyperlink**\]](#); the matters discussed in paragraphs [\[**\]](#) and [\[**\]](#) of the guidance to that article [\[**hyperlink**\]](#) are therefore relevant here.

63. The examination of evidence, and the manner in which it is conducted (such as whether hearings are to take place), will be a significant determining factor as regards the necessary length of administrative or quasi-judicial proceedings, and will reflect the legal tradition in the enacting State concerned. If detailed rules governing procedures in administrative or quasi-judicial review do not already exist in the enacting State, the State may provide such rules by law or in the procurement regulations, to cover such matters as the conduct of review proceedings, the manner in which applications are to be filed, and questions of evidence.

Article 68. Rights of participants in challenge proceedings

64. Article 68 is designed to ensure that due process operates during the challenge proceedings. The references in paragraph (1) to any supplier or contractor participating in the procurement proceedings and to any governmental authority whose interests may be affected by challenge proceedings establish a broad right of participation in challenge proceedings beyond the applicant. These rights of participation are intended to provide an appropriate balance between effective challenge proceedings and avoiding excessive disruption, as noted regarding general rights to commence challenge proceedings described in the commentary to article 64 [\[**hyperlink**\]](#) above, and are predicated on the notion that participation is granted to the extent that the supplier or contractor, or other potential participant, can demonstrate that its interests may be affected by the challenge proceedings.

65. In this context, the “participants in challenge proceedings” can include a varying pool of participants, depending on the timing of the challenge proceedings and subject of the challenge, and can include other governmental authorities. In this regard, the term “governmental authority” means any entity that may fall within the definition of the procuring entity under article 2 [\[**hyperlink**\]](#) any approving

⁵ The Working Group has expressed the wish that the Guide should address the quantification of costs, and is requested to provide the requisite commentary.

authority that has participated in the procurement concerned.**].⁶ The reference to suppliers or contractors “participating in the procurement proceedings” is intended to permit all those that remain in the proceedings concerned, but to exclude those that have been eliminated through pre-qualification or a similar step earlier in the proceedings, unless that step is the action or decision of the procuring entity to which the challenge relates.

66. Paragraph (2) enshrines the right of the procuring entity to participate in challenge proceedings before an independent body.

67. Paragraph (3) sets out the fundamental rights of participants in the proceedings, of which the most significant are the right to be heard, to have access to all the proceedings and to present evidence. These rights accrue to those described in paragraphs (1) and (2) of the article, and not to anyone that may be present during hearings that take place in public (such as members of the press). The independent body may grant access to the record of the challenge proceedings (which will, under the provisions of article 67(8) [\[**hyperlink**\]](#), include the record of the procurement proceedings). Participants in the proceedings will need to demonstrate their interest in the documents to which access is sought: this measure is intended to allow the independent body to keep effective control of the proceedings and to avoid suppliers or contractors conducting exhaustive searches of the documents in case they may discover issues of relevance. Access to records is also subject to the provisions on confidentiality in article 69 [\[**hyperlink**\]](#). There will be a need for robust procedural rules in order to ensure that the proceedings examine the issues in each case in the appropriate level of detail and in a timely fashion.

Article 69. Confidentiality in challenge proceedings

68. The article has been included in chapter VIII to apply the principles of confidentiality found in article 24 [\[**hyperlink**\]](#) to challenge proceedings, in particular those taking place in the independent body (to which article 24 does not apply).

⁶ The Working Group may wish to consider adding a reference to or public sector bodies that would intend to use a framework agreement.

VII. FUTURE WORK

A. Procurement and infrastructure development: possible future work

(A/CN.9/755)

[Original: English]

I. Future Work

A. Introduction

1. At the sessions of Working Group I in 2010-2012, the Working Group exchanged preliminary views on possible topics for future work related to public procurement, which might be presented to the Commission for its consideration in due course. The Report of the Working Group's 21st session (A/CN.9/745, paras. 38-41) noted the following issues as possible relevant topics:

(a) Aspects of public procurement that were not addressed in the UNCITRAL Model Law on Public Procurement (adopted by the Commission at its forty-fourth session in 2011),¹ such as the contract administration phase of procurement, suspension and debarment, rules on corporate compliance and sustainability and environmental issues. At a previous session, the Working Group had stated that procurement planning was also a relevant aspect of public procurement, not currently addressed in the Model Law;²

(b) Harmonization of the provisions governing the procurement-related aspects of the UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects (the Legislative Guide on PFIP) (2000) and Model Legislative Provisions (2003) with those of the Model Law;

(c) Consolidation of the Legislative Guide and the Model Legislative Provisions (together, the UNCITRAL PFIPs instruments);

(d) Identification of other topics that should be addressed in a modern text on PFIP (such as oversight and promoting domestic dispute resolution measures, rather than using international dispute resolution bodies); and

(e) Broadening the scope of the current UNCITRAL PFIPs instruments in any future text, to cover forms of private financing in infrastructure development and related transactions not currently covered, such as public-private partnerships (PPPs) that might not include infrastructure development, concessions over natural resources and the private provision of services previously provided by Government.

2. This Note addresses each of these possible topics in turn.

¹ Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

² A/CN.9/718, para. 138. The Working Papers for and Reports of Working Group I sessions are available at www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html.

B. Background information on topics proposed for possible future work

1. Aspects of public procurement not addressed in the UNCITRAL Model Law on Public Procurement

(a) Contract management/administration

3. As the Working Group has noted, there are three main phases of the procurement cycle: (1) planning and budgeting prior to commencing a procurement procedure, (2) the selection of suppliers and (3) contract management and administration.³ This is an approach taken by other agencies in procurement reform and commentators, and is reflected in the Principles annexed to the OECD Recommendation on Enhancing Integrity in Public Procurement, which define the procurement cycle as ranging from needs assessment to “contract management and final payment”.⁴ The United Nations Convention Against Corruption (2003, “UNCAC”) article 9 (2), provides that a procurement system must ensure adequate internal control and risk management, a requirement that is clearly not limited to phase (2).⁵

4. The Working Group decided, however, that the scope of the Model Law would not be expanded to phase (3), and would address only limited aspects of phase (1). (In this regard, the Model Law reflects the scope of much national and other international procurement legislation.) In particular, the Working Group noted that budgetary legislation (procurement planning) and contract law (contract administration) might be a more appropriate forum than a procurement law.⁶ Nonetheless, the Working Group considered that all three phases were integral parts of the procurement cycle,⁷ and that the Guide to Enactment that accompanies the Model Law should consider them in some detail.⁸

5. The main objectives of the contract management phase are ensuring performance of the contract, i.e. that the goods, construction or services under the procurement contract are provided in the requisite quantity and quality, at the agreed price, and on time, and avoiding abuse. These objectives track those of value for money and avoiding abuse in the procurement process itself. As recently noted by Transparency International and others, this phase of the procurement cycle, and

³ A/CN.9/WG.I/XIII/INF.2 para. 31, before the Working Group at its 13th session. Terms for this phase of the procurement cycle include contract management, contract execution and contract administration. If future work on this topic is undertaken, a consideration of terminology might be included in its scope. This note will use the term “contract management”, as it has the broadest scope among these terms.

⁴ OECD Principles for Integrity in Public Procurement, 2009, Definitions, page 126, available at www.oecd.org/document/25/0,3746,en_2649_34135_42768665_1_1_1_1,00.html.

⁵ Article 9 (2): “2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia: ... (d) Effective and efficient systems of risk management and internal control ...”. The text is available at www.unodc.org/unodc/en/treaties/CAC/.

⁶ See, for example, A/CN.9/590, para. 13, and A/CN.9/595, paras. 80-82, considering A/CN.9/WG.I/WP.42, paras. 36-48.

⁷ Ibid.

⁸ A/CN.9/590, para. 13.

procurement planning, are “increasingly exposed to corruption”,⁹ perhaps as a result of reforms to regulate the selection phase. Abuses observed in practice include theft of assets prior to deployment, deficient supervision in some cases arising from collusion between contractors and supervising officials, false accounting, cost misallocation, etc.¹⁰

6. What is required to ensure contract performance varies depending on the complexity of what has been procured: from taking delivery and effecting payment for simple procurement through to a detailed programme involving engineers, surveyors, project managers, auditors and so on in complex cases.

7. The draft Guide to Enactment to the Model Law addresses contract management in the following manner: “[t]he contract management stage, if poorly conducted, can undermine the integrity of the procurement process and compromise the objectives of the Model Law of equitable treatment, competition and avoidance of corruption, for example if variations to the contract significantly increase the final price, if sub-standard quality is accepted, if late payments are routine, and if disputes interrupt the performance of the contract. Detailed suggestions for contract administration in complex procurement with a private finance component are set out in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) [...]: many of the points made in that instrument apply equally to the management of all procurement contracts, particularly where the contract relates to a complex project.”¹¹

8. The solutions advised both in the Legislative Guide and other texts to mitigate contract performance risks include appropriate provision in the terms of the project agreement (which should address ownership of assets, financial arrangements, security interests, assignments, review and approval of plans, variation of project terms, monitoring powers of the government entity, operation of infrastructure, and general contract arrangements such as sub-contracting, liabilities and guarantees, changes in conditions, and breaches and remedies). The Legislative Guide also addresses the duration, extension and termination of the project agreement and prevention and settlement of disputes. Other guidance recommends the use of project management tools such as work performance schedules, the identification of responsibilities for each task (such as delivery and inspection), a clear understanding of the authority of government personnel and reporting lines, and defined payment procedures, communication and record-keeping tools.¹²

⁹ Transparency International Handbook, “Curbing Corruption in Public Procurement”, 2007, available at www.transparency.org/global_priorities/public_contracting/tools_public_contracting/curbing_corruption_in_pp_handbook.

¹⁰ OECD Principles for Integrity in Public Procurement, *supra*, at page 69, and “A Guide to best practices for contract administration”, Office of Federal Procurement Policy (OFPP), 1994, available at www.gsa.gov/graphics/fas/BestPracticesContractAdministration.pdf.

¹¹ Guide to Enactment of the UNCITRAL Model Law on Public Procurement, part I, General remarks, “Implementing the principles of the Model Law to all phases of the procurement cycle: procurement planning and contract management”, para. 27, in A/CN.9/WG.I/WP.79/Add.1.

¹² See, for example, OECD, *supra*, at pages 70-73, OFPP, *supra*, Best Practices in Contract Management, Dr. Rene G. Rendon (available at www.ism.ws/files/Pubs/Proceedings/GGRendon.pdf, citing Gregg A. Garrett, Rene G. Rendon, Contract Management: Organizational Assessment Tools, National Contract Management Association, 2005).

9. If it decides that future work in this field would be appropriate, the Commission may also consider whether regulation would need to take into account the legal framework for contract management as set out in the procurement contract (the terms of which are not regulated in the Model Law); if so, it may be difficult to address contract management without addressing contract terms. Standard procurement of general contract terms are stipulated by many procuring entities, including the United Nations,¹³ and the World Bank,¹⁴ and specialist contracts that can be adapted to particular requirements are issued by, among others, the International Federation of Consulting Engineers (FIDIC, which has issued a set of construction contracts).¹⁵

10. A further view is that the public procurement cycle should be considered to be at an end only at “the end of the useful life of an asset or the end of a services contract”.¹⁶ This approach is reflected in the laws of certain countries, which include disposal of public assets within their procurement law.¹⁷ The Commission may therefore also wish to consider whether issues of publicly-owned asset disposal should be considered (the issue of divestment of national resources is also discussed in the context of the scope of the PFIPs instruments, below).

(b) Procurement planning

11. Noting the importance of this phase of the cycle, the Working Group considered that it might be more feasible in the Model Law and/or the Guide to deal with the issues of procurement planning than contract management.¹⁸ In this regard, it recalled that the Model Law does address certain aspects of procurement planning, such as the definition of the terms and conditions of the procurement (including statement of needs and specifications under article 10), who may participate (articles 8 and 9), how the winner will be determined (article 11) and choice of procurement method and means of solicitation (Chapter II). It also encourages the publication of information on forthcoming procurement opportunities (article 6, such as in the form of procurement plans). The Guide also notes that, “[t]he benefits of [advance notices] accrue generally through improved procurement management, governance and transparency. Specifically, [they encourage] procurement planning and better discipline in procurement and can reduce instances of, for example, unjustified recourse to methods designed for urgent procurement (if the urgency has arisen through lack of planning) and procurement being split to avoid the application of more stringent rules. The practice can also benefit suppliers and contractors by allowing them to identify

¹³ See www.un.org/Depts/ptd/conditions.htm.

¹⁴ For goods procurement as an example of such terms, see <http://go.worldbank.org/SOTGACP3U0>.

¹⁵ See www.fidic.org/.

¹⁶ Review of Civil Procurement in Central Government, Peter Gershon, 1999, reproduced in “Getting value for money from procurement”, National Audit Office, United Kingdom, available at www.nao.org.uk/Guidance/vfmprocurementguide.pdf.

¹⁷ See, for example, the Kenya Public Procurement and Disposal Act 2005, the Uganda Public Procurement and Disposal of Public Assets Act, 2003 and the Nigeria Public Procurement Act, 2007.

¹⁸ A/CN.9/595, paras. 80-82.

needs, plan the allocation of necessary resources and take other preparatory actions for participation in forthcoming procurements”.¹⁹

12. Needs assessment and planning and budgeting in the broader sense are not otherwise addressed in the Model Law or Guide. On needs assessment, the OECD states that avoiding information asymmetries between the private sector and the procuring entity, which can facilitate corruption, involves market research and perhaps interaction with the market; it continues that the need itself should be assessed against defined objectives and benchmarks, and that transparency measures should feature in this process. As regards planning and budgeting, the OECD recommends assessing the procurement in the light of the strategic priorities of the relevant organization, setting realistic time-frames and budget estimates, preparing a business case, ensuring the appropriate division of decision-making in the process, and preparing for the transparency requirements of the procurement procedure itself.²⁰ These points are echoed in the Legislative Guide.²¹

(c) Suspension and debarment

13. Suspension and debarment (also termed “blacklisting”) of suppliers or contractors are sanctions available to procuring entities. One view of the aim of such measures is to ensure that governments deal only with potential suppliers or contractors that will fulfil their legal and contractual obligations, by excluding those that have failed to observe those obligations in the past; others include that a debarment regime is part of the appropriate sanctions regime to support procurement procedures. Debarment removes a supplier’s or contractor’s eligibility for government contracts for a fixed period of time where misconduct or other illegal behaviour is established; suspension generally means a temporary exclusion, for example while allegations of misconduct are investigated.

14. The Technical Guide to the United Nations Convention Against Corruption notes that public procurement agencies or similar bodies should address debarment policies and procedures,²² as an aspect of compliance with the provisions of its Article 9 on Public Procurement and the Management of Public Finances.

15. Article 21 of the Model Law addresses the exclusion of a supplier or contractor from the procurement proceedings on the grounds of attempted or actual inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest; it provides an exhaustive list of grounds for the mandatory exclusion of a supplier or contractor from the procurement proceedings, for reasons of abuse rather than as a result of qualification information or from the contents of a submission per se. It does not address exclusion of the supplier or contractor from future procurements, i.e. debarment, unlike many other systems, including those of the multilateral development banks.

¹⁹ Draft Guide to Enactment, part I, General remarks, “Implementing the principles of the Model Law to all phases of the procurement cycle: procurement planning and contract management”, para. 26.

²⁰ OECD Principles for Integrity in Public Procurement, *supra*, at pp. 55-57.

²¹ See, for example, the PFIP Legislative Guide, Chapter II, Selection of the Concessionaire, part A.4 “Preparation for the selection proceedings”.

²² At page 79, “II.7. Preventing the misuse of procedures regulating private entities”; text available at www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

16. At the international and regional level, examples of debarment systems can be found. The World Bank debarment system is based on an administrative process under its Sanctions Committee Procedures. The multilateral development banks have also entered into an Agreement for Mutual Enforcement of Debarment Decisions (effective July 2011).²³ Article 45 of the 2004 EU Public Procurement Directive and article 39 of the 2009 EU Defence Procurement Directive provide the basis for debarring, or mandatorily excluding, companies convicted of corruption, fraud, money-laundering and participation in a criminal organization from public contracts.

17. National systems in all regions address debarment, though not all through primary legislation on public procurement. For samples of debarment regulation from each region, see Argentina (Decree No. 1023/01, Article 28); the United States of America (Federal Acquisition Regulation Subpart 9.4—Debarment, Suspension, and Ineligibility); Czech Republic (Decree of Government of the Czech Republic dated 25 October 2006 No. 1199), Nigeria (Section 6(1)(e) of the Public Procurement Act 2007); in Singapore, the authority to debar arises under the Prevention of Corruption Act, and is exercised by the Standing Committee on Debarment.²⁴

18. If the Commission considers that UNCITRAL should engage in work on debarment and related issues, it may wish to provide guidance on the possible scope of such work, such as addressing issues of due process requirements, ensuring consistency in application, ensuring proportionality and fairness, considering mandatory and/or discretionary debarment, whether the debarment function, should be centralized, transparency, time periods (and how to apply to be removed from a blacklist),²⁵ and “self-cleaning”.²⁶

(d) Rules on corporate compliance

19. The Model Law regulates the actions of the Government and procuring entity, but not those of the supplier or contractor, other than providing sanctions for effectively proscribed behaviour under article 21 of the Model Law. It was suggested to the Working Group, based on emerging approaches being considered in one State, that norms and standards should be applied to the supplier or contractor. The aim, it was noted, was to alert suppliers to the potential for prosecution for fraud and corruption in procurement, and to encourage them to follow defined preventive measures (reflecting the obligations on the procuring entity and the scope of article 21 of the Model Law as described above). While the Working Group

²³ For further details, see <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>.

²⁴ See ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, Anti-corruption policies in Asia and the Pacific: Thematic review on provisions and practices to curb corruption in public procurement, Self-assessment report Singapore, available at www.oecd.org/dataoecd/53/54/35054589.pdf.

²⁵ See, for example, Transparency International’s “Recommendations for the Development and Implementation of an effective Debarment System in the EU”, 2006, available at www.eib.org/attachments/strategies/TI_EU_debarment_recommendations.pdf.

²⁶ A process whereby suppliers that would otherwise have been excluded from procurement because of convictions for bribery and certain other offences, are permitted to participate in the future, on the grounds that they have taken measures to remedy the consequences of their actions.

did not consider that it was appropriate to extend the scope of the Model Law in this way, the Commission may wish to consider the issue, perhaps in the context of debarment and self-cleaning (see above) and ensuring sub-contractors' compliance.

(e) Sustainability and environmental issues

20. It has been observed that “[s]ustainable procurement is a national and international agenda item. This can be seen in the recommendation from the Johannesburg Earth Summit that ‘relevant authorities at all levels should promote procurement policies that encourage the development and diffusion of environmentally sound goods and services’”.²⁷ The United Nations Environment Programme, for example, engages in partnerships with various organizations such as the World Bank, the International Training Centre of the International Labour Organization, the League of Arab States and the International Council for Local Environmental Initiatives, and national governments, to promote sustainable procurement.²⁸

21. The Working Group did not take up a suggestion to include “sustainable procurement” as an objective of the Model Law.²⁹ It did, however, consider that the increasing attention paid to the topic may indicate future work in the area would be appropriate.³⁰

22. The draft Guide to Enactment addresses the topic as follows: “[t]he Commission has noted that there is no agreed definition of sustainable procurement, but that it is generally considered to include on a long-term approach to procurement policy, reflected in the consideration of the full impact of procurement on society and the environment within the enacting State (for example through the promotion of life-cycle costing, disposal costs and environmental impact). In this regard, sustainability in procurement can be considered to a large extent as the application of best practice as envisaged in the Model Law. For this reason, sustainability is not listed as a separate objective in the Preamble, but addressed as an element of processes under the Model Law. The term sustainable procurement can also be used as an umbrella term for pursuit of social, economic and environmental policies through procurement, such as “social” factors: employment conditions, social inclusion, anti-discrimination; “ethical” factors: human rights, child labour, forced labour; and environmental/green procurement. The Model Law’s flexibility in allowing socio-economic policies to be implemented in this way are discussed in detail in [the commentary to articles 8-11]”.³¹

23. The Commission may wish to consider whether further legislative work is required in this field, or whether the Model Law already contains the required tools, as supplemented by the above commentary in the Guide to Enactment; in the latter case, it may wish to take steps to bring the approach of the Model Law to those agencies active in this area.

²⁷ Quotation from “Sustainable procurement — making it happen”, UK Government, available at www.idea.gov.uk/idk/aio/69979.

²⁸ For further detail, see www.unep.fr/scp/procurement/.

²⁹ The suggestion was made in intersessional consultations — see A/CN.9/WG.I/WP.71, para. 32(a).

³⁰ A/CN.9/713, para. 142.

³¹ Draft Guide to Enactment, General remarks, *supra*, at paras. 34-44.

2. Harmonizing the procurement-related provisions in the UNCITRAL PFIPs instruments and relevant procurement methods in the Model Law on Public Procurement

24. The Working Group has noted the importance of consistency between the Model Law and the PFIPs instruments.³² In the Legislative Guide, it is noted that the method of selecting the concessionaire is based on the “principal method for the procurement of services” under the UNCITRAL 1994 Model Law on Procurement of Goods, Construction and Services.³³ The (2011) Model Law no longer contains this procurement method, but a method for procurement of complex subject-matter, called “Request for Proposals with Dialogue” (article 49), includes certain features of the features of the selection of the concessionaire under the Recommendations and commentary in the Legislative Guide, including the process of pre-selection. Common features of this selection process and article 49 of the Model Law include an initial, open publication, a pre-selection procedure, prescribed contents of invitations to participate, minimum technical standards, and pre-disclosed evaluation criteria. Nonetheless, the provisions of article 49 and the Recommendations are not identical; the former are more detailed and impose additional requirements (such as regards evaluation criteria). The Commission may therefore wish to update the Legislative Guide on selection of the concessionaire to reflect relevant provisions of the Model Law.

3. Additional provisions for a modern text on PFIP

(a) Oversight

25. The combination of mandated procurement procedures and requirement for a record of each procurement process (under article 25 of the Model Law) is designed to facilitate the oversight of the procurement process. Recommendation 38 of the Legislative Guide provides that an equivalent record should be kept for the selection process. The Legislative Guide also considers regulatory oversight of the selection process, contract approval, monitoring obligations and compliance with contract terms, licence conditions, etc., sanctions, and dispute settlement.³⁴ As regards the operation of the infrastructure and facility, the Legislative Guide provides that the contracting authority or an independent regulatory agency may exercise the relevant oversight function, particularly where legal requirements for the provision of public services and changes in regulation (which may affect the viability of the project) may be contemplated.

26. The Legislative Guide notes that “an exhaustive discussion of legal issues relating to the conditions of operation of infrastructure facilities would exceed [its] scope”.³⁵ In the context of the possibility of regulatory change, and the use of contractual mechanisms such as stabilization clauses that are sometimes used to

³² A/CN.9/713, para. 142.

³³ Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

³⁴ See chap. I, “General legislative and institutional framework”, paras. 30-53.

³⁵ See chap. IV, “Construction and operation of Infrastructure ...”, Section I, “operation of infrastructure”, para. 80.

address them (and which have attracted much negative comment),³⁶ the Commission may wish to consider exploring oversight issues in more detail.

(b) Promoting domestic dispute resolution measures

27. At its 2007 Congress entitled “Modern Law for Global Commerce”, UNCITRAL was urged to identify (a) the necessary elements of a sound national regime for the prevention and resolution of disputes between regulator and operator in the concession environment and (b) relevant best practices. The aim in undertaking work in this area, it was said, was to address the observed inability of countries properly to “handle the disputes arising from regulation of increasingly privatized sectors of the economy, once thought to be core responsibilities of government”, and the consequent disincentive to private investment in those sectors. Although the International Centre for Settlement of Investment Disputes (ICSID) might be able to take on some such disputes, it was considered that promoting local engagement in the relevant recipient State was an important consideration.

28. It was suggested that UNCITRAL should develop a national system for dispute prevention and settlement, building on the dispute-settlement provisions in Chapter VI of the Legislative Guide, and considering the appropriate forum. The contents of any future text in this area could include “provision in agreements and regulations for regular information exchange between regulator and operator; ‘early warning’ systems as problems arise, possibly standing machinery (analogous to contract review boards, or other standing provision for the application of independent expertise) to tackle problems in their incipiency by assuring legitimate implementation of regulations by the regulator and good faith compliance by the operator”. Allied to these provisions, it was recommended that the dispute-settlement machinery (to include the selection of the members of the relevant body, and ensuring competence) and related administration should be and seen to be independent of politics and short-term government policy.³⁷

4. Consolidating the UNCITRAL PFIPs instruments

29. In 2001, the Commission requested the Secretariat to consolidate in due course the text of the UNCITRAL PFIPs Instruments into one single publication and, in doing so, to retain the legislative recommendations contained in the Legislative Guide as a basis for Model Legislative Provisions then being developed.³⁸ If the Commission decides to engage in this consolidation exercise, it may also wish to ensure that all issues discussed in the Legislative Guide are reflected in its

³⁶ See, for example, “Stabilization Clauses and Human Rights: A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights”, 2008, available at [www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf) and “Freezing government policy: Stabilization clauses in investment contracts”, R. Howse, 2011, available at www.iisd.org/itn/2011/04/04/freezing-government-policy-stabilization-clauses-in-investment-contracts-2/.

³⁷ See pages 351-363 of the Proceedings of the Congress of the United Nations Commission on International Trade Law held on the Occasion of the Fortieth Session of the Commission, Vienna, 9-12 July 2007, available at www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

³⁸ At its 35th session; see A/58/17, para. 171.

Recommendations and Model Legislative Provisions (the commentary in the Legislative Guide is broader in scope than the Recommendations and Model Legislative Provisions).

5. Broadening the scope of the PFIPs Instruments to include forms of private financing in infrastructure development and related transactions not currently covered in the PFIPs Instruments

30. Public-private partnerships (PPPs) have become established ways of delivering infrastructure development. There are many definitions in circulation but, as explained by the World Bank, “[t]he term ‘public-private partnerships’ has taken on a very broad meaning, the key element, however, is the existence of a ‘partnership’ style approach to the provision of infrastructure as opposed to an arm’s length ‘supplier’ relationship ... Either each party takes responsibility for an element of the total enterprise and work together, or both parties take joint responsibility for each element. ... A PPP involves a sharing of risk, responsibility and reward, and is undertaken in those circumstances when there is value for money benefit to the taxpayers”.³⁹ Hence it may be considered that the term “PPP” has broader connotations than PFIP in that non-financial contributions from the private sector could be involved. Nonetheless, a common understanding of PPPs and PFIP is that the tools are broadly equivalent.

31. The definitions of PPPs also, in the view of some, include other ways of service delivery by governments, including outsourcing and the divestment of state-owned assets or enterprises for that purpose. According to one report, “PPPs have evolved to include the procurement of social infrastructure assets and associated non-core services. PPPs have extended to housing, health, corrective facilities, energy, water, and waste treatment”.⁴⁰ A key feature is the provision of what were previously government services by third parties; the Legislative Guide does not address the provision of such services other than as part of infrastructure development.

32. The Legislative Guide states, in its introduction, that “The Guide pays special attention to infrastructure projects that involve an obligation, on the part of the selected investors, to undertake physical construction, repair or expansion works in exchange for the right to charge a price, either to the public or to a public authority, for the use of the infrastructure facility or for the services it generates. Although such projects are sometimes grouped with other transactions for the “privatization” of governmental functions or property, the Guide is not concerned with “privatization” transactions that do not relate to the development and operation of public infrastructure. In addition, the Guide does not address projects for the exploitation of natural resources, such as mining, oil or gas exploitation projects under some “concession”, “licence” or “permission” issued by the public authorities of the host country.”⁴¹ It has been noted that such transactions may include the

³⁹ The World Bank, 2003. See, also, <http://ppp.worldbank.org/public-private-partnership/>.

⁴⁰ New South Wales Treasury (2009): New South Wales Public-Private Partnerships — An Evolution, cited in Public-Private Partnerships, Literature Review — Draft, G. Palmer, Aid Delivery Methods Programme, 2009 (available at www.dpwg-igd.org/cms/upload/pdf/PublicPrivatePartnership__Lit__Review.doc).

⁴¹ See Introduction and background information on privately financed infrastructure projects, para. 8.

transfer to the private sector of common and natural resources or land, and there are reports of disregard of rights over such land, negative environmental consequences, and a lack of transparency in some of them.⁴² The reports also indicate a significant increase in projects involving the disposition of land and other natural resources.⁴³

33. It has been observed that many of the recommendations of the Legislative Guide would apply to these excluded transactions; indeed, the OECD's "Basic Elements of a Law on Concession Agreements", developed with the Istanbul Stock Exchange, and regional experts, addresses all types of concessions.⁴⁴ Given the increasing significance of relevant transactions, the Commission may wish to consider whether the scope of the Legislative Guide should be expanded to accommodate them. It may also wish to take into account the envisaged scope of the proposal from the European Commission for a Directive on concessions.⁴⁵

34. The Commission may recall that the Legislative Guide states that successful infrastructure projects should "achiev[e] a balance between the desire to facilitate and encourage private participation in [relevant] projects, on the one hand, and various public interest concerns of the host country, on the other".⁴⁶ The Commission may consider that these elements and the appropriate balance between them requires additional elucidation should the scope of the Legislative Guide be expanded to include the items currently not addressed and identified above. In this regard, identifying the relevant public interest and public interest concerns may require particularly careful treatment: as has been noted, any "judgement about the 'value' placed on public policy outcomes",⁴⁷ is likely to be subjective.

35. In this context, the Commission may wish to note that UNIDROIT is considering possible future work in related areas: with IFAD and FAO on the issue of contract farming, and more generally international guidance on land investment contracts, taking account, in particular, of the UNIDROIT Principles of International Commercial Contracts.

6. Additional matters

36. The Commission may consider that the brief description of some of the issues set out above requires further elaboration in order to set the appropriate mandate for any future work; if so, it may wish to instruct the Secretariat to conduct a more

⁴² See Uniform law Review, NS — Vol. XVII 2012, Devising Transparent and Efficient Concession Award Procedures, C. Nicholas, and the various sources referred to therein.

⁴³ See, for example, S. Haralambous, H. Liversage and M. Romano, The Growing Demand for Land Risks and Opportunities for Smallholder Farmers, Discussion Paper prepared for the Round Table organized during the Thirty-second session of IFAD's Governing Council, 18 February 2009, available at www.ifad.org/events/gc/32/roundtables/2.pdf and Rachel Nalepa, The Global Land Rush: Implications for Food, Fuel, and the Future of Development, Pardee Papers, No. 13, May 2010, available at www.bu.edu/pardee/files/2011/08/PP13_GlobalLandRush.pdf.

⁴⁴ Ibid., at page 3. The text of the OECD Basic Elements of a Law on Concession Agreement is available at www.oecd.org/dataoecd/41/20/33959802.pdf.

⁴⁵ The text of which is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0897:FIN:EN:PDF>.

⁴⁶ See Introduction and background information on privately financed infrastructure projects, para. 8.

⁴⁷ Illidge, R. and Cicmil, S. [2000] From PFI to PPP: Is risk understood? available at www1.uwe.ac.uk/bl/bbs/trr, at page 2.

detailed study into relevant norms, standards and practice, and to address the feasibility and desirability of work by the Commission in the fields concerned. It may also wish to consider whether holding a colloquium would assist in developing the appropriate scope of any future work.

37. The Commission may also wish to assess the appropriate scope and form of any future text in these areas. The Commission may wish to consider the extent to which the issues identified above are amenable to regulation; it may consider some would be more appropriately addressed through guidance on best practice. In this regard, the Working Group at its 21st session considered that certain issues of importance to public procurement and related activities went beyond the scope of a legal text and policy guidance such as in a Guide to Enactment, including as regards implementation and use of the text concerned (see, for example, the issues considered in paragraphs 6-9, 12, 17 and 34 above). The Working Group has therefore contemplated additional documents to support the Model Law on Public Procurement, including a glossary of terms in the Model Law and accompanying Guide to Enactment.⁴⁸

38. The Commission may also wish to consider how further information might be collected and made available with respect to enactment, implementation, interpretation and use of the Model Law. As regards interpretation, the 1994 Model Law was rarely enacted without tailoring to local circumstances, and this approach is expected for the 2011 Model Law. Hence the use of CLOUT as a tool may be of limited assistance.

39. In the insolvency arena, the “UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective” (2011) and the “UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation” (2009) support the Model Law concerned: a similar approach, and encouraging contributions through the UNCITRAL website and expert consultations may support the Model Law on Public Procurement.

⁴⁸ A/CN.9/745, para. 36.

B. Selected legal issues impacting microfinance**(A/CN.9/756)****[Original: English]****CONTENTS**

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I. Introduction

1. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat including a summary of the proceedings and the key issues identified at the international colloquium on microfinance, held in Vienna from 12 to 13 January 2011, pursuant to a request of the Commission (A/CN.9/727). After discussion, the Commission agreed to include microfinance as an item for the future work of UNCITRAL and to further consider that matter at its next session, in 2012. The Commission also agreed that the Secretariat should, resources permitting, undertake research for consideration by the Commission on the following items: (i) overcollateralization and the use of collateral with no economic value; (ii) e-money, including its status as savings; whether “issuers” of e-money were engaged in banking and hence what type of regulation they were subject to; and the coverage of such funds by deposit insurance schemes; (iii) provision for fair, rapid,

transparent and inexpensive processes for the resolution of disputes arising from microfinance transactions; (iv) facilitating the use of, and ensuring transparency in, secured lending to microenterprises and small and medium-sized enterprises.

2. This note includes a short summary of the state of the matter in each of the four topics indicated above, as well as key legal and regulatory issues, relating thereto, for consideration by the Commission.

II. Secured lending in microfinance

A. An overview

3. Microfinance does not necessarily involve secured lending (in the sense of a security interest in a movable asset to secure outstanding amounts of a loan). It may be available without any security, with personal security (guarantees) or security in immovable property. However, microfinance may involve secured lending, in the context of which fragile borrowers in the microfinance sector may be utilizing essential household items to secure loans for micro trade as well as consumption purposes. The nature of the borrower and the collateral poses a number of challenges. First, there may be practices that are unfair for an individual borrower that offers assets such as household goods as collateral; second, valuation of collateral is not easy (valuation of collateral is a problem that arises in respect of any type of collateral, but in particular when the collateral's value is intangible or which may be difficult to ascertain, like household items); third, registration of security interests in a microfinance context creates particular difficulties; and fourth, enforcement and collection in the event of borrower default raises particular issues. All issues are linked and pose potential pitfalls for the availability of credit and financial inclusion of any borrower, and in particular borrowers in microfinance transactions.

4. Secured lending is an area in which UNCITRAL has a depth of experience which could be of great assistance to the microfinance sector. UNCITRAL prepared: (a) in 2001, the United Nations Convention on the Assignment of Receivables in International Trade (the "Convention"); (b) in 2007, the UNCITRAL Legislative Guide on Secured Transactions (the "Guide"); (c) in 2010, the Supplement on Security Rights in Intellectual Property (the "Supplement"). UNCITRAL is also preparing a draft Technical Legislative Guide on the implementation of a Security Rights Registry, which is expected to be finalized in 2013. Like most national secured transactions laws, all these texts apply to secured transactions among businesses, including small and medium-sized enterprises (SMEs), as well as between a business and a consumer. However, the Convention and the Guide provide that they do not affect the rights of consumers under consumer protection law (see article 4.4 of the Convention and recommendation 2, subpara. (b), of the Guide; this recommendation applies also to the Supplement). The reason that these texts take this approach is that there is nothing therein that would be incompatible with the principles of good faith or fair dealing typically incorporated in consumer protection or similar law, and the exclusion of SMEs or consumers could inadvertently have a negative impact on the availability and the cost of credit to SMEs or consumers. This is the case with other texts of UNCITRAL (such as, for example, the Model Law on International Commercial Arbitration). Thus, consumer

transactions are not excluded altogether from the Convention or the law recommended in the Guide, but appropriate deference is shown to consumer protection laws. In any case, UNCITRAL has not attempted to unify or harmonize consumer protection law, as it is generally considered to be an area of law that does not lend itself to unification or harmonization at the international level, because it raises fundamental policy issues that go to the core of each legal system.

5. In the last decade, the microfinance industry has attracted the interest of international investors and investment therein has surged. In fact, the Mix Market, an entity which monitors financial transparency of microfinance institutions (MFIs), reports that the sector grew 39 per cent each year on average over the last ten years, which represents more than 45 billion euros in volume of business globally.¹ Over the years, MFIs have also undergone a shift in methodology from the early years when lending relied heavily on the group enforcement mechanism. Groups were responsible both for ensuring that all members were creditworthy, and as a result, each group member subsequently became a guarantor through joint and several liability for other group member's loans. By contrast, modern microfinance in many countries prioritizes individual loans backed by pledges of the borrower's own assets, such as household goods, or mortgages of immovable property. Personal guarantees are also requested as additional assurances of repayment.

6. Like any other secured lender, MFIs should be complying with an array of laws, such as contract law, property law and in particular secured transactions law, civil procedure law, land law, insolvency, consumer protection law, and fair trade and competition laws. A reliable assessment of the risk of potential default is always a problem for any lender, including for MFIs in particular in many developing countries where there is insufficient information about borrowers and no credit bureau that could illustrate the past lending history of a particular potential borrower. Thus, obtaining other assurances of repayment, such as guarantees from friends and family, pledges of movable assets and mortgages of immovable property are an integral part of every microfinance transaction.

7. In any secured transaction, including a microfinance transaction, the appropriate use of collateral could be a benefit to both lenders and borrowers. Borrowers who have household goods (to the extent they may be pledged, which is a matter of general property law), business inventory and receivables and other assets can potentially obtain larger amounts of credit, or (if borrowing from commercial banks) possibly lower interest rates and longer repayment periods. Lenders who appropriately value and effectively obtain security interests in collateral are less likely to experience loss in the event of a borrower default, and can expand their business. Borrowers that are able to offer as collateral particular types of asset, such as household goods, can be included in the financial system and obtain access to affordable credit. Of course, whether an asset is transferable and thus can be offered as collateral for credit is typically an issue of property law. In order to protect the minimum living standard of borrowers, many legal systems do not permit the creation of security interests in essential household goods and employment benefits necessary for the essential needs of a person or family that can

¹ From the state of the MicroCredit Summit Campaign report 2011 based on a data sample of 3,300 MFIs from which it received annual data on client volume. Available at www.microcreditsummit.org/SOCR_2011_EN_web.pdf.

be used as a collateral. For the same reason, in many legal systems, even where the creation of a security interest in such a type of asset is permitted, the enforcement of such a security interest is made subject to special rules. In recognition of the social policies pursued by such laws, the law recommended in the Guide does not override provisions of such other law that limits the creation or the enforcement of a security interest or the transferability of certain types of asset (see recommendation 18).

8. In many countries, however, in the absence of a modern secured transactions law, unfair practices have developed, in particular in the microfinance sector. It is, therefore, important to promote the global adoption of effective and efficient secured transactions laws, such as the texts prepared by UNCITRAL and other organizations such as the International Institute for the Unification of Private Law (“Unidroit”) and the Hague Conference on Private International Law (the “Hague Conference”).² It may also be important to examine how those texts may apply in particular to the microfinance sector.³

B. Unfair practices in microfinance transactions

9. To determine the usage patterns of collateral in the microfinance industry, the Secretariat surveyed a random sampling of MFIs that report financial data including information on their financial products and lending methodology to the Mix Market. It analysed the types of loans offered and collateral requirements of 33 institutions from 11 countries. Results of the survey illustrate that 26 of the 33 surveyed MFIs require collateral such as: (a) compulsory savings retained by the MFI; (b) household assets; (c) movable goods; (d) receivables; (e) immovable property; (f) personal guarantees; and (g) blocked portions of the microloan itself.⁴

10. MFIs, like many commercial lenders require multiple collateral, combining compulsory savings and household goods with personal guarantees. The most complex collateral requirements appear to be set by Eastern European and Latin American MFIs, where immovable property is used as collateral, and even receivables are pledged (and upon payment are directed to a reserve account paid for by the borrower).⁵ The most commonly required collateral per the survey is the compulsory savings requirement. Thirteen of the MFIs surveyed required savings retained by the MFI; three of which also required an additional form of collateral, like chattels.

11. MFI practices vary greatly within countries as well as from region to region regarding the compulsory savings issue. There are examples of MFIs requesting a

² For a comparative analysis of major features of international instruments relating to secured transactions, see A/CN.9/720.

³ Of particular relevance in this regard is the work of Unidroit on a new Protocol to the Cape Town Convention on matters specific to agricultural, mining and construction equipment.

⁴ MFI data was taken from www.MixMarket.org and cross checked with information contained on the MFIs' websites.

⁵ At Fundacion Mujer in Costa Rica, an individual borrower pays 200 colones for the accounts receivable reserve account; from 2-3000 colones for a credit inspection as well as legal fees to register the pledge of collateral or mortgage for the microloan. Individual credit terms can be found at www.fundacionmujer.org/servicios/credito-individual.

seemingly modest 25 cents per week in savings,⁶ whereas another MFI requires 20 per cent obligatory savings (which has the effect of raising its effective interest rate to 125.9 per cent).⁷ In some countries MFIs combine the group methodology, with compulsory savings and household goods as collateral.⁸

12. The practice of compulsory savings tied to a loan product raises several concerns. First, a significant number of MFIs requiring compulsory savings are not licensed deposit taking financial institutions. Therefore, interest is not likely to be paid on these savings accounts by the MFI and the accounts are not protected by deposit insurance schemes. In addition, this practice has the effect of increasing the cost of funds for borrowers, while simultaneously making it very difficult for borrowers to calculate the effective interest rate for the loan or the total cost of funds for comparison purposes. Moreover, obligatory bundling or tying financial services such that the customer must purchase two services, when they may only want one raises fair trade and competition issues. MFIs most commonly bundle compulsory savings and insurance products. The former do not pay the client any interest, and the latter are frequently provided without an explanatory policy, but rather presented as an additional cost in the loan agreement. Therefore, in substance, these products appear to be no more than additional insurance against borrower default, or another type of collateral.

C. Valuation of collateral in a microfinance transaction

13. Like any other secured lender, MFIs must maintain a delicate balance with regard to collateral. On the one hand, they need to cover the possible risk of default, but, on the other, they cannot demand too much collateral, because their potential clients may not own items of sufficient value. Thus, by requesting too much collateral, the MFI would risk eliminating a significant share of its market, because poor populations may not own assets such as a car or house. The MFI's valuation must fairly assess the present, *actual* market value of collateral in the event of a future default. And, collateral pledged by borrowers, which may be used household appliances or aging animals, is likely to have a higher value to the borrower than to the MFI. Requiring very high collateral-to-loan ratios, however, can put borrowers in a precarious position whereby, if they default on their microfinance loan, they could also lose the family's sole source of income, or even home.⁹ Finding the appropriate collateral-to-loan ratio is an important issue for any secured lender, including MFIs, and any borrower, including an SME or a consumer. Yet, there does

⁶ See for instance the Dariu Foundation in Viet Nam: the average loans balance is \$133 per client and average deposit balance is \$13 per data submitted by the Foundation to MixMarket available at www.mixmarket.org/mfi/dariu/report. Thus, although the compulsory savings requirement seems modest, it does in fact result in an additional and significant cost to the borrower.

⁷ See for instance, LAPO-Nigeria, loan details can be found at www.lapo-nigeria.org/web/what-are-the-benefitsadvantages-of-becoming-a-lapo-customer-.html. Further pricing clarifications can be found online at www.kiva.org/partners/20.

⁸ International Development Law Organization (IDLO), *Consumer Protection and Microfinance Country Reports*, 2011, pages 81-83 available at www.idlo.int/DOCCalendar/FINAL%20Microfinance%20Reports.pdf.

⁹ Borrowers surveyed in Cameroon were frequently asked for title to their homes to secure a microloan. Collateral values to loan values were on average 356 per cent.

not appear to be a consensus within the microfinance community on what ratio is fair and appropriate. Further, there does not appear to be much discussion of the issue in recent years among microfinance practitioners, nor among international organizations concerned with client protection issues. In addition, collateral-to-loan ratios required by MFIs appear to be much higher than those required by commercial banks. Certainly, every lending situation is unique, but many MFIs have a poverty alleviation mandate, thus best practices for secured lending are certainly relevant to the discussion. Collateral valuation, however, is an economic, not a legal issue. Thus, the Guide discusses collateral valuation in several places to highlight the relevant issues but makes no recommendation.¹⁰

D. Registration of a security interest in a microfinance transaction

14. Like any other secured lender, an MFI is also challenged to register a notice of and protect its security interest in the types of collateral used by borrowers in microfinance transactions, so as to make a security interest effective against third parties and ensure its priority over competing interests. Priority is particularly important where the same types of asset (for example, the same TV, pots and pans or chickens) are being used for multiple loans with different MFIs, and the total value of the loans exceeds the total value of the collateral, with the result that creditors without priority may not be paid at all or at least not in full. This affords a significant challenge because many countries, whether developed or developing, do not have registries for security interests in movable goods. Of the eleven developing countries surveyed, per the World Bank's *Doing Business Reports*, only four countries have collateral registries and laws that allow a business to use movable goods as collateral while maintaining possession of the goods.¹¹ It is not evident, however, whether the collateral registries in these four countries allow the registration of a notice of a security interest in collateral used in microfinance transactions with a view to making a security interest effective against third parties. In addition, it is not clear how simple, quick and inexpensive the registration process is, which is crucial given that the duration of a microfinance loan may be quite short.¹² Thus, even if technically available to the MFI, the type of collateral registry in those four countries may be ill-suited for short-term microfinance loans.

15. In the absence of an effective and efficient security interests registry, such as the one recommended in the Guide and in the draft Technical Legislative Guide on the Implementation of a Security Rights Registry, MFIs develop mechanisms that may or may not be legal or fair and probably do not protect sufficiently their security interests. For example, as already mentioned, in some countries MFIs are

¹⁰ See the UNCITRAL Legislative Guide, pages 217, 297, 431, 435, 451, 452 and 534.

¹¹ One of the issues assessed in the World Bank *Doing Business Reports* is access to credit and secured lending. Individual country reports can be viewed at www.doingbusiness.org and by clicking on "explore economy data".

¹² While there is no specific data on the *Doing Business* site related to time and costs of the registration of collaterals, we can use the time and number of steps to register property as an indicator. In one country examined, which has a collateral registry, there are 13 steps required to register property which takes on average 82 days per the World Bank. This seems not compatible with the short loan cycles of microfinance borrowers. The Nigerian access to credit report is published at www.doingbusiness.org/data/exploreeconomies/nigeria#registering-property.

simply requiring a transfer of title to the borrower's immovable property and keeping the title documents in their safes. Borrowers subsequently found out that it was quite easy to obtain a new deed of title, stating that the old one had been "lost."¹³ Thus, the lack of an effective and efficient collateral registry led MFIs to follow approaches that may leave them without security. This result is bound to have an impact on the availability and the cost of credit, which in turn is likely to perpetuate the financial exclusion of the SMEs and consumers.

16. In order to address the above-mentioned problems, security interests registries may need to be established or reorganized in accordance with the recommendations of the Guide and the draft Technical Legislative Guide on the Implementation of a Security Rights Registry. In particular, the security interests registry recommended in the Guide is so designed to permit the registration of notices of security interests in all types of secured transaction, including microfinance transactions (that is, assets of SMEs or consumers), to the extent that under the relevant property law a particular asset may be transferred or encumbered (see recommendations 32 and 34). Such registration does not create a security interest, nor is registration a requirement for the creation of a security interest (see recommendation 33). In addition, the registration process is quick, easy and inexpensive, and thus may accommodate any type of secured transaction, including microfinance transactions of a short length, or where the amount of credit or the value of the collateral is small (see recommendation 54).

E. Fair and transparent enforcement of a security interest in a microfinance transaction

17. MFIs also struggle with the fair and transparent practices in relation to the enforcement of their security interests and collection of debts. When constrained to seize and sell a borrower's pledged assets, in countries where the group lending mechanism is still widely used, MFIs rely on the group members to seize and sell the collateral. For instance, in one country MFIs groups have a designated person for this purpose, called "discipline master."¹⁴ However, this does not seem consistent with the law of the country which specifies that only licensed auctioneers may seize and sell collateral in a very precise manner, with strict notification rules to ensure transparency of the entire enforcement process.¹⁵ In another country, bank regulators concluded that coercive and aggressive enforcement and collection

¹³ International Development Law Organization (IDLO), *Consumer Protection and Microfinance Country Reports*, 2011 available at www.idlo.int/DOCCalendar/FINAL%20Microfinance%20Reports.pdf.

¹⁴ See, International Development Law Organization (IDLO), *Consumer Protection and Microfinance Country Reports*, 2011, page 77 available at www.idlo.int/DOCCalendar/FINAL%20Microfinance%20Reports.pdf.

¹⁵ Laws of Kenya, The Auctioneers Act, Chpt. 526, 2009 available at www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/AuctioneersActCap526.pdf.

practices may have been a contributing factor in a recent over-indebtedness crisis in the region.¹⁶

18. To address the specific problems mentioned above, the implementation of the recommendations of the Guide with respect to enforcement should be recommended. Of particular importance in this context are the following recommendations:

(a) Recommendation 131, which requires the secured creditor to enforce its security interest under the law in good faith and in accordance to reasonable commercial standards;

(b) Recommendations 132-135, which provide that these standards may not be waived by agreement before default;

(c) Recommendation 136, which provides that any person that violates the enforcement provisions of the law is liable for any damage caused by such failure;

(d) Recommendation 142, which provides for enforcement through judicial proceedings or extrajudicial enforcement;

(e) Recommendation 145, which provides that the higher ranking secured creditor may take over enforcement proceedings from the enforcing secured creditor; and

(f) Recommendations 147-151, which provide for the protection of the borrower and other persons with rights in the collateral in the case of extrajudicial enforcement.

F. Legal Framework for secured transactions in a microfinance context

19. In many States, the national legal framework for secured transactions implicates an array of domestic laws. In those States, there is no comprehensive secured transactions law of the kind recommended in the Guide. To the contrary, the law is a composite drawn from various segments of the law of those States. For example, in a Financial Sector Deepening legal survey, some 25 laws were identified in a country that impact the registration of security interests.¹⁷ In another country, 21 different laws have implications for secured lending.¹⁸ In addition, in many countries there is no security interests' registry or the existing registry cannot accommodate secured transactions, including microfinance transactions. For example, registration of notices of security interests may not be available with respect to collateral such as household goods, or the registration process may be simply too lengthy and add an additional cost for MFIs.

¹⁶ Reserve Bank of India (RBI), *Report of the Sub-Committee of the Central Bank Board of Directors of Reserve Bank of India to Study Issues and Concerns in the MFI Sector*, January 2011, available at www.rbi.org.in/scripts/PublicationReportDetails.aspx?UrlPage=&ID=608#L11.

¹⁷ Financial Sector Deepening Kenya (FSD), *Costs of Collateral in Kenya, Opportunities for Reform*, September 2009.

¹⁸ International Labour Organization (ILO), *Securing Small Loans: The Transaction Costs of Taking Collateral*, 2001.

20. MFIs have thus tended to compensate for these challenges with strategies that can be unfair to clients and that do not actually protect the MFI from legal or credit risks. MFIs may have adopted these strategies because of problems relating, for example, to the lack of a functioning security interests registry for movable goods in general or for the type of collateral used in microfinance transactions. Thus, MFIs circumvent these problems by requiring compulsory savings or bundled insurance products.

G. Matters for consideration

21. In view of these problems, the Commission may wish to consider whether the secured transactions issues mentioned above are already adequately addressed in the Guide and recommend broad implementation of the recommendations of the Guide. Once a sufficient number of States has implemented the recommendations of the Guide, the Commission may also wish to consider whether any other secured transactions issues need to be addressed to specifically facilitate microfinance transactions.

22. Alternatively, the Commission, in conjunction with other organizations working on microfinance, such as the World Bank, may wish to consider the way in which the secured transactions law recommended in the Guide applies to secured transactions in a microfinance context and consider whether a supplement to the Guide could usefully discuss and clarify the application of the secured transactions law in a microfinance context and, if necessary, make additional recommendations.

III. Dispute Resolution Mechanisms

A. Brief assessment of the legal framework

Access to justice for the poor

23. Recognizing that access to justice is essential in the fight against poverty, the United Nations Development Programme (UNDP) hosted a Commission on Legal Empowerment of the Poor, a global initiative to focus on the link between exclusion, poverty and the law. A report prepared pursuant to General Assembly resolution 63/142, underlined that measures to improve access to justice should focus on developing low-cost justice delivery models, taking into account the capacity and willingness of the poor to pay for such services, congestion in the court system, and the efficacy of informal and alternative dispute resolution mechanisms.¹⁹

24. The gravity of the access to justice gap for the poor was underscored by the Commission's report titled "Making the Law Work for Everyone." It indicated that four billion persons lack access to well-functioning judicial systems due to poverty. Affordable, efficient and fair dispute resolution systems are in short supply for the poor, particularly when low value disputes are at issue. Moreover, the adversarial system excludes the poor, because they cannot afford the costs related to lawyers, or

¹⁹ Ibid., Sixty-fourth session (A/64/133), para. 24.

paying court fees. Further, court procedures can be slow, and it is not uncommon for courts to have a large backlog of cases.²⁰

25. Studies carried out by the International Development Law Organization (IDLO) highlighted that microfinance institutions enter into contractual agreements with the poor who often have low literacy levels, and who are not fully informed of the terms of the loan contract, in particular regarding all applicable fees and interest rates, including the type of interest rate, be it flat or on a declining balance.²¹ Microfinance clients also have low financial literacy levels, and little knowledge of their legal rights.²² Thus, clients may have a difficult time understanding their rights and obligations vis-à-vis a contract.²³ Furthermore, if a dispute arises, normally, the only recourse of the microfinance client is to revert to the loan officer or MFI itself for redress.²⁴ The microfinance industry refers to this situation as “asymmetries of information”; a technical term for a rather large imbalance of power.

Applicable regulation

26. An integral component of financial services client protection, the provision of effective, alternative dispute settlement mechanisms for micro entrepreneurs, is often unavailable.²⁵ Sometimes, there may also be several authorities with overlapping jurisdiction related to financial services complaints resolution, making it more difficult for the microfinance client to discern which authority is competent to hear the claim.²⁶

Use of court system by MFIs

27. It is not clear how frequently MFIs resort to the court system for debt collection purposes. Courts in many developing countries are not automated, thus it is difficult to obtain data. Anecdotal evidence suggests the courts are being utilized

²⁰ UNDP, Commission on Legal Empowerment of the Poor, *Making the Law work for Everyone*, available at www.undp.org/legalempowerment.

²¹ Centre for Microfinance, *How do Microfinance Clients Understand their Loans?* Tiwari, A., Khandelwal, A. & Ramji, M. October 2008. Available at www.microfinancegateway.org/p/site/m/template.rc/1.9.31190/.

²² Id. In the aforementioned CMF study, less than 50 per cent of Indian microfinance clients surveyed could cite their effective interest rate and had only been orally explained their contract terms; no written copy was supplied. Similarly, in a CGAP survey done in Kenya, 25 per cent of microfinance clients were surprised by interest rates and service fees and that there were limited avenues for recourse. On the importance to strengthen the financial literacy and capability of users of microfinance services see also Access through Innovation Sub-Group of the G-20 Financial Inclusion Experts Group, *Innovative Financial Inclusion, Principles and Report on Innovative Financial Inclusion*, pages 27-28.

²³ On this point see also Access through Innovation Sub-Group of the G-20 Financial Inclusion Experts Group, *Innovative Financial Inclusion, Principles and Report on Innovative Financial Inclusion*, pages 25-26.

²⁴ *Supra*, IDLO, page 34, where it is mentioned that one-hundred per cent of Indian microfinance clients surveyed indicated that in the event of a complaint, their sole recourse was to the MFI management, or an internal MFI customer helpline.

²⁵ Economist Intelligence Unit (EIU), *Global Microscope on the Microfinance Business Environment*, EIU, Ltd. 2011.

²⁶ Such authorities could be for instance a consumer protection authority, the Central Bank, administrative agencies, local courts.

more as a potential threat to inspire recalcitrant debtors to pay, versus an actual debt collection mechanism.²⁷

Existence of alternative systems for dispute resolution

28. The Economist Intelligence Unit noted in its assessment of the business climates for microfinance in 55 countries that the lack of well-functioning dispute resolution systems was a common denominator in most countries surveyed. The report found that “where an established mechanism of dispute resolution does exist and can be accessed by microfinance clients, in many cases it does not work in practice — often because it is too costly, time-consuming, or is only available to a limited number of users.”²⁸ Similarly, the Consultative Group to Assist the Poor (CGAP) assessed 140 countries as part of a survey on “Financial Access” in 2010, and noted that while more than half of the countries do have a third-party recourse mechanism for consumer dispute resolution; such as an ombudsman or mediation, the effective implementation of same may be limited.²⁹

29. While stakeholders directly engaged in microfinance recognize that providing clients with efficient and fair dispute resolution mechanisms is essential for the proper functioning of the entire microfinance industry, their efforts to strengthen dispute resolution systems and improve access for clients are uniquely focused on in-house dispute resolution. Accion International, for example is a prominent microfinance industry actor that established a voluntary code of conduct for MFIs consisting of seven integral principles for client protection, including provision of an internal grievance resolution procedure.³⁰ More than 2,300 microfinance industry actors, including 714 financial services providers have signed this code of conduct, called the “Smart Campaign”.³¹ To date, however, there has not been a detailed analysis of the dispute resolution procedures put in place by MFIs taking part in the Smart Campaign. Nor has information been collected and compared on volumes and types of microfinance client complaints throughout the industry.

30. Also, the informal nature of microfinance, and the fact that a substantial number of MFIs remain unregulated by a prudential regulator in itself often limits recourse to the only existing redress mechanism for financial services disputes. Thus, even if the regulator provides a complaints window, an ombudsman or other mechanism for grievance redress, these facilities are generally not available to clients of unregulated MFIs. In India for example, those with a complaint against a commercial bank can have recourse to one of the 15 Ombudsmen of the Reserve Bank of India.³² This service, however is not available for clients of non-regulated MFIs. Likewise, in Colombia there is a Financial Consumer Defender whose

²⁷ *Supra*, IDLO, pages 65 and 110.

²⁸ *Id.*

²⁹ CGAP World Bank Group, *Financial Access 2010: The State of Financial Inclusion through the Crisis*, 2010 available at www.cgap.org/gm/document-1.9.46570/FA_2010_Financial_Access_2010_Rev.pdf.

³⁰ See www.smartcampaign.org/about-the-campaign/smart-microfinance-and-the-client-protection-principles.

³¹ See http://centerforfinancialinclusionblog.files.wordpress.com/2011/11/20111115_certification_proposal-for-public-comment_final.pdf.

³² The Reserve Bank of India Ombudsman offices can be found at www.rbi.org.in/Scripts/bs_viewcontent.aspx?Id=164.

mediation services are available to clients of regulated MFIs, but only when the MFI has elected to use the Defender of the Financial Consumer, and further agrees to be bound by its decision.³³ In Peru, there has been an attempt to connect microfinance clients with arbitration services.³⁴

31. Within the European Union, financial services ombudsmen have been established in most member States, and the UK ombudsman in particular publishes data annually on the volume and types of complaints received,³⁵ which has illustrated the intrinsic value of the ombudsman as a law and policymaking aid, in addition to a dispute resolution tool. Therefore, it would seem that a necessary precursor to developing new dispute resolution law and policy for microfinance would be to aggregate data which individual MFIs may already collect on the types of client complaints and how they are resolved, such as the UK Ombudsman does.

B. Types of disputes

32. Just as there is a scarcity of published research on the volume and types of complaints specific to the microfinance industry, there has also been little attention paid to the disputes of small businesses in developing countries, including how often they avail themselves of the courts or utilize out-of-court dispute resolution.³⁶

33. Studies by prominent international organizations, such as Microfinance Pricing Transparency, suggest that within the microfinance sector, a significant number of disputes may be caused by the industry's opaque pricing and unfair contracting policies.³⁷ IDLO also conducted an assessment of *de jure* vs. *de facto* microfinance consumer protection in place, which revealed that borrowers often had complaints related to incomplete and inaccurate disclosure of the terms of the agreement, and the MFIs' refusal to restructure debts during repayment difficulty.³⁸ Other studies of microfinance industry abuses focus almost entirely on inappropriate collection practices and theft from clients.³⁹ Also, in the event of a borrower default, it would appear to be in the interest of the MFI to mediate and attempt to restructure client loans by extending payment periods, or lowering instalment amounts during times of reduced cash flow from microbusinesses. In an analysis of that issue, however,

³³ *Supra*, IDLO, pages 68-69; Colombia, Law 1328 of 2009.

³⁴ This ADR initiative ("Huancayo initiative") was presented at the UNCITRAL Colloquium on Microfinance held in Vienna on 12-13 January 2011. It was indicated that there are 250,000 financial services disputes per year in Peru which are dealt with by the courts, estimating that each of the 60 regulated MFIs in Peru have 2,000 disputes annually.

³⁵ See www.financial-ombudsman.org.uk.

³⁶ In a survey of 30 Peruvian small business owners, entrepreneurs indicated that their impression of the judiciary lead them to modify their business conduct so as to avoid the need for judicial intervention to enforce contracts. See Herrero, Alvaro, and Henderson, Keith *The cost of resolving small-business conflicts: the case of Peru*, Inter-American Development Bank, 2004.

³⁷ Microfinance Transparency has developed a pricing calculator at www.MFTransparency.org so that the poor can insert all the costs, including insurance and withheld, or blocked portions of the loan used as collateral in order to determine the effective APR, or true cost of the loan.

³⁸ *Supra*, IDLO, pages 32-33; 62; 77; 79-80; 96-97 and 101.

³⁹ Zeija, Flavian, *The Legal Requirements of Profitability, Sustainability, and Loan Recovery by Arrest and Imprisonment: A Dichotomy between Concern for the Poor and Concern for the Rich in Uganda*, IDLO Voices of Development Jurists, 2009. Available at www.idlo.int/MF/Documents/Publications/60E.PDF.

IDLO found that MFIs did not appear to be interested in restructuring, despite expressed interest on the part of the client.⁴⁰ The act of restructuring would most likely salvage a client relationship (once a borrower has defaulted, new loans are not normally granted, and the client is effectively lost to the MFI). Mediation therefore would appear to be in both the MFI and the client's best interest versus a seizure and sale of the debtor's assets used as loan collateral, which was discussed in the initial segment of this paper.

C. Matters for consideration

34. The access to justice gap for the poor is so large that new, innovative and more efficient dispute resolution systems should be developed which are tailored to the low incomes, literacy levels, geographical and cultural constraints of the poor. When parties to a contract have unequal bargaining positions, misunderstandings and disputes are likely to arise. In developing countries, however, with low access to financial services for the poor, regulators rarely have the resources to allocate to financial services complaint resolution systems.⁴¹ Thus, the lack of third-party redress mechanisms appears to be an obstacle for both clients seeking resolution of complaints against MFIs, as well as for the financial institutions seeking to enforce and collect on valid debts.

35. At its forty-fourth session, the Commission⁴² noted that a favourable legal and regulatory framework for microfinance included the provision of fair, efficient, transparent and inexpensive procedures for resolution of disputes arising from microfinance transactions, and that the lack of such procedures for microfinance clients was an issue to be further considered. Therefore, the Commission may want to consider the following matters:

(a) Whether alternative dispute resolution systems like arbitration, mediation and conciliation may provide viable solutions for the economic resolution of the low-value disputes of the poor; and in particular, if such a system is developed, the questions of how it would be financed in order to remain independent, and how it would be accessed by MFI clients living in remote locations are all crucial aspects;

(b) Whether the microfinance industry needs to better understand the types of client complaints, and how they impact industry growth as a whole, and to engage the legal sector to assist in the development of redress mechanisms appropriate to the industry's needs. In that respect, a detailed assessment of the types and volumes of complaints in the industry is a prerequisite to determine whether alternative dispute resolution could be an effective means to resolve the disputes, and if so which form is best suited to the needs and lifestyles of the poor. Such a study could be done by UNCITRAL in conjunction with United Nations agencies such as UNDP and UNCDF, the World Bank's Consultative Group to Assist the Poor, Accion International or a prominent research institution or civil society actor interested in these matters; and

⁴⁰ *Supra*, IDLO, pages 33 and 64-65.

⁴¹ See Brix, Laura and McKee, Katharine, *Consumer Regulation in Low-Access Environments: Opportunities to Promote Responsible Finance*, CGAP Focus Note No. 60, February 2010.

⁴² *Official records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 242 and 246.

(c) Given the technological advances in the mobile banking and e-money sectors which are already used by MFIs in several countries to distribute loans, whether an online dispute resolution facility should also be studied to determine the feasibility of online dispute resolution (ODR) for microfinance related disputes. An ODR system has the potential to reach the poor residing in rural areas, though there may be a need for an extensive awareness raising campaign to accompany any such dispute resolution system.

IV. Electronic currency (E-money)

A. Prospects for financial inclusion

36. E-money can be a valuable bridge between the poor and financial services. E-money refers to value exchanged only electronically, using computer networks, the Internet and stored value systems (see A/C.9/698). To use e-money, a client converts actual currency to electronic money, usually at an agent of the service provider. The client may also access other financial services, such as linked savings accounts, and credit in the form of e-money. Growth in this sector has been very rapid in developing countries, where large percentages of the population are unbanked. According to figures presented at the UNCITRAL Colloquium, 364 million low-income, unbanked persons could be using mobile financial services by 2012.⁴³

B. State of the industry

37. There are approximately 130 mobile money initiatives in existence worldwide.⁴⁴ In developing countries, the cell phone has demonstrated its remarkable ability to reach remote, rural villages, where banks and even MFIs are not present due to high infrastructure costs.⁴⁵ Cell phone services providers have existing agent relationships with thousands of cash-in, cash-out shops throughout the country, which translates into the telecom-led e-money initiatives having a significant market advantage. Telecom agents are also accustomed to dealing with high volumes of low-value cash transactions.

E-money encourages telecom and financial sector collaborations

38. The relationship between telecoms and banks, however, as well as microfinance institutions is continually evolving. There have been several recent joint initiatives to provide a broader array of financial services via cell phones. For example, the international NGO CARE has partnered with Orange/Telkom Kenya and Equity Bank to provide savings accounts to village savings and loan

⁴³ See UNCITRAL A/CN.9/727.

⁴⁴ Dolan, Jonathan, *Accelerating the Development of Mobile Money Ecosystems*, Washington, D.C.: IFC and the Harvard Kennedy School, 2009.

⁴⁵ See also Access through Innovation Sub-Group of the G-20 Financial Inclusion Experts Group, *Innovative Financial Inclusion, Principles and Report on Innovative Financial Inclusion*, 3 May 2010, page 3 and pages 30-31.

associations (VSLA). Both deposit and withdrawal services are available through the use of Equity/Orange agents.⁴⁶

39. Recent events on the global financial scene have shown that self-regulation by financial institutions is often insufficient to protect and sustain the confidence of consumers. Thus it is critical that regulators pay close attention to the developments in e-money.

Central banks in developing countries are actively monitoring and engaging with non-bank e-money initiatives to develop proportional regulation

40. In both Kenya and the Philippines, where e-money initiatives are flourishing, regulators first *observed, engaged in dialogue with the industry, and learned*,⁴⁷ which allowed the regulators to gauge the potential impact and risks of e-money prior to determining how to regulate. Based on their observations, the Central Banks of both countries determined the appropriate level of supervision for e-money actors based on their activities, rather than the type of institution.

41. The Philippines subsequently published its e-money circular No. 649 of 2009⁴⁸ and Kenya's Central Bank issued a no-action letter regarding M-Pesa operations. To date, Kenya does not yet have regulation on e-money (but has published draft regulations).⁴⁹ Both Central Banks are widely credited for their regulatory prowess, not only with respect to e-money, but also for their commitment to financial inclusion.⁵⁰ As a result, both countries have a positive experience from the regulatory, market and consumer perspectives on e-money.

42. In the Philippines, Smart Money and Globe G-Cash (a bank linked and a telecom e-money product respectively),⁵¹ launched in 2003 and 2004 and have over 9 million subscribers cumulatively. Kenya's Safaricom, a mobile services company, had 14.91 million clients for its M-Pesa service as of June 2011, and it effected \$3.15 billion worth of transactions in a six-month period.⁵² Safaricom has subsequently partnered with Equity Bank Kenya to offer M-Pesa clients: an interest-bearing savings account and an international remittance service for the Kenyan diaspora to send money home (in partnership with Western Union), in addition to insurance products.

⁴⁶ CARE, Equity Bank and Orange Launch Partnership to Connect Community Savings Groups to Banks Using Mobile Phones, Press Release, March 16, 2012 available at www.care.org/newsroom/articles/2012/03/care-mobile-banking-services-kenya-20120316.asp.

⁴⁷ The G20 Principles for Innovative Financial Inclusion make explicit reference to a *test and learn* approach as an effective approach to managing innovation. See Access through Innovation Sub-Group of the G-20 Financial Inclusion Experts Group, *Innovative Financial Inclusion, Principles and Report on Innovative Financial Inclusion*, 3 May 2010, pages 24-25.

⁴⁸ Available at www.cgap.org/gm/document-1.9.44821/Circular%20649.pdf.

⁴⁹ www.centralbank.go.ke/downloads/nps/Electronic%20%20Retail%20and%20E-regulations.pdf.

⁵⁰ See UNCITRAL A/CN.9/727.

⁵¹ See also Access through Innovation Sub-Group of the G-20 Financial Inclusion Experts Group, *Innovative Financial Inclusion, Principles and Report on Innovative Financial Inclusion*, page 31.

⁵² *Safaricom Half-Year Results Presentation, November, 2011*, available at www.safaricom.co.ke/fileadmin/About_Us/Documents/Half%20Year%20Results%20September%202011.pdf.

Credit card company acquisitions in the e-money market

43. The large credit card companies are also establishing e-money services. One global credit card company is making acquisitions of existing e-money platforms. For example, in June of 2011, Visa purchased a South African e-money platform provider, *Fundamo*, which had a subscriber base of five million and predicted growth to be more than 180 million customers.⁵³ In December 2011, Visa also contracted with the Government of Rwanda to provide financial services to the government and to simultaneously roll out financial services as well as literacy programmes to Rwandan citizens.⁵⁴ If the acquisitions and (possibly exclusive) agreements with governments continue, there may very well be a negative impact on competition among e-money providers before the sector has had a chance to mature. Thus, competition authorities should be closely monitoring the sector's development. Consideration should also be given to the requirement of interoperability of networks so as to allow new players to enter the market. Effectively, this would allow the consumer to send money from any service provider to a user of another service provider, without using multiple SIM cards or e-money accounts.

Potential risks of e-money to the consumer

44. Potential risks to e-money clients include the possibility that:

- (a) A significant portion of a client's income stored on a cell phone or a prepaid card could be lost through hacking and fraud;
- (b) A provider's (or agent's) liquidity problems, insolvency or bankruptcy could disrupt the client's ability to access funds, temporarily, or perhaps even permanently;
- (c) Increased access to credit products could also lead to increased levels of over-indebtedness for those who may already be living at or near the poverty line; and
- (d) Personal, financial data and spending histories are increasingly being shared with merchants, which raises privacy concerns.⁵⁵

⁵³ *Visa acquires Fundamo, signs new agreement with Monitise*, Visa Press Release, 9 June 2011 available at <http://corporate.visa.com/media-center/press-releases/press1128.jsp>.

⁵⁴ *Visa-Rwanda partnership to drive electronic financial services*, Visa Press Release, 5 December 2011 available at <http://pressreleases.visa.com/phoenix.zhtml?c=215693&p=irol-newsarticlePR&ID=1635856&highlight=>. Visa aspires to earn 50 per cent of its revenue outside of the US market by 2015. Visa Press Release, 5 December 2011. The Rwandan market is interesting to e-money and other financial services providers like Visa because GDP per capita in Rwanda is expected to rise to \$1,000 in 2020 from \$220 in 2000. The financial inclusion concern, however, relates to the blurring the line between payment services providers and credit providers. The (over) extension of credit to fairly modest earners can have serious implications on a nation's economy and culture.

⁵⁵ As evidenced already by the Internet and advances in smartphone technology, companies will not only track consumer search patterns, e-mail content (Gmail and Hotmail) and purchasing patterns, sending targeted advertisements based on the consumers' past purchases, but they may also track a consumer's physical movements.

C. Emerging regulatory issues in a dynamic industry

45. Non-bank e-money service providers seem to be evolving into full-fledged financial services providers including through partnerships with prudentially regulated financial services institutions.⁵⁶ However, how should a regulator approach the complex task of dealing with non-bank e-money providers, like telecoms and credit card companies, which do not partner with regulated financial institutions, but still provide bank-like services? And, could stored value ever become a savings deposit account?

46. To date, all countries with existing mobile financial services initiatives require 100 per cent of the customers' electronic value to be backed by deposits in a regulated bank.⁵⁷ And, thus far, those countries with more mature e-money initiatives like the Philippines, Kenya and Malaysia have determined that e-money is not a deposit, per se, but rather transactional funds remaining on an account awaiting transfer. No State, however has specifically stated that a telecom which maintains e-float on deposit in a regulated bank *could not elect* to pay interest on the stored value. Permitting the payment of interest on stored value accounts backed 100 per cent by deposits in regulated financial institutions may be an additional tool towards financial inclusion for the poor.

47. Prominent financial inclusion proponents from CGAP have also spoken out in favour of allowing non-bank e-money providers to pay interest, provided the funds are protected by insurance schemes.

Financial sector integrity and financial crimes concerns

48. On the issue of the integrity of the financial system, there are certainly anti-money-laundering and terrorism financing concerns to be addressed. E-money, though, unlike cash transactions does allow for monitoring of suspicious activity, which is not possible with cash payments. Again, Kenya has handled this issue initially through a voluntary reporting agreement, whereby the telecoms submit reports, including on suspicious transactions and patterns to the Central Bank. There is also a limit to how much money can be held and sent via Safaricom.⁵⁸ Further, Kenya also handled the "know your customer" requirements retroactively by mandating that each SIM card be registered to one user; those who did not provide adequate identification to the issuing company would have their account invalidated (as a large percentage of the cards were sold prior to the existence of M-Pesa when no documentation was required).⁵⁹ South Africa, Tanzania and Ethiopia also require

⁵⁶ Colombia, for example has passed several decrees to stimulate microsavings through the offering of simplified opening procedure for traditional savings accounts for small savings account holders (Circular Externa 053/09) and even decrees on e-savings accounts (decrees 4590/08 and 1349/09). Permanent Mission of Colombia Office to the United Nations Communication EMD-096, 30 January 2012.

⁵⁷ *The Mobile Financial Services Development Report 2011*, World Economic Forum USA, Inc. 2011 available at www.weforum.org/reports/mobile-financial-services-development-report-2011.

⁵⁸ Mutegi, M., *Kenya: Safaricom in Talks to Raise M-Pesa Limit*, AllAfrica.com, 4 October 2010, available at <http://allafrica.com/stories/201010080127.html>.

⁵⁹ *It's now Mandatory to register your SIM Card*, Communications Commission of Kenya, Press Release, 21 June 2010, available at www.cck.go.ke/news/2010/news_21june2010.html.

the mandatory registration of SIM numbers to combat financial crimes and terrorism.⁶⁰

Security of the e-money platform for the client

49. Integrity of the software at use by telecom e-money providers is also a priority. In Kenya this was addressed by Safaricom submitting to an intensive system audit by a third-party consulting company per the Central Bank's request.⁶¹ This issue could certainly be addressed as credit card companies have in the past done with fraud protection, as well as insurance schemes. Further, having a fair and clearly communicated dispute resolution system for clients should be a prerequisite.

Legal status of e-money and transactions therein

50. Similarly, as microenterprises begin to conduct more of their business transactions with e-money, what is the legal status of the payments concluded uniquely with e-money? Is the client required to accept e-money as opposed to cash for refunds?⁶² This is also an emerging topic, on which few countries have applicable legislation.

D. Matters for consideration

51. The critical e-money issue for financial inclusion may be whether non-bank e-money providers can pay interest on stored value. Because leading e-money sector actors are telecoms and credit card companies, UNCITRAL could explore with regulators how to safely allow these institutions to offer interest bearing savings accounts and insurance, perhaps regulating according to the types of financial services being provided. Likewise, non-bank e-money providers desiring to offer credit products should have measures in place to assess the suitability of the proffered financial service for the clients' needs and ability to repay.⁶³

52. The selling of inappropriate financial services can lead to over-indebtedness which has caused repayment crises in quite a few developing countries' microfinance sectors. Thus, it would seem timely for the international community to develop best practices regarding responsible lending of e-credit products. UNCITRAL could be instrumental in initiating this dialogue among nations.

53. Further, because e-money is the result of an emerging technology, time may reveal security weaknesses. Regular audits of the security of the software platform,

⁶⁰ Id.

⁶¹ Alliance for Financial Inclusion, *Enabling mobile money transfer: The Central Bank of Kenya's treatment of M-Pesa*, 2010, page 5.

⁶² In Singapore, the regulator expressed intent that merchants would be obliged to accept e-money payments by 2008. Electronic Money: the new legal tender, ZDnet.com, 21 December 2000 available at <http://m.zdnet.com.au/electronic-money-the-new-legal-tender-120107819.htm>. Nigeria is also making efforts to become a cashless society. Therefore, presumably e-money will become legal tender by default.

⁶³ See the National Credit Act in South Africa mandates. Thus far, South Africa appears to be the only country which mandates that financial institutions are responsible for ensuring the financial service provided is appropriate to the client's needs. Republic of South Africa, No. 34 of 2005; National Credit Act, 2005 available at www.ncr.org.za/pdfs/NATIONAL_CREDIT_ACT.pdf.

including client data privacy protocols, should be undertaken by external security experts. UNCITRAL could be instrumental in creating guidelines on the integrity of e-money platforms and determining the frequency and focus of systems audits.

54. The Commission may wish to consider a study of the above-mentioned issues to determine appropriate legislative guidelines, or recommendations with regard to a harmonized approach to regulation of non-bank financial institutions which offer e-money services beyond mere transfers of money and which balances: (a) financial inclusion needs with (b) the need to protect vulnerable client populations in a globally interconnected, and still fragile economy.

C. Selected legal issues impacting microfinance — Observations by the New York State Bar Association (NYSBA) International Section

(A/CN.9/757)

[Original: English]

The New York State Bar Association (NYSBA) International Section submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) observations concerning UNCITRAL's role in microfinance. The text of the observations is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

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Annex

I. Introduction

1. Microfinance and issues broadly relating to financial inclusion have come to the forefront of international standard setting bodies (SSBs) that provide guidance to Governments and regulators regarding the conduct, practices, and governance of microfinance institutions (MFIs) and their investors. As such, legal and regulatory issues respecting microfinance are ripe for consideration by UNCITRAL, whose mandate includes promoting the harmonization and modernization of commercial law by drafting international standards. Such work promotes the rule of law and advances progress toward the United Nations Millennium Development Goals. UNCITRAL has initiated information gathering processes in this area, such as the colloquium on microfinance held in January 2011 and distribution of the questionnaires that member States are currently completing with respect to microfinance practices in their respective jurisdictions.

2. UNCITRAL's success in providing guidance toward the creation of an effective and predictable legal framework will particularly benefit developing country economies where microfinance sector growth has advanced the need for legal structures tailored to the idiosyncrasies of MFIs; such legal developments will promote economic growth and trade. Recognizing the importance of microfinance in the national economy and poverty alleviation strategies of these countries, UNCITRAL's timely efforts can create an enabling environment for markets guided by sound legal principles and transparent regulatory systems.

3. In its 2011 report to the General Assembly, the 44th Commission identified four topics as substantive legal areas that other SSBs are not addressing.¹ The topics the Commission selected for further study (hereafter called “the Identified Issues”) are: (1) Overcollateralization and the use of collateral with no economic value; (2) Electronic-money, including its status as savings; whether “issuers” of e-money were engaged in banking and hence what type of regulation govern them; and the coverage of such funds by deposit insurance schemes; (3) Provision for fair, rapid, transparent and inexpensive processes for the resolution of disputes arising from microfinance transactions; and (4) Facilitating the use of, and ensuring transparency in, secured lending to microenterprises and small and medium-sized enterprises.²

4. The Commission determined that UNCITRAL should not duplicate international efforts already in progress relating to financial inclusion. In fact, the work of other SSBs shows no particular focus on global harmonization of the Identified Issues. Therefore, UNCITRAL has an important role in covering these areas.

5. The Secretariat’s April 1, 2011 Note³ surveyed eight SSBs addressing issues of inclusive finance, and a White Paper prepared by the Consultative Group to Assist the Poor (CGAP) on behalf of the G-20’s Global Partnership on Financial Inclusion surveyed the work of five additional SSBs.⁴ While this literature demonstrates convergence on matters of insurance, lending, and prudential regulation of deposit-taking institutions, the Identified Issues have not enjoyed the same level of scrutiny.⁵ For example, the Financial Action Task Force (FATF) is an intergovernmental body that develops and promotes international policies to combat money-laundering and terrorism financing. MFIs have long confronted issues of the application of FATF standards to the microfinance scheme, often a poor fit that thwarts the growth of the industry. To these ends, FATF addresses issues of proportionality in the standard “know your customer” regime for monitoring potential money-laundering transactions. While FATF addresses the policy issues of formalizing informal commerce vis-à-vis these concerns, the central legal issues are less scrutinized.

6. UNCITRAL has the opportunity to develop consensus among member States regarding model laws accompanied by standardized contract terms for microfinance-related transactions, while it also deals with various legal issues of a technical nature, such as new payment methods. Related concerns include the relative applicability of the laws of sending and receiving countries for international money transfers; the legal constitution of savings; and establishment of standard

¹ General Assembly, Official Records, *Sixty-sixth Session, Supplement No. 17*: Report to UNCITRAL, *Forty-fourth Session* (27 June-8 July 2011) A/66/17, 246.

² *Id.*

³ UNCITRAL, *Forty-fourth Session*, Legal and Regulatory Issues Surrounding Microfinance, Note by Secretariat (Vienna, 27 June-8 July 2011) A/CN.9/727.

⁴ Global Standard-Setting Bodies and Financial Inclusion for the Poor: Toward Proportionate Standards and Guidance, A White Paper Prepared by CGAP on Behalf of the G-20’s Global Partnership for Financial Inclusion.

⁵ Non-governmental organizations have been advocating for best practices relating to similar topics, the outcomes of which can inform the Commission. For example, see MFTransparency (www.mftransparency.org); see also The Smart Campaign, Client Protection Principles (www.smartcampaign.org); see also The Microcredit Summit Seal of Excellence (www.microcreditsummit.org/about/the_seal_of_excellence).

legal norms that balance the conflicting interests of protection of international investors, MFIs, and microborrowers and their local communities. The Commission can also develop relevant special choice of law rules in coordination with the Hague Conference on Private International Law (HCCH) and UNIDROIT, as necessary. Microfinance would benefit from UNCITRAL leadership in the area of mobile money, since, in the event of default, such alternative payment systems simplify the transfer of accounts for servicing of outstanding loans, which correspondingly encourages investment.⁶ This effort could include development of standard e-transaction provisions that build on existing UNCITRAL e-commerce work. UNCITRAL guidance in this context would both assist countries struggling with these types of paradigms and increase investor confidence, thereby facilitating trade.

II. Transparency as integral to financial inclusion

7. Among the Identified Issues, transparency in lending is particularly apt for consideration by UNCITRAL. Legislation to regulate financial institutions that primarily serve small borrowers is not well developed in many jurisdictions. The economically vulnerable communities served by microfinance present a moral imperative for fair lending standards. Given the increase in microfinance activities worldwide,⁷ a model law or legislative guide drafted by the Commission would provide a valuable resource to developing economies. As observed by the Secretariat, “pragmatic guidance on microfinance regulation from an institution such as UNCITRAL which is legitimated by considering the input from its Commission’s member State delegates and creating consensus-oriented legal instruments could prove highly valuable for countries with less developed regulatory regimes and fewer resources to allocate to consideration of the issues involved in enacting microfinance.”⁸

8. Regarding the transparency of financial products and services:

(i) *Mandatory Savings Accounts.*⁹ Some MFIs require that borrowers deposit a portion of their loan into a mandatory savings account with the lending MFI. These accounts are often locked (i.e., borrowers cannot access them at their discretion) rather than being available “on demand” to the borrower. Most MFIs do not calculate the amount that is in the savings account as part of the costs that they disclose to the borrower. In addition, some MFIs charge maintenance fees on these savings accounts, which fees are also not consistently disclosed. Local law

⁶ See, *Throwing in the Towel: Lessons from MFI liquidations*, Daniel Rozas (September 20, 2009) at www.microfinancefocus.com/news/wp-content/uploads/2009/09/Throwing-in-the-Towel.pdf.

⁷ “While the overall amount loaned by MFIs is still a small proportion of the total of funds loaned in the developing world, there is evidence to suggest that in many countries the number of loans granted by, and customers served by, MFIs exceed that of banks.” UNCITRAL, *Forty-third session*, Microfinance in the context of international economic development, Note by Secretariat (NY, 21 June-9 July, 2010) A/CN.9/698 at paragraph 15.

⁸ Id. at paragraph 63.

⁹ See Id. at paragraph 54: “It appears that many MFIs are now demanding collateral for loans by means of “forced deposits,” whereby a percentage of the loan is held back by the lender, often without interest being paid by the lender on the amount held back. This affects the overall effective rate of interest, although borrowers are often not in a position to fully appreciate it”.

treatment of whether these savings accounts serve as collateral for a loan varies; even where they are considered collateral, many states do not have effective registries making such collateralization less useful to investors.¹⁰ These weaknesses are notable as, in the event of an MFI failure or bankruptcy, collateral is an influential factor in borrower repayment.¹¹ Thus, the issue of savings accounts cuts across several of the Identified Issues. An UNCITRAL-led set of guidelines for disclosure standards under a model law accompanied by standard contract terms can solve problems in the use of mandatory savings accounts and achieve consistent treatment of savings accounts as collateral by MFIs. Such solutions would benefit all parties and nurture responsible growth of the industry;

(ii) *Pricing Transparency and Standardized Disclosure Forms.* For competition to increase among MFIs, borrowers need to have access to information to adequately assess products the MFIs offer. For microcredit, Annual Percentage Rates (APRs) can provide a valuable method for borrowers to compare loan products. Mandated truth in lending laws can require that MFIs calculate APRs to include not only the interest paid on the loan, but also all fees, the price of obligatory insurance (where such insurance is required), and the cost of compulsory savings accounts, which may effectively act as security deposits. Furthermore, to facilitate comparisons across various MFI products, local laws can require MFIs to provide standardized disclosure and repayment schedule forms and contracts. UNCITRAL can foster greater and more consistent transparency in lending by harmonizing lending contract terms and related legal norms under a model law. Such work promotes domestic and international investment in MFIs as legal predictability reduces risks, which in turn should bring economic benefit to the microborrowers;

(iii) *Flat Balance vs. Declining Balance Interest Rate Calculation Methods.* The flat balance interest rate calculation method is one in which a lender charges the borrower interest on the original amount of the loan for its entire term, irrespective of amounts the borrower has already repaid. The declining interest rate method takes into consideration the repayment amounts and charges interest on the declining principal amount of the loan. For borrowers to compare prices among MFIs, all MFIs need to use the same interest rate calculation method. From a borrower's perspective, the flat balance interest rate calculation method means that borrowers pay more for a loan than the amount originally advertised. For instance, a loan promoted at "2 per cent a month" would have an annualized true price of 24 per cent if calculated on a declining balance but an annualized true price in the range of 40-48 per cent — nearly double — if calculated "flat". UNCITRAL work concerning microfinance can consider methods for encouraging consistent use of the

¹⁰ UNCITRAL should mobilize the current work of Working Group VI (security interest) on legislative guidance on security interest registry systems if it proceeds with the microfinance agenda. See also, *Disintermediating Avarice: A Legal Framework for Commercially Sustainable Microfinance*, Steve L. Schwarcz, *University of Illinois Law Review* (Vol. 2011, p. 1165).

¹¹ See, Rozas, *supra* footnote 6. Despite the fact that the cornerstone of microcredit is non-collateralized loans, Rozas' research on MFI liquidations indicates that collateralization does incentivize loan repayment even among microborrowers. He states "... in this study, effective collateral has proved to be the most reliable predictor of client repayment after their MFI ceased making new loans".

declining interest rate calculation method, or at least clear disclosure, so as to avoid predatory practice.¹²

9. UNCITRAL has a variety of ways to nurture inclusive finance through model laws, legislative guidance, and other methods focusing on specific industry transactions and contracts that accommodate and promote financial services and products to underserved parties.

III. The implementation of future opportunities

10. The cross-disciplinary nature of microfinance lends itself to a variety of opportunities within UNCITRAL. Assignment of the microfinance agenda to a specific working group to develop such legislative texts, guides, standards, and contractual terms, as appropriate, is a desired next step when UNCITRAL member States reach a consensus on the related legal issues. However, if UNCITRAL deems the formation of a new working group premature, the Commission should consider the best alternative methods for moving the subject matter forward, including using the resources of external organizations and seeking special funding outside the standard budgetary mechanisms. As yet further options, the Commission may consider separating some of the Identified Issues for consideration by separate working groups; commencing another colloquium or expert group; or collaborating with other standard-setting bodies in developing model rules and contracts promoting microfinance.

11. Numerous stakeholders can contribute to this process, including professional organizations of lawyers, academia, and advocacy. UNCITRAL should leverage the knowledge and expertise of these parties, together with its questionnaire results and the relevant Commission decisions, to boost its efforts to develop legal tools that promote microfinance.

¹² Some jurisdictions have already outlawed the use of flat interest. See: www.mftransparency.org/pages/wp-content/uploads/2011/10/Case-Study_Cambodia_Regulation-Outlawing-Flat-Interest.pdf.

**D. Possible future work in the area of international contract law —
Proposal by Switzerland on possible future work by UNCITRAL in
the area of international contract law**

(A/CN.9/758)

[Original: English]

I. Introduction

1. In preparation for the forty-fifth session of the Commission, the Government of Switzerland submitted to the Secretariat a proposal in support of future work in the area of international contract law. The English version of that note was submitted to the Secretariat on 2 May 2012. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

I. Executive Summary

The global aggregate volume of trade of goods has again significantly increased over the last decade. Although modern means of communication facilitate access to foreign law, differences in domestic law of contracts remain a burden on international trade. International endeavours such as the 1980 Convention on Contracts for the international Sale of Goods (CISG) have greatly improved the level of legal certainty for many parties to international sale of goods contracts. However, that Convention leaves important areas to applicable domestic law. Over the last 30 years, numerous endeavours have been undertaken to elaborate sets of uniform contract law on a regional scale. Yet, where successful, those efforts may have made international contracting even more complex. Having said this, they have evidenced the need for harmonization and may have cast ground work for further thought.

Today, Switzerland believes that time has come for UNCITRAL (i) to undertake an assessment of the operation of the 1980 Convention on Contracts for the international Sale of Goods and related UNCITRAL instruments in light of practical needs of international business parties today and tomorrow, and (ii) to discuss whether further work both in these areas and in the broader context of general contract law is desirable and feasible on a global level to meet those needs.

II. Introduction

Due to globalization, the overall development of international trade over the last half century is startling. Without having regard to the dramatic decrease of world merchandise exports in 2009, which however was basically equalized in 2010, it may be useful to have a look at the demonstrated trend up to 2008. World Trade Organization figures (WTO) for 2008 indicate that worldwide merchandise export trade amounted to USD 15,717 billion and worldwide merchandise import trade to

USD 16,127 billion. These figures are approximately 100 times more than 50 years ago and more than 10 times the level at the time of the signing of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1980. The average annual growth from 2000 to 2008 was more than 5 per cent for both exports and imports worldwide. No longer is the highest growth found in North America, Europe and Japan, but instead it is the transition economies from different points of the globe — particularly China, Brazil, Russia, and some African countries.

It goes without saying that different domestic laws form an obstacle for international trade as they considerably increase transaction costs for market participants. Different surveys conducted during the last years revealed that traders themselves conceive differences in contract law as one of the main obstacles for cross-border transactions. They include the difficulty in ascertaining the content of an applicable contract law, obtaining legal advice, negotiating the applicable law as well as adapting standard terms to different domestic laws. Unsurprisingly, trade has always been the motor for harmonization and unification of contract law in particular since the 19th century starting on a domestic level and turning to the international level in the 20th century. Notably, in the area of sales law, in the 1960s the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Uniform Law on the International Sale of Goods (ULIS) were the first endeavours in unifying sales law at an international level.

Today's international sales practice shows that contracts — by the choice of the parties — tend to be governed by a closed circle of domestic laws, even though those laws may not necessarily be suitable to adequately govern international contracts. In Switzerland's view, this is evidence that UNCITRAL ought to discuss and assess whether the practical needs of today's and tomorrow's international business communities might not be better served by uniform rules covering the full array of legal issues that arise in a contractual business to business (b2b) relationship.

III. United Nations Convention on Contracts for the International Sale of Goods (CISG)

It was exactly against this background that UNCITRAL started working on the unification of sales law in 1968, culminating in the Convention on Contracts for the International Sale of Goods (CISG) which entered into force on 1 January 1988. The CISG proved to be the most successful international private law convention worldwide. Today there are 78 contracting States with the number continuously increasing. According to WTO trade statistics, nine of the ten largest export and import nations are contracting States, with the United Kingdom of Great Britain and Northern Ireland being the only exception. It can be assumed that approximately 80 per cent of international sales contracts are potentially governed by the CISG.

Moreover, a truly great success is the strong influence the CISG has exerted at both the domestic and international level. The Uniform Act on General Commercial Law by the Organization for the Harmonization of Business Law in Africa (OHADA) in its sales part is in many respects practically a transcript of the CISG. The UNIDROIT Principles of International Commercial Contracts, the Principles

of European Contract Law, the Draft Common Frame of Reference and now the Draft Common European Sales Law are all modelled on the CISG. Furthermore, the EC Consumer Sales Directive heavily draws on the CISG. Similarly, the Sale of Goods Act in the Nordic Countries, the modernized German Law of Obligations, the Contract Law of the People's Republic of China and other East Asian Codifications, and the majority of the recent post-Soviet codifications in Eastern Europe, Central Asia, and in two of the Baltic States build on the CISG. Likewise, the draft for a new Civil Code in Japan follows the CISG. It is reported that in developing countries the CISG is used to teach traders the structures of contract law so as to improve their level of sophistication.

Despite its worldwide success, the CISG is merely a sales law convention that nevertheless covers core areas of general contract law. In addition to the obligations of the parties and typical sales law issues (e.g. conformity of the goods, passing of risk etc.), it contains provisions on the formation of contracts and remedies for breach of contract. Still it remains a piecemeal work, leaving important areas to the applicable domestic law.

IV. Other UNCITRAL endeavours

In addition to the CISG, UNCITRAL has embarked upon the unification in many other areas of international trade. Some of these instruments again touch upon various questions of general contract law,¹ especially the 1974 Convention on the Limitation Period in the International Sale of Goods, the 1983 Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, the 1992 UNCITRAL Legal Guide on International Countertrade Transactions, and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. However, this still leaves important areas to domestic law.

¹ 1974 Convention on the Limitation Period in the International Sale of Goods; 1978 United Nations Convention on the Carriage of Goods by Sea — the “Hamburg Rules”; 1980 United Nations Convention on International Multimodal Transport of Goods; 1983 Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance; 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes; 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade; 1992 UNCITRAL Legal Guide on International Countertrade Transactions; 1992 UNCITRAL Model Law on International Credit Transfers; 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit; 1996 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, with additional article 5 bis as adopted in 1998; 2001 UNCITRAL Model Law on Electronic Signatures with Guide to Enactment; 2001 United Nations Convention on the Assignment of Receivables in International Trade; 2005 United Nations Convention on the Use of Electronic Communications in International Contracts; 2007 UNCITRAL Legislative Guide on Secured Transactions; 2007 Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods; 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea — the “Rotterdam Rules”; 2010 UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property.

V. International initiatives in the area of general contract law

During the last 30 years, there have been numerous endeavours around the globe to elaborate sets of uniform contract law.

1. UNIDROIT

On a global scale, the UNIDROIT Principles of International Commercial Contracts (PICC) are probably the best-known example of an international venture to harmonize general contract law. Their 1994 version mostly covered areas already dealt with under the CISG, and included validity issues. The 2004 version added issues such as the authority of agents, contracts for the benefit of third parties, set-off, limitation periods, assignment of rights and contracts, and transfer of obligations. Most recently, the 2010 version contains a chapter on illegality and a section on conditions as well as detailed rules on the plurality of obligors and obligees and on the unwinding of contracts. In short, the PICC 2010 now cover all areas that are perceived as contract law in most legal systems.

There is no doubt that the substantive qualities of the PICC will constitute an important source of inspiration for any future work of UNCITRAL on the assessment of its own instruments as well as in the broader context of related issues of general contract law. Beyond this, future UNCITRAL work will greatly benefit from the PICC's experience in permeating legal practice. In particular, UNCITRAL may wish to remain conscious that many courts will decline to give effect to a choice of law in favour of a soft law instrument. Also UNCITRAL may wish to discuss early on whether a mere opt-in scheme would be desirable in light of the problems described above.

2. Regional endeavours

On a regional level, a number of initiatives can be discerned.

Several approaches can be found in Europe which all aimed at a European Civil Code or at least a European Contract Law. First and foremost, the Principles of European Contract Law (PECL) shall be mentioned here. Starting with preparatory work in the 1980s, PECL were published in three parts (1995, 1999, 2003), Part I covering performance, non-performance and remedies, Part II covering formation, agency, validity, interpretation, content and effects of contracts, and Part III covering plurality of parties, assignment of claims, substitution of the debtor, set-off, limitation, illegality, conditions, and capitalization of interest. The PECL have a clear European focus, but also take into account the US-American Uniform Commercial Code as well as the Restatements on Contracts and Restitution. Like the PICC, the PECL are so-called soft law. Although the parties at least in arbitration may choose the PECL, there are no reported cases where this has happened.

More recently, the Study Group on a European Civil Code and the Research Group on EC Private Law published the Draft Common Frame of Reference (DCFR) in 2009. In contrast to PICC and PECL, the DCFR not only addresses general contract law but virtually all matters typically addressed in civil codes except family law and law of inheritance. The DCFR was, however, met with severe criticism not only with regard to the general idea of the project but especially with regard to

drafting and style as well as specific solutions in the area of general contract and sales law.

Building on the DCFR, the European Commission published a proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) in October 2011. Thus, the idea of a general contract law on the European level was not pursued anymore but rather narrowed down to sales law. The content of CESL is almost identical to that of the CISG and the United Nations Limitation Convention with additional provisions on defects of consent, unfair contract terms, pre-contractual information duties, and contracts to be concluded by electronic means. Most notably, in contrast to the CISG, CESL not only applies to b2b contracts but is in fact primarily aimed at contracts with consumers. CESL, too, is an opting-in instrument. The future of this instrument is yet to be seen.

In Europe, a few more private initiatives undertook similar projects, among them the Academy of European Private Lawyers that issued the Preliminary Draft for a European Code (2001) and the Trento Common Core Project.

In Africa, first regard is to be given to the OHADA's Uniform Act on General Commercial Law (1998, amended 2011). As mentioned above, the sales part of this act strongly relies on the CISG, although it contains certain modifications. In addition to this act, OHADA initiated works on a Uniform Act on Contract Law. A draft was prepared in cooperation with UNIDROIT and published in 2004, heavily drawing on PICC. At the time being, the future of this project is uncertain. Considerations for the harmonization of contract law based on the current international experience are also voiced in the framework of the East African Community.

Another recent private initiative aiming at the elaboration of Principles of Asian Contract Law (PACL) can be found in Asia since 2009. Among others, participants come from Cambodia, Viet Nam, Singapore, China, Japan, and South Korea. Until today, the chapters on formation, validity, interpretation, performance and non-performance of the contract have been finalized.

Likewise, in Latin America, general contract principles are being developed since 2009 within the framework of the Proyecto sobre Principios Latinoamericanos de Derecho de los Contratos hosted by a Chilean university. The countries covered up to now are Argentina, Uruguay, Chile, Colombia and Venezuela (Bolivarian Republic of). However, the European approach seems to be considered as well.²

3. International Chamber of Commerce

For decades, important contributions to the harmonization of international trade law have emanated from the International Chamber of Commerce (ICC). As far back as 1936, the ICC published the International Commercial Terms (Incoterms®). Their latest version, the 8th edition, dates from 2010. Although in many sales contracts they are agreed upon and thus being of utmost practical importance, Incoterms® cover only a small fraction of the parties' obligations in an international

² Along these initiatives, a trend aiming at building common regional law by using global texts also exists, for instance in the framework of the North American Free Trade Agreement (NAFTA), and now also in the framework of the Dominican Republic — Central America Free Trade Agreement (DR-CAFTA).

sales contract. With the Uniform Customs and Practice for Documentary Credits (UCP), the ICC has created another important instrument to facilitate international trade. Finally, the ICC provides innumerable model contracts and clauses for use in various types of international commercial transactions.

VI. Desirability: UNCITRAL to assess operation of CISG and desirability of further harmonization and unification of related issues of general contract law

Switzerland expects the number of CISG contracting states to keep rising. Despite this worldwide success in bringing about unification of sales law, the CISG cannot satisfy all the needs of the international commercial community in relation to contract law.

The shortcomings of the CISG firstly relate to the areas not at all covered by the Convention.³ Furthermore, many issues that were still highly debated in the 1970s had to be left open in the CISG (e.g. the problem of battle of the forms, specific performance, and applicable interest rate). Some areas covered by the CISG have in the meantime proven to need more detailed attention, such as the rules on unwinding of contracts. Finally, conventions meant to supplement the CISG, such as the 1974 United Nations Convention on the Limitation Period in the International Sale of Goods and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts, have not attracted as many members as the CISG, thereby diminishing their unifying effect.

Switzerland is of the view that time has come for UNCITRAL to reflect on these issues of general contract law in the context of international sales — and possibly other types of — transactions from a global perspective. Regional endeavours to harmonize and unify general contract law cannot meet the needs of international trade. Rather, different legal regimes in different regions lead to fragmentation. Instead of saving transaction costs and thus facilitating cross-border trade, international contracting may become even more complicated. Regional unification adds yet another layer to domestic rules and the well-established instrument of the CISG. Additionally, in many instances, not only does the terminology used in the general contract law instruments differ from that of the CISG, which in itself leads to confusion; frequently, there will also be contradicting solutions to one and the same legal problem. Finally, regionalization of legal systems reduces the number of cases decided on a truly international level and hence has a negative impact on the predictability of the outcomes.

Given its mandate, UNCITRAL clearly seems the most appropriate forum for such a project. According to General Assembly Resolution 2205 (XXI), para. 8: “The Commission shall further the progressive harmonization and unification of the law of international trade by: (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws [...].”

³ Especially, the CISG does not deal with agency, validity questions such as mistake, fraud, duress, gross disparity, illegality, and control of unfair terms, third party rights, conditions, set-off, assignment of rights, transfer of obligations, assignments of contracts, and plurality of obligors and obligees.

VII. Feasibility of further work in the area of international contracts

Future work in the area of general contract law could cover a considerable array of issues.⁴ At this point, work should start with the identification of the areas where a practical need for UNCITRAL work is felt that would be complementary to existing instruments. At the same time and possibly in parallel, UNCITRAL should carefully discuss what particular form UNCITRAL's future work on general contract law might take. Indeed, what delegations are able and willing to agree to on substance is often closely linked to the question of the possible form of an instrument.

General contract law belongs to the core of private law in any domestic legal system. It has usually developed in a long tradition. It might therefore be wise for UNCITRAL, given its mandate, to focus its discussions on international commercial contracts only, without interfering with questions related to purely domestic contracts.

VIII. Conclusion

As has been shown, there is an urgent need for a global reflection on the further unification of contract law beyond the endeavours already carried out by UNCITRAL. In light of the above, Switzerland proposes that UNCITRAL give a mandate for work to be undertaken in this area.

Switzerland looks forward to fruitful debates on the scope, timing, form and nature of such work, including the question of coordination with international organizations and institutions active in related fields.

⁴ In particular: **general provisions**, among others: freedom of contract, freedom of form; **formation of contract**, among others: offer, acceptance, modification, discharge by assent, standard terms, battle of forms, electronic contracting; **agency**, among others: authority, disclosed/undisclosed agency, liability of the agent; **validity**, among others: mistake, fraud, duress, gross disparity, unfair terms, illegality; **construction of contract**, among others: interpretation, supplementation, practices and usages; **conditions**; **third party rights**; **performance of contract**, among others: time, place, currency, costs; **remedies for breach of contract**, among others: right to withhold performance, specific performance, avoidance, damages, exemptions; **consequences of unwinding**; **set-off**; **assignment and delegation**, among others: assignment of rights, delegation of performance of duty, transfer of contracts; **limitation**; **joint and several obligors and obligees**.

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.

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat at the following address:

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P.O. Box 500
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They may also be accessed through the UNCITRAL homepage on the Internet at 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.9/753)

[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).¹

2. In its resolution 66/94 of 13 January 2012, 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

¹ *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

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 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-fifth session, see A/CN.9/751).

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-fourth session in 2011 (A/CN.9/724 of 29 March 2011), and reports on the development of resources to assist technical cooperation and assistance activities.

7. A separate document (A/CN.9/749) 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. 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

11. The Secretariat's continued participation in the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business Project (Enforcing Contracts) offers an example of cooperation among States, an international organization and the Secretariat. That project, carried out in cooperation with the Ministry of Justice of the Republic of Korea, aims at strengthening the legislative and institutional framework for the enforcement of contracts in APEC economies (Indonesia and Peru in 2011 and Thailand and the Philippines in 2012)*. Adoption of UNCITRAL texts on arbitration and sale of goods are suggested as possible law reform measures to improve the legal environment for enforcing contracts in these States.

12. Other regional initiatives involving the Secretariat include the ongoing partnership with the Deutsche Gesellschaft für Internationale Zusammenarbeit ("GIZ"). As part of this partnership, the secretariat attended, as in the past, the arbitration conference and the pre-Moot co-hosted by GIZ and the University of Belgrade, Faculty of Law (Belgrade, 8-11 April 2011). At the occasion, a closed meeting with GIZ representatives and regional legal experts took place in order to discuss phase two of the legal reform project implemented by GIZ through the Open Regional Fund for South East Europe — Legal Reform. While phase one of the project particularly focused on the United Nations Convention on Contracts for the International Sale of Goods, phase two would deal with alternative dispute resolution methods.

13. A presentation on UNCITRAL work, standards and online resources, including CLOUT, was delivered to a group of young law professors and researchers at a Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) workshop in the context of UNCITRAL/GIZ regional activity in the Balkans (Tirana, 1-2 September 2011).

Promotion of the universal adoption of fundamental trade law instruments

14. One approach relies on promoting primarily 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.

15. The treaties currently considered under that approach are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards² (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,³ and the CISG.

² United Nations, *Treaty Series*, vol. 330, No. 4739.

³ United Nations General Assembly, *Resolution 62/65* of 8 January 2008, para. 3.

General promotion of the work of UNCITRAL

16. Secretariat staff took part in:

(a) The First St. Petersburg International Legal Forum, with an overall focus on the role of law in addressing new global challenges. UNCITRAL's presentation related to "The Importance of Ensuring That International Trade Law Is Implemented at the National Level", with a view to promoting UNCITRAL texts in the Russian Federation and to highlight the benefits of adopting international instruments (St. Petersburg, Russian Federation, 20 May 2011); and

(b) The University of Vienna guest lectures programme, to deliver a lecture on the work of UNCITRAL (Vienna, 12 January 2012).

Promotion of recent treaties

17. The Secretariat continues to promote recently adopted instruments, including at the regional level, in order to encourage their signature and adoption by States with a view to facilitating their early entry into force.

18. Events in which the Secretariat took part include:

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"),⁴ adopted by the General Assembly on 11 December 2008⁵ (see A/CN.9/695/Add.1): Conference on "Rotterdam Rules in Asia-Pacific Region" organized by the Japanese Maritime Association and the University of Tokyo and co-sponsored by the Japanese Ministry of Justice, Ministry of Foreign Affairs and Ministry of Land, Transportation and Infrastructure, as well as CMI with the aim to raise awareness in the region, and, in particular, in Japan, given that the Rotterdam Rules have not yet gathered formal support (signature or accession) in East Asia (Tokyo, 21-24 November 2011).

19. Promotion by the Secretariat of the United Nations Convention on the use of Electronic Communications in International Contracts (the "Electronic Communications Convention") remains the object of special attention.⁶ References to some activities in this regard may be found in A/CN.9/749.

B. Specific activities*Sale of goods*

20. The Secretariat has continued pursuing universal adoption of the CISG. In this respect, it should be noted that recent accessions to that text were supported by dedicated workshops and conferences (Cotonou, Benin, 21-23 February 2006,⁷ and Milano, Italy, 7-8 October 2011) as well as by bilateral meetings and other forms of interaction.

⁴ United Nations publication, Sales No. E.09.V.93.

⁵ United Nations General Assembly, *Resolution 63/122* of 2 February 2009.

⁶ New York, 23 November 2005, United Nations publication, Sales No. E.07.V.2.

⁷ A/CN.9/599, para. 9(d).

21. Moreover, the Secretariat has contributed to ongoing adoption processes by participating in events organized with a view to supporting those processes (Sao Paulo, Brazil, 3-4 November 2011, and Bangkok, Thailand, 21 March 2012)*.

22. Given increasing interest from academia and practitioners, the Secretariat has also continued supporting States in their process of revision of the declarations lodged upon becoming a party to the CISG, with a view to reconsidering them, where appropriate, in order to further harmonize the scope of application of the convention.

23. Finally, in light of the attention demonstrated by stakeholders, the Secretariat has engaged in the promotion of the adoption and uniform interpretation of the Convention on the Limitation Period in the International Sale of Goods (the Limitation Convention),⁸ including by inviting States to consider the adoption of the amended version of the Limitation Convention when already a party to the unamended one.

Dispute resolution

24. The Secretariat has been engaged 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 this field is particularly acute.

25. In particular, the Secretariat has provided comments on various mediation laws with a view to identifying areas for modernization of the texts as part of a joint project with the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), including laws of Montenegro, Serbia, Bosnia Herzegovina and Albania.

26. Comments were also provided on a draft arbitration law prepared by the Government of Albania.

27. Further, the Secretariat has provided comments on the draft law of the Union of Comoros on recognition and enforcement of awards, and encouraged the adoption of the New York Convention in the Union of Comoros.

28. The Secretariat provided comments on a number of arbitration rules of arbitral institutions, including the Bangladesh International Arbitration Centre (BIAC) and the Cyprus Arbitration and Mediation Centre (CAMC).

29. The Secretariat met with counterparts within the Government of Egypt and officials of the International Finance Corporation to discuss, inter alia, the UNCITRAL Model Law on Conciliation at mediation workshops for judges of the Economic Courts with the National Center for Judicial Studies (Cairo, 22-28 June 2011).

30. The Secretariat collaborated with a number of arbitral institutions and organizations, including by co-organizing with the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) the VIAC-UNCITRAL Conference 2012 (Vienna, 29-30 March 2012).

⁸ United Nations, *Treaty Series*, vol. 1511, Nos. 26119 and 26121.

31. Events on international arbitration that saw the participation of the Secretariat include:

(a) An Asia-Pacific Economic Cooperation (APEC)-UNCTAD Workshop on Investor-State Dispute Settlement, to provide information on the UNCITRAL Arbitration Rules, as revised in 2010, and their use in the context of investor-State arbitration, as well as on the current UNCITRAL work on transparency in treaty-based investor-State arbitration (Manila, 22-24 June 2011);

(b) A conference titled “NYSBA International Section Seasonal Meeting 2011: Latin America as an Engine for Economic Recovery and Growth”, organized by the New York State Bar Association (NYSBA), to present the current work of UNCITRAL in the field of transparency in treaty-based investor-State arbitration (Panama, 21-23 September 2011);

(c) A round table organized by the Organisation for the Harmonization of Business Law in Africa (OHADA), where the application of OHADA texts and the possibility to develop an OHADA instrument on mediation were considered (Benin, 17 October 2011);

(d) A colloquium on the occasion of the 25th anniversary of the UNCITRAL Model Law on International Commercial Arbitration, organized by McGill University to present the status of enactments of legislation based on the Model Law, and introduce the Digest of Case Law on the Model Law (Montreal, Canada, 24-25 November 2011);

(e) A conference on International Arbitration under the auspices of the Bar Association of Padua and the Veneto Region to promote UNCITRAL instruments in the field of arbitration (Padua, Italy, 5-6 December 2011);

(f) A round table to discuss developments in the field of investment dispute settlement: mediation, and the current work of UNCITRAL on transparency in treaty-based, investor-State arbitration with representatives of different Ministries of Georgia as part of the “Judicial Independence and Legal Empowerment Project” of the United States Agency for International Development (USAID) (Tbilisi, 23 February 2012); and

(g) Providing assistance to the project “Regional Implementation of the Alternative Dispute Resolution (ADR) Instruments” for young law professors and researchers organized in the context of the UNCITRAL/GIZ cooperation for the development of arbitration in the Balkans (Tirana, Albania, 1-2 September 2011 and Vienna, 5-6 March 2012).

32. Pre-moot sessions that saw the participation of the Secretariat include:

A pre-Moot conference on arbitration dealing with independence and impartiality of arbitrators, organized as part of the “Judicial Independence and Legal Empowerment Project” of the United States Agency for International Development (USAID) (Tbilisi, 24 February 2012).

Electronic commerce

33. The Secretariat has continued promoting the adoption of UNCITRAL texts on electronic commerce, in particular in cooperation with other organizations and

emphasizing a regional approach (see A/CN.9/749). It has also provided comments on draft regional and national legislation, as appropriate.

34. Partly also as a result of those promotional activities, several new national enactments of legislation on electronic commerce and electronic signatures were recorded (see A/CN.9/751).

35. The Secretariat has renewed efforts to promote the formal adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts so as to advance its entry into force. In particular, the importance of that Convention as an enabler for paperless cross-border trade has been highlighted at regional meetings (APEC Workshop on “Supply Chain Connectivity: E-Commerce as a Main Driver and Integration Tool”, San Francisco, USA, 19 September 2011; UN ECA — UN ECE — UN ECLAC — UN ESCAP — UN ESCWA Conference on “Connecting International Trade: Single Windows and Supply Chains in the Next Decade”, Geneva, Switzerland, 12-13 December 2011).

Procurement

36. In accordance with requests of the Commission and Working Group I (Procurement), the Secretariat has established links with other international organizations active in procurement reform to foster cooperation with regard to the 2011 UNCITRAL Model Law on Public Procurement (the “Model Law”).⁹

37. The aims of such cooperation are to ensure that regional requirements and circumstances are understood by the Working Group and Commission when finalizing a draft Guide to accompany the Model Law, and that reforming 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.¹⁰ 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.

38. To this end, the Secretariat has participated as speaker/presenter at a wide range of international events, including:

(a) The Collaborative Regional Workshop “Cooperation and Integration, the path to Government Procurement Development in the Caribbean”, hosted by the Ministry of Finance and the Public Service, Government of Jamaica, CARICOM, the Commonwealth Secretariat, the Interamerican Development Bank, the Organization of American States and the Canadian International Development Agency. The Secretariat presented on “approaches in modernizing public procurement laws” and the UNCITRAL approach to procurement reform. The Workshop sought to introduce the notion of a regional free market in public procurement, and to encourage member States to improve their procurement systems (Jamaica, 12-13 April 2011);

⁹ Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html.

¹⁰ See documents A/CN.9/575, paras. 52 and 67, A/CN.9/615, para. 14, and A/66/17, paras. 186-189.

(b) The 7th Regional Public Procurement Forum hosted by the Government of Georgia, the Asian Development Bank (ADB), Islamic Development Bank (IsDB), World Bank (WB), Organization for Security and Cooperation in Europe (OSCE) and European Bank for Reconstruction and Development (EBRD), and attended by government officials from Albania, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, the former Yugoslav Republic of Macedonia, Tajikistan, Turkey, Turkmenistan, Kosovo, Georgia and Uzbekistan, and by representatives from the host organizations. The focus was on the Model Law in the context of harmonization of international and regional procurement regimes (Tbilisi, 16-19 May 2011)*;

(c) Launch of an EBRD and UNCITRAL initiative, supported by the OSCE, on enhancing public procurement regulation in the CIS countries and Mongolia, at a Roundtable on Public Procurement Policy-making: Efficiency and Transparency (Astana, Kazakhstan, 15-20 May 2011). The topics addressed were the use of the Model Law to upgrade and modernize procurement laws and practice in the region (which had been assessed as part of the initiative), as well as balancing value for money and transparency safeguards in public procurement. Subsequent participation as a speaker and facilitator at two regional workshops under the same initiative, focusing on identification of reform needs and implementation of the Model Law, in Armenia and Moldova (Yerevan, 10-12 October 2011; Chisinau, 13-15 December 2011)*;

(d) The seventh Annual Conference of the Inter-governmental Procurement Network, hosted by the Interamerican Network on Government Procurement (Spanish acronym, RICG), the General Directorate of Public Procurement of the Dominican Republic, the Organization of American States (OAS), the Interamerican Development Bank (IDB), the Canadian International Development Agency (CIDA) and the International Development Research Center (IDRC/ICA). (See www.ricg.org/content/display_news.aspx.) The conference considered national efforts in procurement reform and implementing and improving sustainable procurement. The Model Law was presented in the context of international standards and procurement reform (Santo Domingo, 18-20 October 2011);

(e) A colloquium hosted by Unidroit on “Promoting investment in agricultural production: private law aspects”, addressing a session entitled “Foreign investment in agricultural land” on devising transparent and efficient concession award procedures, with reference to solutions provided by the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) and the Model Law (Rome, 8-10 November 2011);

(f) The Asia Pacific Conference on electronic procurement (e-GP), hosted by the Working Group of the multilateral development banks on e-procurement. The discussions addressed the legal aspects of e-GP reform, and the approach of the Model Law on the topic. A draft handbook on e-GP was presented (Jimbaran, Indonesia, 21-26 November 2011);

(g) Thomson Reuters Conference on “Government Contracts: Year in Review”, which is convened to provide expert briefings to local and international practitioners, policymakers and academics on the past year’s legal developments affecting public procurement. The session was entitled “Crossing Borders in International Procurement — Next Steps”, and included presentations by

UNCITRAL (on the Model Law), the World Trade Organization (on its revised Agreement on Government Procurement), and leading academics and practitioners (Washington, D.C., 20-25 February 2012);

(h) Lectures to students of international public procurement law and policy at the University of Nottingham and to students of international public procurement law and policy and international business law at the Universidade Catolica Portuguesa, to present and encourage broader understanding of the Model Law's provisions and its use as a tool for procurement reform (Nottingham, United Kingdom, 14-15 January 2012 and Lisbon, 19-20 March 2012);

(i) Presentation of the Model Law to students of Public Procurement for Sustainable Development, at ITC-ILO and the University of Turin; again to encourage broader understanding of the Model Law's provisions and its use as a tool for procurement reform (Turin, Italy, 14-15 June 2011 and 29 Feb-2 March 2012); and

(j) An International Conference on Public Procurement Integrity, hosted by the Government of Mexico, where a presentation was given on the Model Law and its approach to promoting integrity in public procurement. There was also a presentation of a paper on e-GP and its implementation at a related workshop for Central American countries (Mexico City, 27-29 March 2012) (see www.funcionpublica.gob.mx/index.php/unidades-administrativas/unidad-de-politica-de-contrataciones-publicas/integridad-2012.html).

Insolvency

39. The Secretariat has promoted the use and adoption of insolvency texts, particularly the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law, through participation in various international fora. Such activities included:

(a) Attending the 7th regional meeting of the American Bankruptcy Institute (ABI) held in Dublin to discuss developments in enactment of the Model Law on Cross-Border Insolvency (Dublin, 21 October 2011); and

(b) Participating at the 8th meeting of the Forum on Asian Insolvency Reform (FAIR) held in Kuala Lumpur. The meeting focussed on issues associated with insolvency and Islamic finance and included a session considering the use of UNCITRAL insolvency texts in the Asian region and the effectiveness of their application (Kuala Lumpur, 30 Nov-1 Dec 2011)*.

Security interests

40. 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,¹¹ the UNCITRAL Legislative Guide on Secured Transactions¹² and its Supplement on Security Rights in Intellectual Property¹³) is twofold. The first approach focuses on disseminating

¹¹ United Nations publication, Sales No. E.04.V.14.

¹² United Nations publication, Sales No. E.09.V.12.

¹³ United Nations publication, Sales No. E.11.V.6.

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) American Bar Association (ABA) meeting on secured lending and lien registry systems to discuss best practices in the Americas and Europe (Washington, D.C., 6-9 April 2011);

(b) A seminar organized by Bocconi University on understanding the impact of juridical multilingualism on the harmonization process of rules governing finance (Milan, 9-10 May 2011);

(c) A conference on the draft Principles on Conflict of Laws in Intellectual Property (CLIP) hosted by the European Max-Planck-Group (Berlin, 4-5 November 2011);

(d) A conference on the draft provisions on pledge of the Russian Civil Code, as well as on the Russian draft law on pledge registries (Moscow, 22-27 January 2012); and

(e) A meeting with the International Bar Association, Section on Insolvency, Restructuring and Creditor Rights, with regard to the treatment of licence rights in insolvency (Helsinki, 20-22 May 2012).

41. The second approach focuses on international financial institutions including the World Bank, the International Finance Corporation (IFC) and regional development banks, which provide technical assistance to States in the field of secured transactions, yet without formulating legislative standards of their own. As such law reform-related activities, including the establishment of security rights registries, need to be based on internationally recognized legislative standards, the Secretariat coordinates with those international financial institutions to ensure that technical assistance is provided consistent with UNCITRAL texts on secured transactions.

42. Examples of such an approach include the Secretariat's review of draft secured transactions laws of Ghana and Haiti in coordination with the IFC; and the Secretariat's participation in a meeting with Egyptian officials to discuss potential legal reform in the area of insolvency and secured transactions (Cairo, 22-28 June, 2011). The Secretariat is also seeking coordination with the World Bank regarding secured transactions law reform in Moldova in the broader context of the United Nations Development Assistance Framework (UNDAF) programme.

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. Such constant interactions with relevant actors have resulted in the UNCITRAL Legislative Guide on Secured Transactions (the "Guide") being reflected in recent enactments and law revisions in Australia (Personal Property Securities Act, 2009), Malawi (draft Secured Transactions Law) and the Republic of Korea (Act on Securities in Movable Property and Receivables, 2010). Such activities have also resulted in the Principles, Definitions and Model Rules of a European Private Law, Draft Common Frame of Reference (DCFR), volume 6, book IX (Proprietary security in movable assets) prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), being largely consistent with the recommendations of the Guide.

Finally, the Secretariat is working with the World Bank with a view to preparing a set of principles for effective and efficient secured transactions laws.

Other capacity-building activities

44. The Secretariat has also been engaged in other capacity-building activities aimed at increasing the knowledge of international trade law. Among these, cooperation with the International Training Centre of the International Labour Organization (ITC-ILO) and the University of Turin may be noted.

45. In the framework of that cooperation, the Secretariat has continued to contribute to the management and the delivery of the Master Course on Public Procurement for Sustainable Development and of the Master of Laws course in International Trade Law. These master level courses form an integral part of the broader educational programme denominated “Turin School of Development”.¹⁴

46. International development agencies and other institutions managing comprehensive technical assistance programmes may wish to consider sponsoring the participation of students in such courses in order to strengthen local capacity in partner countries over the longer term.

III. UNCITRAL Regional Centre for Asia and the Pacific

47. The General Assembly, in its resolution 64/111 of 16 December 2009, noted the request by the Commission that its Secretariat explore the possibility of establishing a presence in regions or specific countries by, for example, having dedicated staff in United Nations field offices, collaborating with such existing field offices or establishing Commission country offices with a view to facilitating the provision of technical assistance with respect to the use and adoption of Commission texts.

48. At its forty-fourth session, in July 2011, broad support was expressed for the initiative taken by the Secretariat to build such a presence through the establishment of UNCITRAL regional centres in different parts of the world.¹⁵ It was considered a novel yet important step for UNCITRAL in reaching out and providing technical assistance to developing countries.¹⁶ Informed of the offer received from the Republic of Korea for a pilot project in the Asia-Pacific region, the Commission approved the establishment of the UNCITRAL Regional Centre for Asia and the Pacific (the “*Regional Centre*”) in Incheon, Republic of Korea.¹⁷

49. The General Assembly, in its resolution 66/94 of 9 December 2011, welcomed that decision and expressed its appreciation to the Government of Republic of Korea for its generous contribution.

50. The *Regional Centre* was officially opened on 10 January 2012 by the Legal Counsel and Under-Secretary-General for Legal Affairs of the United Nations, who

¹⁴ www.itcilo.org/en/news/masters.

¹⁵ *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/66/17)*, paras. 263 and 264.

¹⁶ *Ibid.*, para. 264.

¹⁷ *Ibid.*, paras. 267 and 269.

emphasized the importance of the principle of the rule of law and the role of the *Regional Centre* in enhancing international trade and development in the Asia-Pacific region.¹⁸ The opening programme concluded with the signing of key agreements and a ribbon-cutting ceremony to officially launch the *Regional Centre*. The ceremony was followed by a regional workshop to discuss the role of the *Regional Centre* and the significance of UNCITRAL texts in the Asia-Pacific region.¹⁹

51. The main objectives of the *Regional Centre* are to (a) enhance international trade and development in the Asia-Pacific region by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL; (b) provide bilateral and multilateral technical assistance to States with respect to the adoption and uniform interpretation of UNCITRAL texts through workshops and seminars; (c) engage in coordination activities with international and regional organizations active in trade law reform projects in the region; and (d) function as a channel of communication between States in the region and UNCITRAL.

52. The Head of the *Regional Centre* assumed his duties in March. The Ministry of Justice of the Republic of Korea provided a legal expert for the project on a non-reimbursable basis. Other administrative measures to facilitate the operation of the *Regional Centre*, including the conclusion of an arrangement with ESCAP and necessary arrangement with the host country and relevant authorities, were undertaken.

53. It is expected that the *Regional Centre* will actively engage in numerous technical assistance activities, while developing custom-tailored strategies for dissemination of UNCITRAL texts in the region. In the framework of those strategies and of the ensuing initiatives, the *Regional Centre*, in 2012, will be organizing and contributing to a number of national and regional meetings on various UNCITRAL topics.

54. As additional funding will be required to expand the role of the *Regional Centre*, fund-raising will remain one of the *Regional Centre*'s core activities. States may wish to take note of the activities of the *Regional Centre* in order to include cooperation with that centre in their ongoing and future trade law reform technical assistance activities in the Asia-Pacific region.

55. At its forty-fifth session, in July 2012, the Commission will hear an oral report on the progress made at the *Regional Centre* as well as developments on the establishment of UNCITRAL regional centres in other regions.

IV. Dissemination of information

56. 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. These resources

¹⁸ The full text of the speech is available at http://untreaty.un.org/ola/media/info_from_lc/POB%20Incheon-Welcome%20Address.pdf.

¹⁹ More information about the Regional Centre and the Launch Event can be found at the date of this document from www.uncitral.org/uncitral/en/tac/regionalcentre.html.

are being constantly developed to further improve the ease of dissemination of information and ensure that it is current and up to date.

A. Website

57. 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).

58. In 2011, the website received roughly 500,000 unique visitors. Approximately 67 per cent of the traffic is directed to pages in English, 22 per cent to pages in French and Spanish, and the remaining 11 per cent to pages in Arabic, Chinese and Russian. 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 currently the sole available source of information in its class in some of those languages.

59. 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. In 2011, the UNCITRAL Law Library finalized a project to provide optical character recognition for all UNCITRAL *Yearbooks*. This project makes these *Yearbooks* full-text searchable via the UNCITRAL website, additionally increasing access to the Commission's historical documents.

B. Library

60. 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, other Vienna-based international organizations, external researchers and law students. In 2011, library staff responded to approximately 350 reference requests originating from over 41 countries.

61. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 10,000 monographs, 150 active journal titles, legal and general reference material, including non-UNCITRAL United Nations documents, and 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.

62. 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.

63. 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-fifth Commission session, see A/CN.9/750). 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.

64. An advanced version of the consolidated bibliography of writings related to the work of UNCITRAL was made available on the UNCITRAL website in 2009.²⁰ The consolidated bibliography aims to compile all entries of the bibliographical reports submitted to the Commission since 1968. It currently contains over 6,000 entries, reproduced in the English and the original language versions, verified and standardized to the extent possible. The final version of the consolidated bibliography will be made available as an official UNCITRAL publication subject to availability of financial resources.

C. Publications

65. 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.

66. The following works were published in 2011: *Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law held on the Occasion of the Fortieth Session of the Commission*;²¹ *UNCITRAL Arbitration Rules (as revised in 2010)*;²² *UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property*;²³ and the 2006 and 2007 *UNCITRAL Yearbooks*.²⁴

67. The following works were published in early 2012: *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*,²⁵ and a revised booklet for the 1974 Convention on the Limitation Period in the International Sale of Goods with an updated explanatory note.²⁶

68. In light of budget and environmental concerns, the Secretariat has continued its efforts to use electronic media as a primary method to disseminate UNCITRAL

²⁰ Available from www.uncitral.org/uncitral/publications/bibliography_consolidated.html.

²¹ Available from www.uncitral.org/uncitral/en/publications/publications.html.

²² Available from www.uncitral.org/uncitral/uncitral_texts/arbitration.html.

²³ Available from www.uncitral.org/uncitral/uncitral_texts/security.html.

²⁴ Available from www.uncitral.org/uncitral/publications/yearbook.html.

²⁵ Available from www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

²⁶ Available from www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html.

texts. Thus, several texts published in 2011 and so far in 2012 have been published exclusively in electronic format, namely: Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law held on the Occasion of the Fortieth Session of the Commission (e-book); the 2006 and 2007 UNCITRAL *Yearbooks* (CD-ROM and e-book); UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (e-book); and the revised booklet for the 1974 Convention on the Limitation Period in the International Sale of Goods (e-book).

D. Press releases

69. Press releases are being regularly issued when treaty actions relating to UNCITRAL texts take place or information is received on the adoption of a 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.

70. 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

71. 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

72. The Secretariat provided a briefing on UNCITRAL and its working methods at the Orientation Seminar for Members of Permanent Missions accredited to the International Organizations in Vienna organized by the United Nations Institute for Training and Research (UNITAR) at the United Nations Office at Vienna on 28 September 2011.

G. Information lectures in Vienna

73. 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, lectures have been given to visitors from, inter alia, Austria, Germany,

Hungary, Republic of Korea, Russian Federation, Slovenia and the United States of America.

V. Resources and funding

74. 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.

75. 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

76. 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.

77. In the period under review, a contribution was received from the Government of Indonesia, to whom the Commission may wish to express its appreciation.

78. 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.

79. 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.

B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL

80. 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.

81. In the period under review, an additional contribution was received from the Government of Austria, to whom the Commission may wish to express its appreciation.

82. 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.

83. 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.9/751)

[Original: English]

Not reproduced. Updated information may be obtained from the UNCITRAL secretariat or found on the Internet at www.uncitral.org.

XI. COORDINATION AND COOPERATION

Note by the Secretariat on coordination activities

(A/CN.9/749)

[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.¹ 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.²

3. This report, prepared in response to resolution 34/142 and in accordance with UNCITRAL's mandate,³ 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.

¹ *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

² *Ibid.*, para. 100.

³ See General Assembly Resolution 2205 (XXI), sect. II, para. 8.

II. Coordination activities

A. The International Institute for the Unification of Private Law (Unidroit) and the Hague Conference on Private International Law

1. International Institute for the Unification of Private Law (Unidroit)

4. The Secretariat attended a Colloquium on “Promoting investment in agricultural production: private law aspects”, hosted by Unidroit (Rome, 8-10 November 2011). The Colloquium focused on three main areas: investment in agricultural land, commercial agriculture for small farmers and capital mobilization and equipment finance for agricultural production. Over 30 high-level experts from different backgrounds, in particular representing multilateral Organizations presented reports and participated in the discussions, with an audience made up of representatives of Unidroit member States and independent experts. The aim of the Secretariat’s participation was to explore with Unidroit possible future activities regarding foreign investment in agricultural land and production, identifying legal issues particularly as regards norms and standards for concessions over land, drawing on the provisions of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000).

2. Hague Conference on Private International Law (HCCH)

5. The Secretariat participated in the following meetings of the Hague Conference on Private International Law (Hague Conference):

(a) The Conference “Access to Foreign Law in civil and commercial matters” (Brussels, 15-17 February 2012) organized by the Hague Conference jointly with the European Commission. The Conference gathered legal practitioners, judges, academics, officials from governments, international and inter-governmental organizations dealing with the challenges associated with accessing foreign law in civil and commercial matters. The aim of the Conference was to discuss how to facilitate in the future access to foreign law in civil and commercial matters at a global level;

(b) The meeting of the Hague Conference Council on General Affairs and Policy (The Hague, Netherlands, 17-20 April 2012), which the Secretariat attended as an observer.

3. Joint activities with Unidroit and the Hague Conference

6. The Secretariat hosted the annual coordination meeting with Unidroit and the Hague Conference at which current work of the three organizations and potential areas for cooperation were discussed (Vienna, 4 May 2011). As the meeting was held in Vienna, staff of the Secretariat had the opportunity to attend and provide a thorough briefing of their current activities to the representatives of Unidroit and the Hague Conference.

7. At its forty-fourth session in 2011, the Commission considered and approved a note by the Secretariat entitled “Comparison and analysis of major features of international instruments relating to secured transactions” (A/CN.9/720) to which a

paper, jointly prepared by the three organizations and discussing the interrelationship of their security interests texts, was annexed. At that session, the Commission requested that the paper be given the widest possible dissemination, including by way of a United Nations sales publication with proper recognition of the contribution of the Permanent Bureau of the Hague Conference and the secretariat of Unidroit.⁴ The publication is now expected to be published by the summer of 2012.

B. Other organizations

8. The Secretariat has undertaken other coordination activities with various international organizations. These have included provisions of comments by the Secretariat on documents drafted by those organizations, as well as participation in various meetings and conferences with the purpose of briefing about the work of UNCITRAL or to provide UNCITRAL perspective on the matters at stake.

1. General

9. The Secretariat remains actively involved in the activities of the Inter-Agency Cluster on Trade and Productive Capacity.⁵ Since the submission of the last “Note by the Secretariat”, various meetings of the Cluster were held at which ways and means to raise awareness of the Cluster and of the importance of trade and productivity in the development process were discussed. The Secretariat was actively involved in the preparation of the Special Event “Development of productive capacities and trade: the key to inclusive and sustainable growth of the UN Cluster on Trade and Productive Capacity” (Istanbul, Turkey, 9 May 2011) that the Cluster organized in the context of the Fourth United Nations Conference on the Least Developed Countries (LDC-IV, Istanbul, Turkey, 9-13 May 2011). The special event featured addresses by the United Nations Secretary-General and high-level representatives of seven United Nations agencies and/or Offices, including the Secretariat. The Cluster members presented a joint concept note describing the aims of the Cluster and calling for more attention on and support to issues of trade and productivity in development cooperation programmes and projects. The Secretariat also took part into another special event (Doha, 21 April 2012), organized by the Cluster in the context of UNCTAD XIII. At this event, chaired by the Deputy Secretary-General of the United Nations, the Secretariat delivered a speech addressing the theme of the Conference (“Development-led globalization: Towards sustainable and inclusive development paths”) from an UNCITRAL perspective.

10. As part of the Cluster, the Secretariat was involved in the negotiation of the United Nations Development Assistance Framework (UNDAF) for Moldova. The UNDAF articulates the collective response of the United Nations system to national development priorities, by coordinating the common contribution of the United Nations system to the needs and priorities of countries. Finally, the Secretariat delivered a short address, via podcast, to the information session “Delivering Aid for Trade: the way forward” organized by UNCTAD (Geneva, Switzerland,

⁴ See: *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17* (A/66/17), para. 283.

⁵ See A/CN.9/725.

22 February 2012). The session, opened to new UNCTAD delegates, all the Geneva Permanent missions, NGOs, press, and staff members, was intended to provide information on the Cluster, its objectives and its activities.

11. The Secretariat participated in the Annual meeting of the United States State Department Advisory Council on private international law (Washington D.C., 22-23 September 2011), which gave an opportunity to provide participants with an update on the work of UNCITRAL.

2. Procurement

12. The Secretariat is a member of a Working Group of the multilateral development banks (MDBs) on e-procurement, which has worked on the production of an updated Handbook on e-Government Procurement, to be published in April 2012, which follows the approach set out in the UNCITRAL Model Law on Public Procurement (2011). Participation in the Working Group also entails attendance at quarterly meetings of the Working Group by videoconference, at which strategic, operational and technical issues are discussed. The group holds a biannual conference on e-government procurement, the hosts rotating among the MDB members, the aim of which is to provide a forum to share experiences and discuss common standards for developing and implementing e-government procurement. The Secretariat was among the speakers at the last conference (Jimabaran, Indonesia, 22-24 November 2011) at which over 100 participants representing senior government officials, multilateral and bilateral development institutions, civil society organizations and private sector took part.⁶

13. The Secretariat participated in consultations held by UNECE on public-private partnerships, including attendance at the third session of the team of specialists on public-private partnerships (TOS PPP), considering a UNECE PPP Toolkit and proposals for a UNECE International PPP Centre of Excellence and regional Specialist Centres (Geneva, Switzerland, 18-19 April 2011).

14. The Secretariat coordinates with UNODC to support States' implementation of article 9 of the United Nations Convention against Corruption (UNCAC), which sets standards for public procurement systems. This collaboration also includes a survey into the effectiveness of current approaches, identification of best practices and provision of UNCITRAL texts (Model Law on Public Procurement (2011) and accompanying Guide to Enactment) to support legislative implementation. Meetings of a UNODC Working Group on this topic are expected to commence in September 2012.

15. Participation in consultations on Progress made in Implementing the 2008 OECD Recommendation on Enhancing Integrity in Public Procurement, for presentation of report and findings to the OECD Council.

⁶ See <http://beta.adb.org/news/events/asia-and-pacific-conference-electronic-government-procurement-e-gp>.

3. Dispute settlement

16. The Secretariat participated in the following activities:

(a) An OECD Expert Group Dialogue on International Investment agreements and Investor-State Dispute Settlement (Paris, 20-21 March 2011) to consider consistency of OECD possible future work in the field of investment arbitration with UNCITRAL work on the same topic;

(b) A conference of the International Council for Commercial Arbitration (ICCA) on the occasion of the 50th anniversary of this organization, at which possible future developments in international arbitration were discussed (Geneva, Switzerland, 20 May 2011);

(c) The World Bank's Expert Consultative Group for the preparation of a second annual report on Investing Across Borders. The Secretariat provided comments and feedback on the alternative dispute resolution indicators which include questions on the implementation of the UNCITRAL Model Law on International Commercial Arbitration and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention");⁷

(d) A working group session on the use of mediation for the settlement of investment disputes jointly organized by the UNCTAD and the International Bar Association (IBA) (Geneva, Switzerland, 19 May 2011). The purpose of the meeting was to discuss the preparation of rules (or guidelines) on mediation, a matter that could also be considered by UNCITRAL for inclusion in its future work programme. The information exchanged at the meeting provided the basis for the submission of a paper by UNCTAD on that topic at the forty-fourth session of the Commission, in 2011;⁸ and

(e) A meeting hosted by the International Arbitration Institute (IAI) (Paris, 20-21 April 2012) in order to assess the preparation of international instruments on matters identified by UNCITRAL as possible items for future work in the field of arbitration.

4. Electronic commerce

17. The Secretariat has been particularly active in contributing to regional legislative activities, in particular in Central America and in Africa, with a view to ensuring the compatibility of resulting texts with UNCITRAL legislative standards and their underlying principles.

18. Moreover the Secretariat carried out the following activities:

(a) Providing comments on United Nations/CEFACT draft recommendation 37 on Signed Digital Document Interoperability (United Nations Doc. ECE/TRADE/C/CEFACT/2010/14/Rev.1);⁹

(b) Providing substantive input in the draft Legal Guide to the Implementation of Electronic Single Window Facilities, a publication promoted by

⁷ Information on the initiative can be found at <http://iab.worldbank.org>.

⁸ See A/CN.9/734.

⁹ See A/CN.9/725, para. 15 (a).

the United Nations Network of Experts for Paperless Trade in Asia and the Pacific (UN NExT); and

(c) Contributing to the ongoing process led by the European Commission, Directorate-General for Information Society and Media, on a future European Union electronic identification, authentication and signature policy (Action 8 of the “Digital Agenda for Europe”).

5. Security interests

19. Coordination with relevant organizations active in the field has been pursued to ensure that States are offered comprehensive and consistent guidance in the area of secured transactions law.

20. Specific activities of the Secretariat included:

(a) Coordination with the American Bar Association (ABA), resulting in a resolution adopted at the annual meeting of the House of Delegates of the ABA¹⁰ supporting the efforts of national and international bodies, including UNCITRAL, to promote the development and harmonization of international trade and commerce and the establishment of predictable systems of secured lending in developing countries through the reform of commercial laws, including secured transactions law.¹¹ In that resolution, ABA also supported the efforts of international and multinational bodies, including UNCITRAL, development banks, and multilateral and bilateral aid agencies to encourage developing countries to adopt legislation that facilitates secured lending and to provide them with technical assistance;

(b) Continued participation in the International Finance Corporation (IFC) Secured Transactions and Collateral Registries online Community of Practice, for consolidating and discussing valuable information on secured transactions and collateral registries, sharing updates on international reforms, along with cross-organizational projects and events, and exploring opportunities for cross-institutional collaboration across institutions;

(c) Coordination with the World Bank regarding secured transactions law reform in Moldova in the broader context of the United Nations Development Assistance Framework (UNDAF) in that country;

(d) Submission of comments on the new draft secured transactions law of Haiti, prepared with the assistance of the IFC;

(e) Coordination with the IFC with regard to the draft secured transactions law of Ghana;

(f) Coordination with the National Law Center on Inter-American Free Trade with regard to the possible consideration of the United Nations Convention on the Assignment of Receivables in International Trade by States that have already enacted or are about to enact a modern secured transactions law;

(g) Submission of comments on the draft provisions on pledge of the Russian Civil Code, prepared for the Russian Ministry of Economic Development in

¹⁰ The meeting of the ABA representatives took place on 9 August 2011 in Toronto, Canada (the Secretariat was not represented).

¹¹ The ABA resolution is available at www.abanow.org/2011/07/2011am301.

cooperation with the European Bank for Reconstruction and Development (EBRD), as well as on the Russian draft law on pledge registries, prepared by the Russian Ministry of Finance and the Central Bank;¹²

(h) Efforts to coordinate with the EU Commission for a coordinated approach on the law applicable to proprietary effects of assignments, with regard to which the British Institute of International and Comparative Law (BIICL) is preparing a study for the EU Commission;

(i) Coordination with the Licensing Executive Society International (LESI) on aspects related to intellectual property financing including possible participation in the Global Technology Impact Forum (GTIF) hosted by LESI;

(j) Participation in a meeting of the European Max-Planck-Group for Conflict of Laws in Intellectual Property (CLIP)¹³ (Berlin, 3-5 November 2011) to exchange information on the law applicable to security rights in intellectual property, an issue which had not been resolved at Working Group VI prior to the deliberation at the forty-third session of the Commission;¹⁴ and

(k) Coordination with the International Bar Association, Section on Insolvency, Restructuring and Creditor Rights, with regard to the treatment of licence rights in insolvency and possible legislative regulation in line with the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Interests in Intellectual Property (Helsinki, 20-22 May 2012).

6. Insolvency

21. The Secretariat participated in the World Bank's Working Group for the Treatment of the Insolvency of natural persons (Washington D.C., 17-18 November 2011). The Working Group was established under the auspices of the World Bank's Insolvency Law Task Force to begin work on identifying the policies and general principles that underlie the diverse legal systems that have evolved for effectively managing the risks of consumer insolvency and individual over-indebtedness in the modern context.

¹² See also A/CN.9/753.

¹³ Established in 2004, the European Max-Planck-Group for Conflict of Laws in Intellectual Property (CLIP) is a group of scholars in the fields of intellectual property and private international law that meets regularly to discuss issues of intellectual property, private international law and jurisdiction. The goal of CLIP is to draft a set of principles for conflict of laws in intellectual property and to provide independent advice to European and national law makers. Information is available at www.ip.mpg.de/ww/de/pub/mikroseiten/cl_ip_eu.

¹⁴ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 210-223.

Part Three

ANNEXES

I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement

Summary record of the 943rd meeting, held at Headquarters, New York, on Monday, 25 June 2012, at 10.30 a.m.

[A/CN.9/SR.943]

Temporary Chairperson: Mr. Sorieul (Secretary of the Commission)

Chairperson: Mr. Sikirić (Croatia)

Later: Wiwen-Nilsson (Vice-Chair, Chair of Working Group I)

The meeting was called to order at 10.50 a.m.

Opening of the session

1. **Ms. O'Brien** (Under-Secretary-General for Legal Affairs, Legal Counsel), noting that the Commission would be finalizing and adopting at the current session the Guide to Enactment of the new UNCITRAL Model Law on Public Procurement, said that a modern public procurement regime helped States to ensure fairness, transparency and efficiency in their processes for making contracts, often involving substantial amounts of public funds. It also set standards to avoid corruption in public finance, which was a concern for contracting parties and international donors, as reflected in the United Nations Convention against Corruption. Indeed the UNCITRAL Model Law was an important tool for the effective implementation of that Convention.

2. Since the previous session, the Regional Centre for Asia and the Pacific had been opened with the support of the Government of the Republic of Korea. The Centre was an important means of promoting the adoption and use of the Commission's texts. It was to be hoped that UNCITRAL would expand its field presence to other regions in the future. On the related subject of technical assistance, the Commission would be taking up a document on a strategic direction for UNCITRAL with a view to optimizing the use of resources and expanding the role of the Working Groups and the UNCITRAL secretariat in promoting the Commission's work.

3. Other matters with which the Commission would deal included arbitration rules, future work on procurement and infrastructure development, legal issues that had an impact on microfinance, and international contract law.

4. In the larger context of United Nations activities related to the rule of law, work was progressing to increase awareness of the Commission's crucial work to address commercial law aspects of migration caused by impoverishment, inequality and internal conflicts, or inequitable access to shared resources. The Commission's work would be taken into account at the high-level meeting of the General Assembly on the rule of law at the national and international levels that would be held later in the year.

5. The Commission's work advanced the values of the Charter of the United Nations, thereby helping to bring about a fair and inclusive global economy.

Election of officers

6. **The Temporary Chair** said that in a letter, Belarus, on behalf of the Eastern European States, had nominated Mr. Sikirić of Croatia to chair the session.

7. *Mr. Sikirić (Croatia) was elected Chair by acclamation.*

8. *Mr. Sikirić (Croatia) took the Chair.*

9. **Mr. Sorieul** (Secretary of the Commission) asked representatives of other groups to inform the secretariat of their nominations before the end of the week. A rapporteur must be elected that same week, to introduce the part of the report on procurement, before consideration of the matter on the Friday.

10. **Mr. Fruhmann** (Austria), speaking on behalf of the Western European and other States, proposed that Mr. Wiwen-Nilsson (Sweden) be elected Vice-Chair of the Commission in his personal capacity.

11. **Mr. Grand d'Esnon** (France) endorsed the nomination.

12. *Mr. Wiwen-Nilsson (Sweden) was elected Vice-Chair of the Commission, in his personal capacity, by acclamation.*

Adoption of the agenda (A/CN.9/735 and Add.1)

13. **The Chair** said that he took it that the Commission agreed to add a new item, following item 12 of the provisional agenda (A/CN.9/735 and Add.1), entitled "Possible future work in the area of international contract law", as proposed by Switzerland. The subsequent items would be renumbered in consequence.

14. *It was so decided.*

15. *The agenda, as amended, was adopted.*

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.79 and Add. 1-19; A/CN.9/745; A/CN.9/754 and Add.1-3)

16. **The Chair** said that, in accordance with established practice and in the interest of efficiency, the discussion of agenda items relating to the finalization or adoption of draft texts referred to the Commission by a Working Group would be presided over by the Chair of that Working Group.

17. *Mr. Wiwen-Nilsson (Sweden), Vice-Chair, Chair of Working Group I, took the Chair.*

18. **The Chair** said that the draft Guide to Enactment was much more than information related to enactment: it contained recommendations for legislators and an explanation of the differences between the new Model Law and that of 1994 so

that States that adopted the new Law could assess the new parts and consider which, if any, to use. He invited members of the Commission to comment on document A/CN.9/WG.I/WP.79 and its addenda.

19. **Ms. Nicholas** (Secretariat), responding to comments by **Mr. Grand d'Esnon** (France), **Ms. Miller** (World Bank) and **Mr. Wallace** (United States of America), explained that changes made to the draft Guide by the Working Group at its meeting in April would be brought to the attention of the Commission as those portions of text were discussed.

20. **The Chair** drew attention to the very good definition of information integrity in paragraph 48 of document A/CN.9/WG.I/WP.79/Add.1.

21. **Ms. Nicholas** (Secretariat) said that the Working Group had proposed a number of changes to paragraphs 16 to 19 of document A/CN.9/WG.I/WP.79/Add.2 on promoting competition among suppliers and contractors for the supply of the subject matter of the procurement. They included deleting the second sentence in paragraph 16, as it would be explained elsewhere in the Guide that collusion was not merely the absence of competition, but was in fact any means used to distort the market; including "among other things" at the end of the second sentence of paragraph 17; and inserting paragraph 18 after paragraph 16, thus the current paragraph 18 would become paragraph 17 and paragraph 17 would become paragraph 18, in order to give better context to article 28 (2) of the Model Law, which was a key application of the principle of competition as set out in the preamble. It would also place more emphasis on the quantitative, rather than the qualitative, elements of competition, as in a restricted market there simply was not the same number of participants as in a more vibrant market.

22. **Mr. Imbachi Cerón** (Colombia) asked where the reference to collusion would appear in the Guide, as that was a concept that was of particular interest to legislators in his country.

The meeting was suspended at 12.05 p.m. and resumed at 12.30 p.m.

23. **The Chair** said that an explanation of collusion appeared in footnote 1 of A/CN.9/WG.I/WP.79/Add.13. It was proposed that

the text be moved into the main body of the document, possibly by inserting a new paragraph 20 into A/CN.9/WG.I/WP.79/Add.2.

24. **Ms. Nicholas** (Secretariat) said that the Working Group had been concerned that the definition of collusion that appeared in previous texts was too restrictive, implying that competition was the antithesis of collusion. The broader definition, to be placed at the end of subsection 3 of addendum 2, would also be cross-referenced where appropriate.

25. **Mr. Wallace** (United States of America) and **Mr. Maradiaga** (Honduras) agreed that it would be useful to integrate the definition into paragraph 19 to improve understanding.

26. **Mr. Fruhmann** (Austria), supported by **Mr. Imbachi Cerón** (Colombia), agreed that it was important to have a broader definition of collusion, but said that it should be expanded further to cover representatives of the procurement entity or contracting authority, who may collude with suppliers or contractors. He noted that the aim of collusion was not always to get a higher price; it could be used to modify or distort the terms of procurement contracts to the benefit of suppliers or contractors.

27. **Mr. Zhao** (China) said that a procurement competition might be restricted as a result of ignorance or lack of understanding on the part of the procurement agency, rather than collusion, it was therefore important to ascertain whether those competing for a procurement contract had indeed colluded by establishing what the participants' intention was, whether the procurement agency or the supplier benefited from the terms of the contract and finally whether any laws or legal norms had been violated.

28. **Ms. LeBlanc** (Canada) said that it was not enough to say that collusion was a broader concept than the absence of competition, which her Government considered to be two different things. An absence of competition might imply collusion, but it might not be the only reason why there was no competition. Similarly, there might appear to be competition, but all or some of the bidders could have colluded with each other.

29. **Mr. Wallace** (United States of America) considered that it would be more relevant to insert the explanation of collusion under subsection 5 on promoting the integrity of, and fairness and public confidence in, the procurement process. The Working Group, of which he was a member, had been conscious of the importance of the issue of collusion but had considered that it was better addressed at length in texts pertaining to anti-corruption legislation.

30. **Mr. Imbachi Cerón** (Colombia) said that as the draft Guide sought to provide guidance to States on how to foster free market conditions it was important to include general definitions of such issues.

31. **The Chair** said that the secretariat would produce a final version of the text for consideration by the Commission. He considered that it was important to expand the reference to collusion in paragraph 16, rather than removing it altogether and moving it down to subsection 5.

32. **Ms. Nicholas** (Secretariat) said that the definition would be sufficiently well-rounded, developed and cross-referenced so that the relevance and importance of the issue would be clear.

The meeting rose at 1 p.m.

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*)

Summary record of the 944th meeting, held at Headquarters, New York, on Monday, 25 June 2012, at 3 p.m.

[A/CN.9/SR.944]

Acting Chair: Wiwen-Nilsson (Vice-Chair, Chair of Working Group I) (Sweden)

Mr. Wiwen-Nilsson (Sweden), Vice-Chair of the Commission, Chair of Working Group I (Procurement), took the Chair.

The meeting was called to order at 3.15 p.m.

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/745 and A/CN.9/WG.I/WP.79/Add.2, Add.7, Add.9, Add.10, Add.13, Add.15 and Add.18)

1. **The Chair** invited the Commission to resume its consideration of the draft revised Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

2. **Mr. Wallace** (United States of America) recalled that a proposal had once been made to consolidate at least the executive summaries of each chapter of the Guide in all six languages in order to facilitate the work of the Commission. Given the Guide's daunting length, such a document might be useful for end-users as well, and he would appreciate the secretariat's views on the matter. It was imperative to ensure that the Guide was user friendly.

3. **Ms. Nicholas** (Secretariat) said that the executive summaries and the very short description of the objectives found in the preamble had been consolidated, but in English only. Insofar as its length was concerned, as a reference document targeting three groups — legislators, regulators and central bodies providing guidance to users of the Model Law — the Guide was not intended to be read in full by any one group. Moreover, the Working Group envisaged it primarily as an electronic document that readers would access swiftly and easily at need as a series of much shorter statements. The Commission would discuss the issue

of whether or not to provide a print version of the Guide once it had finished its consideration of the text.

Preamble and chapter I of the Model Law (*continued*)

4. **The Chair**, replying to a query from **Mr. Fruhmann** (Austria), confirmed that an explanation of the meaning and historic context of the phrase "fair, equal and equitable" would be added to document A/CN.9/WG.I/WP.79/Add.2, in section 4 of the text relating to the preamble.

5. **Ms. Nicholas** (Secretariat), also replying to a query from **Mr. Fruhmann** (Austria), said that it had been decided not to include a glossary in the Guide, which meant that there would not be hyperlinks to one in the text. References to the glossary would be appropriately revised, and the secretariat would draw up an informal glossary at a later date.

6. **The Chair** reminded the secretariat that, as an aide to comprehension only, the glossary must not contain substantive provisions. He took it that, as there were no further comments, the Commission approved the Working Group's proposed changes to document A/CN.9/WG.I/WP.79/Add.2, on the understanding that it would contain a discussion of collusion, an explanation of the meaning and history of the concept of "fair, equal and equitable" and revised references to the glossary.

Chapter II, Part I

7. **The Chair** said that, in the absence of comments, he took it that the Commission approved the Working Group's proposed changes to document A/CN.9/WG.I/WP.79/Add.7 on the Model Law's provisions on methods of procurement.

Chapter IV

8. **Ms. Nicholas** (Secretariat), referring to document A/CN.9/WG.I/WP.79/Add.9 on the Model Law's provisions on restricted tendering and requests for quotations, drew the Commission's attention to paragraph 20, which dealt with ensuring objectivity in selecting suppliers in the case of direct solicitation. The Working Group had agreed that it should mention another objective method of selection — rotation — and should clarify what was meant by “non-selection per se”.

9. **The Chair** took it that the Commission approved the Working Group's proposed changes to document A/CN.9/WG.I/WP.79/Add.9.

Chapter V

10. **Ms. Nicholas** (Secretariat) said that the Working Group had agreed to modify paragraph 11 of document A/CN.9/WG.I/WP.79/Add.10 on the Model Law's provisions on methods of tendering involving procuring entity-supplier interaction, to indicate that appropriate institutional frameworks and safeguards were necessary to allay suppliers' concerns about elevated risks of corruption in the context of requests for proposals with dialogue.

11. **Mr. Grand d'Esnon** (France) was surprised at the proposed addition. As discussed many times, there was no evidence that requests for proposals with dialogue were more prone to corruption than other chapter V methods. In any event, the French delegation firmly opposed to the use of the word “corruption”.

12. **Mr. Wallace** (United States of America) said that the term “corruption” was insulting and gratuitously discredited requests for proposals with dialogue. Problems with that method stemmed from a lack of experience in implementing it.

13. **Mr. Imbachi Cerón** (Colombia) said that Colombian regulations made no provisions for such methods solely because Colombia did not have enough experience with them. If transparency could be achieved through simple procedures, involving, for example, electronic communications and notifications, then there was no reason to disregard a useful method.

14. **Ms. Miller** (Observer for the World Bank) suggested replacing the term “corruption” with “lack of transparency”. The World Bank would like to see the last sentence in paragraph 11 eliminated. Its assertion that some multilateral development banks might object to the use of requests for proposals with dialogue in projects financed by them was simply untrue.

15. **Mr. Grand d'Esnon** (France) agreed that the final sentence should be deleted. With regard to the additional language proposed by the Working Group, the best solution would be not to add that sentence at all.

16. **The Chair** took it that the Commission did not wish to adopt the proposed change in paragraph 11. In paragraph 12, which referred to the “capacity to negotiate”, he thought that “capacity” might not be the best word choice.

17. **Mr. Fruhmenn** (Austria) said that, in the context of negotiations, the proper term was “skills”.

18. **Ms. Nicholas** (Secretariat) said that the secretariat would make sure that the appropriate term was used throughout the Model Law. She noted that the Working Group had decided to eliminate the last sentence in paragraph 17, according to which the experience of the multilateral development banks showed that putting in place the institutional frameworks and safeguards required for the chapter V procurement methods was among the most difficult reforms to implement, as the sentence did not reflect the banks' position.

19. **Ms. Miller** (Observer for the World Bank) and **Mr. Grand d'Esnon** (France) agreed that the sentence should be deleted.

20. **Ms. Nicholas** (Secretariat) drew the Commission's attention to the Working Group's suggestion that footnote 2 should contain a discussion of the usefulness and use of independent observers.

21. **Mr. Wallace** (United States of America), **Mr. Grand d'Esnon** (France) and **Mr. Fruhmenn** (Austria) agreed with the suggestion, on the understanding that the term “probity officer” would not be used in the new footnote.

22. **The Chair** took it that the Commission approved the recommended changes to document A/CN.9/WG.I/WP.79/Add.10, except for the proposed addition in paragraph 11 of a reference to an elevated risk of corruption in the case of requests for proposals with dialogue. It understood the secretariat would review the document to ensure that the word “capacity” was replaced with a more appropriate term, as necessary, and that footnote 2 would not use the term “probity officer”.

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

Chapter VI

23. **Ms. Nicholas** (Secretariat), turning to document A/CN.9/WG.I/WP.79/Add.13 on the Model Law’s provisions on electronic reverse auctions, said that the Working Group recommended a number of changes in paragraph 12. First, the word “permitted” should be replaced by the word “required”. Next, the paragraph should include a discussion of the potential advantages and limited benefits of requiring tender securities in electronic reverse auctions. It should also cross-refer to article 17 on tender securities. Elaborating on the Working Group’s proposed text, she said that the paragraph should discuss how the combination of participating bidders and a vibrant, competitive market for something fairly standardized and easily available might make a tender security unnecessary and should encourage the procuring entity to ensure participation in the auction by making offers and requests attractive, rather than requiring participation, which would tend to elicit bad faith bids.

24. **Mr. Fruhmann** (Austria) said that paragraph 18 discussed how the common practice of using third-party entities to set up and administer electronic reverse auctions could lead to their overuse and abuse. However, third-party entities could potentially provide administrative efficiencies, cost savings and process efficiencies. The text should explain that there were two sides to the coin.

25. **Ms. Nicholas** (Secretariat) said that the secretariat would revise paragraph 18 to ensure that it presented a balanced view.

26. **The Chair** took it that the Commission wished to adopt the changes agreed by the Working Group, as supplemented by the explanatory information provided by the secretariat, and on the understanding that paragraph 18 would be revised to provide a more balanced view of the role of third-party entities.

Chapter VII

27. **Ms. Nicholas** (Secretariat), responding to a comment by **Mr. Wallace** (United States of America) in reference to paragraph 6 of document A/CN.9/WG.I/WP.79/Add.15 on the Model Law’s provisions on framework agreements, said that it should be made clear that framework agreements were not necessarily signed only with centralized purchasing agencies.

28. **Mr. Fruhmann** (Austria) noted that paragraph 6 did not mention that the combined effect of using framework agreements and electronic tools could make it difficult for small and medium enterprises, and even larger companies, to do business with country authorities. A discussion of that potential downside should be included somewhere in the Guide.

29. **Ms. Nicholas** (Secretariat) said that the two implementation-related issues raised by the representatives of Austria and the United States should be included, although perhaps not in paragraph 6, which was in the section on policy considerations. The secretariat would look carefully at the paragraph to ensure that it did not deal with issues best covered under implementation and use.

30. In paragraph 8, the Working Group proposed only editorial changes: replacing the “most advantageous submission, or lowest-priced submission, or equivalent” with the “successful submission”, which was clearer, and ensuring language consistency in the various language versions of the Guide.

31. The Working Group had agreed that the second sentence of paragraph 30 should be revised to emphasize that the purpose of establishing a maximum duration was to avoid repeated extensions of closed framework agreements and to indicate that the maximum duration included the initial duration

and any extensions, but not periods during which the framework agreement was suspended.

32. **The Chair** took it that the Commission approved the proposed changes to document A/CN.9/WG.I/WP.79/Add.15, as well as a clarification regarding the use of purchasing agreements with suppliers other than central purchasing agencies and a discussion of the potential for framework agreements to exclude companies from government contracts.

Chapter VIII

33. **Ms. Nicholas** (Secretariat) said that the proposed changes to document A/CN.9/WG.I/WP.79/Add.18 on the Model Law's provisions on challenge proceedings were essentially editorial. The secretariat was instructed

to clarify the language of paragraphs 14, 23 and 30 by standardizing references to jurisdiction and to the wasting of time and costs, as well as by replacing "post-contract disputes" with "post-contract formation disputes" (para. 30). Also, in the penultimate sentence of paragraph 23, "Thereafter" would be replaced by "After the contract formation period".

34. **The Chair** took it that the Commission approved the proposed changes to document A/CN.9/WG.I/WP.79/Add.18. It had thus finalized and adopted the portions of the draft Guide designated for priority consideration.

The meeting rose at 6 p.m.

**Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law
on Public Procurement (continued)**

**Summary record of the 945th meeting, held at Headquarters, New York,
on Tuesday, 26 June 2012, at 10 a.m.**

[A/CN.9/SR.945]

Chair: Mr. Sikirić (Croatia)

Later: Mr. Wiwen-Nilsson (Vice-Chair)

The meeting was called to order at 10.10 a.m.

Election of officers (continued)

1. **The Chair** said that Nigeria, on behalf of the Group of African States, had nominated Mr. Mugasha (Uganda) for the office of Rapporteur of the Commission at its forty-fifth session.

2. *Mr. Mugasha (Uganda) was elected Rapporteur by acclamation.*

3. *Mr. Wiwen-Nilsson (Sweden), Vice-Chair, took the Chair.*

**Finalization and adoption of a Guide to Enactment
of the UNCITRAL Model Law on Public**

Procurement (continued) (A/CN.9/745, A/CN.9/754 and Add 1 and 2, A/CN.9/WG.1/WP.79 and Add. 1-19)

4. **The Chair** said that documents A/CN.9/754 and Add. 1 and 2, and A/CN.9/WG.1/WP.79 and Add. 1-19 addressed related policy issues and provided an article-by-article commentary. All those documents together formed the Guide. He invited members of the Commission to comment on them.

Document A/CN.9/754

5. **Mr. Wallace** (United States of America), noting that paragraph 10, which referred to “security-related procurement”, said that he did not recollect that term having been used before and wondered whether it was the same as “procurement involving classified information”, mentioned in paragraph 12. He also queried the use of the words “accessible” and “available” in paragraph 16, as he thought that the Working Group had decided that in future no distinction would be made between the two.

6. **Ms. Nicholas** (Secretariat) said that “procurement involving classified information” was broader than “security-related procurement”. Following expert consultations, it had been decided to use the latter term to denote procurement involving essential national security or defence issues. As for the use of the words “accessible” and “available”, the Working Group had indeed decided to cease distinguishing between them in the more general discussion. However, as the purpose of paragraph 16 was to explain the changes made to the 1994 text, the two terms had been retained there. Moreover, both terms were used in the text of the Model Law itself, with different meanings. She suggested the more neutral wording of “give the public access to ... legal texts” in place of “legal texts ... made accessible to the public”.

7. **Mr. Maradiaga** (Honduras) said that he shared the concern of the United States with regard to classified information. In countries like his own, where problems of corruption were not unknown, public procurement was subject to manipulation. It was therefore essential to have a legal instrument that would foster transparency in such matters. The concept of classified information should not lend itself to the concealment of manipulation.

8. **Ms. Nicholas** (Secretariat) emphasized that the section of the Guide under discussion was concerned only with changes to the 1994 text. During extensive discussion of the importance of ensuring full transparency, the point had been made that information could be withheld from the public only when it was legally classified and for no other reason. Care would be taken to ensure due prominence for that concern.

9. **Mr. Wallace** (United States of America) said that the wording of the second sentence of

paragraph 35 was unclear. A successful applicant for pre-qualification would be able to present a submission.

10. **Ms. Nicholas** (Secretariat) said that paragraph 35 reflected article 25, paragraph 3, of the 2011 Model Law, which stated that, subject to legal requirements, the portion of the procurement record relating to the submission process should be made available to those who had presented submissions. The intent of the sentence in question was to explain that that provision did not apply to those excluded at the pre-qualification stage. She agreed that it should be rephrased for the sake of clarity.

11. **Ms. Miller** (World Bank) said that paragraph 24 of document A/CN.9/754/Add.1 contained a fuller statement of the basis for selection than that set out in the first sentence of paragraph 57 in the document under discussion. The latter might usefully be aligned with the former. The footnote to paragraph 58 of A/CN.9/754 was not easy to understand: it seemed to be referring to the 1994 text, except for the last sentence which clarified the terminology currently in use in the 2011 text.

12. **Ms. Nicholas** (Secretariat) said that the references to the 1994 text would be put into the past tense so as to avoid confusion.

Document A/CN.9/754/Add.1

13. **Mr. Wallace** (United States of America) said that, as addendum 1 had not been submitted to the Working Group or been the subject of informal consultations, it would be advisable to give it a careful second reading.

14. **The Chair** asked the Secretariat to take on that task.

Document A/CN.9/754 Add.2

15. **Mr. Ezeh** (Nigeria), noting the statement in paragraph 5 to the effect that the 1994 requirement to solicit quotations from a minimum of three suppliers or contractors “if possible” had been replaced in the 2011 text by an absolute requirement to solicit from at least three suppliers or contractors, said that it should be stipulated that the suppliers or contractors should be unrelated.

16. **The Chair** said that wording to that effect could be inserted into the Guide.

17. **Mr. Grand d’Esnon** (France) said that, while understanding the concern expressed by the representative of Nigeria, he could see obstacles to the inclusion of his proposal. Furthermore, the fact that two enterprises belonged to the same group did not mean that they would not be in competition with one another.

18. **The Chair** suggested that language might be found to guard against any relationship that could entail a distortion of competition, which would need to be determined by the procuring entity.

19. **Mr. Fruhmann** (Austria) questioned the added value of such an addition. It seemed to him that Nigeria’s concern was already taken care of by the guiding principles of the Model Law?

20. **Mr. Wallace** (United States of America), while appreciating the concern expressed by the representative of Nigeria, said that neither the Model Law nor the Guide could be rewritten. He stressed the need for a continuing discussion on electronic reverse auctions or frameworks which were believed, in some quarters, to be set to replace quotations.

21. **The Chair**, noting that the quotations requirement was a broader issue, said that a sentence might be inserted which, rather than referring to a relationship or link between contractors, should guard against the possibility of one being the parent company of another.

22. **Mr. Wallace** (United States of America) said that the concern was already flagged by the reference in paragraph 35 to the risk of abuse and subjectivity in the selection of suppliers. The wording might need to be slightly changed in order to address that concern more fully.

23. **Mr. Zhao Yong** (China) suggested that what was to be avoided was an organizational conflict of interest rather than any relationship between suppliers.

The meeting was suspended at 10.55 a.m. and resumed at 11.30 a.m.

Document A/CN.9/WG.I/WP.79/Add.3

24. **Ms. Nicholas** (Secretariat) said that the Working Group had suggested the deletion of the call to ensure accuracy in the final sentence of paragraph 29, since that requirement was felt to be too onerous, and had considered, more generally, that the paragraph should be revised so as to give less prominence to the distinction between accessibility and availability. In the light of the Working Group's discussions, the issue to be emphasized was promptness of publication. Furthermore, as there might be differences in the nature and author of the information to be published, the reference in the part of the revised Guide dealing with article 5 should be not to the author of the texts but to those issuing the texts.

25. **Ms. Leblanc** (Canada) questioned the usefulness of the final sentence of paragraph 42 and, in particular, the rationale for choosing the regulation of communications as an example.

26. **Ms. Nicholas** (Secretariat) said that it was the secretariat's understanding that in some jurisdictions tender securities were regulated separately. If the Commission considered that that situation was the exception rather than the rule, the example could be deleted.

27. **Mr. Wallace** (United States of America) requested clarification of the last two sentences of paragraph 8. It had not yet become accepted international practice for a procuring entity from one State to act in its capacity as the lead procuring entity as an agent of procuring entities from other States.

28. **Ms. Nicholas** (Secretariat) recalled that, as noted in paragraph 17 (a) of its report (A/CN.9/745), the Working Group had agreed to delete those two sentences.

29. **Mr. Imbachi Cerón** (Colombia) said that international companies could sign legal stability contracts with his Government to protect their investments from changes to certain relevant provisions in the law. He wondered whether such contracts were within the scope of article 3 of the Model Law.

30. **Ms. Nicholas** (Secretariat) said that the flexible wording of article 3 allowed for the

differences between the various federal and constitutional systems and could be tailored to specific national circumstances, as was the case with the Model Law as a whole. It was not the practice of the Commission or the Working Group to provide detailed commentary on issues that concerned just one jurisdiction and that could be dealt with by tailoring the Model Law to suit local circumstances.

31. **Mr. Wallace** (United States of America) said that the expression "socio-economic policies" was commonly understood as referring to national policies, not obligations arising in connection with international regulations. He was curious to hear the reasoning behind including "international regulation such as United Nations Security Council anti-terrorism measures or sanctions regimes" in the definition of "socio-economic policies" as set out in the first sentence of paragraph 9.

32. **Mr. Zhao Yong** (China) agreed that the Security Council anti-terrorism measures or sanctions regimes were not socioeconomic policies, but rather international obligations, and suggested moving the sentence to the commentary to article 3.

33. **Ms. Nicholas** (Secretariat) said that that sentence had been discussed in the context of article 8 of the Model Law, which allowed the exclusion of suppliers of particular nationalities. Definition (o) of "socio-economic policies" contained in article 2 of the Model Law included any policies of the State that might be required to be taken into account by the procuring entity in procurement proceedings and allowed for the less common situation where restrictions were imposed by international agreements or obligations. The reference to United Nations Security Council measures and regimes would be moved from paragraph 9 to the commentary to article 3. In addition, the obligations under such measures and regimes would be noted in the commentary to article 8 contained in document A/CN.9/WG.I/WP.79/Add.4, making it clear that States had the flexibility in the application of international restrictions.

34. **Mr. Wallace** (United States of America) said that the last sentence of paragraph 15 stated that article 3 established "a general prevalence of international treaties". That statement was too narrow and a reference to international agreements

should be added to reflect the wording of article 3 more closely.

35. The second sentence of paragraph 24 was ambiguous and did not appear to reflect the intention of article 5 regarding the publication of legal texts, which was not to exclude from publication internal rulings that concerned a group or a class of companies. He wished to know whether the phrase “general application” excluded all internal documents or only those that pertained to certain procuring entities or groups thereof.

36. **The Chair** suggested that the words “internal documents” in that sentence could be replaced with “internal legal texts”, to reflect the term used in paragraph 1 of article 5.

37. **Ms. Nicholas** (Secretariat) said that paragraph 1 of article 5 was not intended to include internal documents that regulated how one procuring entity did business. Since the commentary in paragraph 24 could not usefully discuss what was meant by “general application” and “legal texts”, it could be left to the State to determine how the article should be applied in the light of national circumstances.

38. **Mr. Grand d’Esnon** (France) said that contracts, laws, regulations and decisions were all legal texts that should be publicly accessible, as were internal documents. The second sentence of paragraph 24 was unclear and should be deleted to avoid confusion.

39. *It was so decided.*

40. **Mr. Wallace** (United States of America), supported by **Mr. Grand d’Esnon** (France) and **Mr. Maradiaga** (Honduras), said that the words “and lobbying” in the fourth sentence of paragraph 39 should be deleted, as lobbying was a separate concern from collusion.

41. *It was so decided.*

Document A/CN.9/WG.I/WP.79/Add.4

42. **Mr. Ezech** (Nigeria), referring to the qualification criteria discussed in paragraph 16, said that, since pre-qualification should not limit competition by excluding those who might normally compete, particularly in international procurement exercises, it should be stipulated that foreign

companies were not subject to local laws, including on the incorporation of companies or compliance with tax and security requirements.

43. **Ms. Nicholas** (Secretariat) said that one way of addressing the concern raised by the representative of Nigeria would be to include some of the examples cited by him in the final sentence of paragraph 17, among the unnecessary requirements that discriminated against overseas suppliers.

44. **The Chair** said that care should be taken, however, not to discourage the legitimate application of local tax laws, but only the abuse of requirements aimed at excluding foreign suppliers.

45. **Mr. Wallace** (United States of America) said that the Guide should explain what was meant by “misrepresentation” and “materially inaccurate or materially incomplete”, as used in article 9 of the Model Law.

46. **Ms. Nicholas** (Secretariat), referring to paragraph 18 (f) of the Working Group’s report (A/CN.9/745), said that it had been decided that no meaningful explanation could be provided for either in the context of the Guide. The Working Group had found that “materiality” was a threshold concept and that it referred to omissions or inaccuracies that might affect the integrity of the competition in the circumstances of the procurement concerned. Consistency would be ensured in the discussion of the concepts of materiality throughout the Guide.

47. **Mr. Imbachi Cerón** (Colombia), supported by **Mr. Maradiaga** (Honduras), suggested that the second sentence of paragraph 9 in the Spanish version be revised to avoid implying that any restriction of participation of suppliers or contracts in procurement proceedings necessarily restricted trade.

48. **The Chair** said that the text could be amended to read “may restrict trade”, rather than “restricts trade”.

49. **Mr. Grand d’Esnon** (France) said that restricting the number of participants would logically restrict trade, making the addition of “may” unnecessary. Meanwhile, the phrase “may violate commitments”, or “*peut contrevenir aux engagements*” in the French version, could be understood as authorizing the violation of

commitments. The word “*peut*” should be replaced with “*est susceptible de*” in the French.

50. **Ms. Nicholas** (Secretariat) said that the intention was to draw attention to the fact that such restriction could violate free trade commitments. She proposed replacing “restricts trade and may violate commitments” with “may violate free-trade commitments”.

51. **The Chair** said that paragraph 9 incorrectly stated that the purpose of paragraph 1 of article 8. It did not spell out the grounds that might be invoked to justify restricting participation. Rather, it allowed restrictions on nationality only where permitted by national regulations.

52. **Mr. Bonilla Muñoz** (Mexico) said that his delegation did not agree with the latest change proposed by the Secretariat.

53. **Mr. Ezech** (Nigeria) said that the wording proposed by the secretariat satisfactorily addressed the issues raised by his delegation.

54. **The Chair** said that while nationality should not be a criterion for restricting participation in procurement proceedings, regulations might allow the procuring entity to restrict participation on grounds of nationality. However, the fact that regulations allowed such a restriction did not mean that the law allowed it, since there could be other overriding international obligations that restricted the right to limit participation on the basis of nationality.

55. **Mr. Grand d’Esnon** (France) said that the issue of national preference should be spelled out clearly in paragraph 9.

56. **Ms. Nicholas** (Secretariat) said that paragraph 9 would be reworded to serve as a descriptive introduction of article 8, setting the stage for the detailed commentary contained in the paragraphs that followed. She suggested that the revised paragraph should state that the purpose of article 8 was to provide for the full and unrestricted international participation in public procurement, and should set out the limited situations in which participation could be restricted. References would be added to the relevant commentary addressing sanctions or anti-terrorism measures under article 3 and the implementation of socioeconomic policies.

The revised paragraph would further state that any such restriction of participation might be a violation of free-trade commitments by States under relevant international instruments; and, lastly, that paragraph 1 and 2 provided procedural safeguards when any such restriction was imposed.

57. *It was so decided.*

Document A/CN.9/WG.I/WP.79/Add.5

58. **Ms. Nicholas** (Secretariat) drew attention to paragraph 19 of the Working Group’s report (A/CN.9/745), which set forth the changes to document A/CN.9/WG.I/WP.79/Add.5 proposed by the Working Group. The Working Group had requested a significant redrafting of paragraphs 21 and onwards, the wording of which had not yet been finalized by the Secretariat.

59. **Mr. Wallace** (United States of America) asked what changes had been made to paragraph 30 of the document. Small and medium enterprises could not easily provide tender security and such a requirement tended to discourage them from participating in procurement proceedings.

60. **The Chair** said that, in line with the reformulation of paragraph 30 that had been requested in paragraph 19 (f) and (j) of the Working Group’s report, the commentary would be revised with a view to ensuring balance.

The meeting rose at 1 p.m.

**Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law
on Public Procurement** (*continued*)

**Summary record of the 946th meeting, held at Headquarters, New York,
on Tuesday, 26 June 2012, at 3 p.m.**

[A/CN.9/SR.946]

Chair: Mr. Wiwen-Nilsson (Vice-Chair) (Sweden)

Mr. Wiwen-Nilsson (Sweden), Vice-Chair, took the Chair.

The meeting was called to order at 3.10 p.m.

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/745, A/CN.9/754 and Add.1 and 2, A/CN.9/WG.I/WP.79 and Add.1-19)

Document A/CN.9/WG.I/WP.79/Add.5

1. **Ms. Nicholas** (Secretariat) drew attention to paragraph 19 of the report of Working Group I (Procurement) on its twenty-first session (A/CN.9/745), which described the changes agreed upon by the Working Group to document A/CN.9/WG.I/WP.79/ Add.5. The Secretariat had not yet finalized the significant redrafting of paragraphs 21 and onwards, relating to article 16, requested by the Working Group.

2. **Mr. Wallace** (United States of America), referring to paragraph 30 of addendum 5, reiterated his delegation's view that small and medium enterprises (SMEs) could not easily obtain tender securities and that requests for their provision might discourage them from participating in procurement proceedings.

3. The Working Group had requested that the first sentence in paragraph 30 of the draft Guide be reformulated in more neutral terms so as to avoid conveying any message that tender securities were necessary or recommended for some types of procurement. His delegation did not agree that tender securities facilitated participation by SMEs in public procurement, while recognizing that tender securities might allay a procuring entity's concerns as to the qualification and capacities of suppliers or contractors in the procurement proceedings.

4. **Ms. Nicholas** (Secretariat) said that the Secretariat's understanding of the Working Group's discussion on tender securities was that it wished to see a balanced commentary for article 17 of the Model Law, presenting the advantages and disadvantages of tender securities. The reference to those advantages and disadvantages in the particular context of SME participation was in parentheses in the text of the Working Group's report and the Commission could therefore decide whether or not to include it.

5. **The Chair** asked whether, in that light, subparagraph (j) could be redrafted to remove any reference to SMEs.

6. **Mr. Fruhmenn** (Austria) insisted that a more balanced explanation of the advantages and disadvantages of tender securities should be reflected in the draft Guide.

7. **Ms. Nicholas** (Secretariat), drawing attention again to paragraph 30 of addendum 5, said that the issue of tender securities had originally arisen with respect to electronic reverse auctions (ERAs). There was no specific reference to SMEs in article 17, but subparagraph (j) set out the possible advantages and disadvantages for them. She also drew attention to the final sentence of paragraph 35 of addendum 5, where the matter was concluded. She wondered whether that would satisfy the Commission.

8. **Mr. Grand d'Esnon** (France) said that in the Working Group a majority had favoured requesting the provision of tender securities but some countries, including his own, had expressed their opposition. The Secretariat should, therefore, reword the first sentence in paragraph 30 in more neutral or objective terms.

9. **The Chair** said that subparagraph 19 (j) seemed to present a balanced reflection of the

discussions on the advantages and disadvantages of tender securities. He had doubts, however, about the use of the word “jurisdictions”; it might be more accurate to talk about “situations” instead. He asked the representative of France to clarify his objection to subparagraph 19 (j).

10. **Mr. Grand d’Esnon** (France) said that he objected to the impression created that requesting the provision of tender securities might have a favourable effect on SMEs. Moreover, the text suggested that tender securities were the norm. The Commission should not enter into a discussion of the advantages or disadvantages of tender securities for SMEs but the text should point out that both existed.

11. **Mr. Wallace** (United States of America) said that the way in which subparagraph 19 (j) was worded suggested that in some jurisdictions tender securities were favourable while in others they were negative. The balance could be struck simply by making it clear that in all jurisdictions tender securities could present both advantages and disadvantages.

12. **The Chair**, recalling that the effects of tender securities were not specific to SMEs, suggested deleting the references to both SMEs and jurisdictions. He took it that the Commission agreed to his suggestion and wished to leave the redrafting to the Secretariat.

13. *It was so decided.*

14. **Mr. Wallace** (United States of America), referring to paragraph 41 of addendum 5, said that his delegation believed that the first sentence, listing a number of factors, was too sophisticated. He did not recall any discussion in the Working Group on the complicated issue of geographical factors, especially for pre-qualification proceedings. He suggested simplifying the sentence in question.

15. **Ms. Nicholas** (Secretariat) said that paragraph 41 should be read in conjunction with the preceding paragraph. Paragraph 40 introduced the issue of international publication, whereas paragraph 41 set out the kinds of factors to be assessed. Those factors were not straightforward, which was why the text was rather complicated.

16. **The Chair**, drawing attention to article 33 (4) of the Model Law, suggested that paragraph 41 should be left as it was. It was simply an explanation of the Model Law and added nothing to it.

17. **Mr. Wallace** (United States of America) said that he could accept the Chair’s suggestion.

Document A/CN.9/WG.I/WP.79/Add.6

18. **Ms. Leblanc** (Canada) said that the term “justify” used in paragraph 6 of the addendum was inappropriate.

19. **Mr. Grand d’Esnon** (France) agreed with Canada, adding that the word “justification” in paragraph 7 would also have to be changed.

20. **The Chair** agreed that the term “justify” did not reflect the outcome of the discussions held.

21. **Ms. Leblanc** (Canada) suggested that the second sentence of paragraph 6 might be reworded to read: “The request should ask the supplier or contractor to clarify the basis upon which the price was determined and confirm any additional details in this respect that may be necessary to allow the procuring entity to conclude whether the supplier or contractor will be able to perform the procurement contract for the price submitted.”

22. **The Chair** expressed concern that the proposed wording went too far.

23. **Mr. Wallace** (United States of America), agreeing with the Chair, said that paragraph 7 already alluded to the issue. Fears had been expressed that ERA procedures might drive prices down too far. Nevertheless, it would be unreasonable to ask the supplier or contractor to clarify the basis upon which the price was determined as that was confidential information. Unless the amendment suggested by the representative of Canada could be toned down it should be rejected.

24. **The Chair**, drawing attention to paragraph 20 of the Working Group’s report, which addressed the issue of prices, said that the Secretariat might redraft paragraph 6 in the light of subparagraphs 20 (b), (c) and (d).

25. **Ms. Leblanc** (Canada) said that her delegation agreed in principle with the views expressed by the United States of America and the Chair and would happily leave it to the Secretariat to improve the wording of paragraph 6.

26. **Mr. Wallace** (United States of America) requested that the word “exhaustive” in paragraph 14 be deleted. The grounds for the mandatory exclusion of a supplier or contractor from the procurement proceedings for reasons not linked to qualification or to the content of a submission might be subject to changes over time and it would be impossible to provide an exhaustive list.

27. **Mr. Fruhmenn** (Austria) said that in view of the title of article 21 the wording of paragraph 14 should remain unchanged.

28. **The Chair** suggested that “provide a list of the grounds” might be preferable wording.

29. **Mr. Grand d’Esnon** (France), expressing understanding for the concerns of the United States delegation, proposed replacing “exhaustive” with “complete” or “closed”.

30. **The Chair**, noting the agreement to delete the word “exhaustive”, said that the Secretariat would find a more satisfactory wording, possibly “the grounds” or “the sole grounds”.

31. **Ms. Leblanc** (Canada), referring to paragraph 18, said that although the Working Group had discussed the definitions of the terms “unfair competitive advantage” and “conflict of interest”, the text did not seem to offer additional clarity. In any case, States should be left to define those terms under their domestic law and no definition should be necessary in the text.

32. **Mr. Imbachi Cerón** (Colombia) agreed that definitions of the terms mentioned by the representative of Canada should not be provided in the Guide; rather, it should be left to the competent national authorities to determine what the terms meant. There were many factors that determined unfair competitive advantage, including technical or economic superiority.

33. **The Chair** asked the delegate of Canada if she had taken paragraph 20 of the Working Group report

into account, in particular footnote 6, which went into considerable detail on definitions.

34. **Ms. Leblanc** (Canada) said that she was simply seeking a clarification but it was her delegation’s opinion that the terms should not be defined at all. She wanted to be sure that its opinion would be taken into account when the Guide was finalized.

35. **Ms. Nicholas** (Secretariat) said that the Commission was free to decide that neither term required a definition in the Model Law. In some countries, the judiciary might even interpret the terms on a case-by-case basis. However, the discussions held in the Working Group might help those countries so wishing to define the terms in their legislation.

36. **The Chair** said that subparagraph 20 (g) of the Working Group’s report seemed to reflect the consensus satisfactorily.

37. **Ms. Miller** (World Bank) requested that the hyperlink in paragraph 48 to the World Bank’s debarment system should be deleted as it was irrelevant to the issue at hand, namely debriefing.

38. **The Chair** said that the Secretariat would act on the World Bank’s request.

39. **Mr. Mugasha** (Uganda) asked what would happen to the footnotes contained in the addenda, such as footnote 4 in addendum 6.

40. **The Chair** replied that all footnotes would be deleted in the final document and the text contained therein would be incorporated into the body of the Guide.

Document A/CN.9/WG.I/WP.79/Add.8

41. **Mr. Fruhmenn** (Austria) said that the wording of paragraph 6 might be confusing as it referred to article 28 (1), whereas the addendum addressed later articles. He asked how the final text would be presented, bearing in mind the need for ease of comprehension.

42. **Ms. Nicholas** (Secretariat) said that the Working Group had instructed the Secretariat to group the commentaries for each procurement method together, which explained the layout of addendum 8. It might be clearer to revise the

heading before paragraph 6 to read “Introduction to open tendering”.

43. **The Chair** said that it might be more logical to change the order of paragraph 6, so that it began with the statement that there were no conditions for the use of open tendering. He suggested that the Secretariat could be tasked with ensuring that the final wording and layout were clear.

44. **Mr. Wallace** (United States of America) said that, in paragraph 11, the last phrase in parentheses, “with the consequence that suppliers or contractors excluded from participation in the procurement proceedings will not be able to obtain the solicitation documents”, posed a problem for his delegation. Such suppliers and contractors should be able to obtain the solicitation documents and the words “will not be able” were too strong.

45. **The Chair** agreed that suppliers or contractors excluded from participation in the procurement proceedings should be able to obtain the documents on request.

46. **Mr. Grand d’Esnon** (France) said that in many national systems, including France’s, solicitation documents were circulated only to the successful candidates and were not made public. That should be reflected in the text, possibly with improved wording.

47. **The Chair** said that the Secretariat would see to it that the text struck the necessary balance by referring to the entitlement of suppliers or contractors excluded from participation in the procurement proceedings to obtain the solicitation documents under article 38.

48. **Mr. Wallace** (United States of America) said that, in the opinion of his delegation, the penultimate sentence of paragraph 24 was misleading. Once a tender had been received the submission of tenders should be at the risk not of the suppliers or contractors but of the procuring entity.

49. **Ms. Nicholas** (Secretariat) said that the text would be redrafted to make it clear that it referred to cases of system failure before receipt of the tender by the procuring entity.

50. **The Chair** took it that the proposed solution was acceptable.

Document A/CN.9/WG.I/WP.79/Add.10

51. **Mr. Wallace** (United States of America) welcomed the reference in the introduction to articles of the Model Law in addition to the reference to chapters. For the sake of easier reading, it would be useful if that approach could be applied throughout the draft Guide.

52. **The Chair** said that the Secretariat would act upon the United States suggestion.

Document A/CN.9/WG.I/WP.79/Add.13

53. **Mr. Zhao** Yong (China) asked why the definition of the terms “services” and “construction” had been deleted from the draft Guide, leading to a lack of clarity in addendum 13.

54. **Ms. Nicholas** (Secretariat) recalled that the Working Group and the Commission had decided, when revising the Model Law, that no distinction needed to be made between procurement for goods, services or construction. Therefore the term “subject matter of the procurement” was used consistently throughout the Model Law although references to goods, construction and services were made in the draft Guide wherever appropriate or necessary. The Working Group had explicitly ruled out defining the terms “services” and “construction” in the specific context of ERA, the subject of addendum 13. She added that paragraph 4 of addendum 3 referred to the definition of “subject matter of procurement” and contained descriptions of goods, construction and services, albeit based on the definitions given in the 1994 Model Law.

Document A/CN.9/WG.I/WP.79/Add.14

55. **Mr. Zhao** Yong (China), noting that the translation of the draft Guide into Chinese generally lacked accuracy, drew attention to a particularly serious mistake in addendum 14, namely the use of the Chinese word for “auction” to translate “ERA”. They were, of course, quite different concepts and the error would result in considerable confusion when drawing up contracts in his country.

56. **The Chair** said that the Secretariat had taken note of the point raised by the representative of China.

57. **Mr. Wallace** (United States of America), recalling earlier problems with translation and interpretation, asked whether delegations might be accompanied by linguistic experts at meetings in order to avoid mistranslations in the future.

58. **Ms. Nicholas** (Secretariat) said that the Secretariat worked closely with the translation services on terminology. Translators always welcomed constructive comments from delegates.

Document A/CN.9/WG.I/WP.79/Add.16

59. **Mr. Fruhmenn** (Austria) asked the Secretariat whether the draft Guide stated, in addendum 16 or elsewhere, that there was no obligation for the procuring entity to use a framework agreement if there was a risk of collusion.

60. **Ms. Nicholas** (Secretariat) confirmed that the draft Guide did so. She would provide the exact reference at a later stage.

61. **Mr. Wallace** (United States of America), referring to footnote 2, asked for clarification of the subparagraph in the Working Group's report to which it referred, namely 10 (d).

62. **Ms. Nicholas** (Secretariat) recalled that, in the lengthy discussion in the Working Group, it had been agreed that procuring entities would not be legally required at the outset of the procedure to set a minimum number of parties to a framework agreement. In fact, procuring entities should be encouraged at the outset of the procedure to consider whether or not setting a minimum number of parties to the framework agreement was appropriate according to the nature of the market. Where the procuring entity envisaged the possibility that a stated minimum number of parties might not be achieved, it should specify in the solicitation document the steps it would then take, which might include the possibility of concluding the agreement with a lower number of suppliers.

63. **Mr. Wallace** (United States of America), recalling that article 15 did not require a minimum number of parties to a framework agreement, said that it was important to encourage best practices, such as setting a minimum number. However, explicitly allowing procuring entities to conclude the agreement with a smaller number of suppliers than the minimum set would be a bad practice.

64. **Ms. Nicholas** (Secretariat) reminded the Commission that the Working Group had decided to allow procuring entities to conclude a framework agreement with a lower number of suppliers, but the Commission could amend the text if it so wished.

65. **Mr. Grand d'Esnon** (France) said that the matter had already been discussed at length and should not be reopened. Where the procuring entity envisaged the possibility that the stated minimum number of parties to a framework agreement might not be achieved, the agreement could be concluded with a lower number of suppliers in order to prevent cancellation of the procurement, which would not be sensible.

66. **Mr. Fruhmenn** (Austria) said that the current wording allowed if not for the best practice, then at least for second best. He agreed with France that it would be regrettable if a procurement exercise was cancelled because only two and not three parties, for example, could be found.

67. **Mr. Wallace** (United States of America) said that he had merely wished to raise the matter and, in the light of the discussion, could agree to the existing wording.

Document A/CN.9/WG.I/WP.79/Add.19

68. **Ms. Nicholas** (Secretariat) recalled that, in its report, the Working Group had asked the Secretariat to ensure consistency in the use of terminology throughout the draft Guide and to replace prescriptive wording with a discussion of the main issues arising and policy options to address them. She assured the Commission that the request would be met in full.

Concluding remarks

69. **Mr. Wallace** (United States of America) said that, in the concluding remarks of its report, the Working Group had taken note that the Guide would not contain a glossary of terms but that a similar document would be produced by the Secretariat in due course. In view of the importance of maintaining accurate glossaries, or similar documents, as well as the disbandment of the Working Group, he asked how the Secretariat planned to produce such a document and how it would be verified on an ongoing basis.

70. **Ms. Nicholas** (Secretariat) recalled that it had been decided by the Working Group and in intersessional consultations that it would be too complicated to annex a glossary proper to the draft Guide to Enactment. Instead, an informal explanatory document, possibly in the form of a detailed commentary, would be produced by the Secretariat in due course, on the basis of the Working Group's deliberations. As the Working Group's report stated, any other materials produced to assist in the enactment and use of the Model Law would be reviewed periodically and, should amendments be warranted, they would be presented to the Commission for its consideration on an informal basis from time to time.

The meeting rose at 5.45 p.m.

Future work in the area of public procurement and related areas

Summary record of the 947th meeting, held at Headquarters, New York,
on Wednesday, 27 June 2012, at 10 a.m.

[A/CN.9/SR.947]

Chair: Mr. Wiwen-Nilsson (Vice-Chair) (Sweden)

Mr. Wiwen-Nilsson (Vice-Chair) (Sweden) took the Chair.

The meeting was called to order at 10.20 a.m.

Future work in the area of public procurement and related areas (A/CN.9/745 and A/CN.9/755)

1. **Ms. Nicholas** (Secretariat), Secretary of Working Group I, introduced the note by the Secretariat (A/CN.9/755), which contained a compilation of five suggested areas for possible future work identified at the April 2012 meeting of the Working Group. The five areas were also described in the Working Group's report (A/CN.9/745, paras. 38-41).

2. The first suggested area was public procurement and aspects or phases of the public procurement cycle not covered by the Model Law. The phases of the procurement cycle included procurement planning, selection of suppliers and contract administration. As the Guide to Enactment to accompany the Model Law on Public Procurement made clear, the scope of the Model Law encompassed only the selection phase and very limited aspects of the planning phase; it did not cover contract terms or contract administration and management. The Working Group had frequently commented that the phases of procurement not covered under the Model Law were extremely important. However, discussion had concentrated on the difficulty of addressing them from a regulatory or legislative perspective.

3. The second area concerned the harmonization of provisions governing the selection of concessionaires under the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (PFIPs) and the relevant provisions on procurement methods in the Model Law. "Requests for proposals with dialogue" had many features similar to the

selection of the concessionaire under the PFIP Legislative Guide.

4. The third topic was a technical one, namely the consolidation of the PFIP Legislative Guide and the model legislative provisions, which were currently presented as two separate documents.

5. The fourth topic, ambitious in scope, was the question of other topics that should be addressed in a modern text on privately financed infrastructure projects including, inter alia, issues of oversight and promoting domestic dispute resolution measures.

6. Lastly, there was the scope of the Commission's approach to private finance. There had been significant changes in recent years with respect to private financing, which was now present in the provision of Government services in unforeseen ways. In addition, certain concessions and transactions were excluded from the scope of the PFIP Legislative Guide. Therefore, the Commission was invited to consider whether a more holistic approach to the privately financed aspects of infrastructure development and related transactions should be taken.

7. Under the heading of additional matters, the Commission might wish to make recommendations on how to support the Model Law and the Guide.

8. The first subtopic of the first area related to contract management and administration, which was not covered by the Model Law. The United Nations Convention against Corruption required internal control and risk management, which went beyond selection of the winning supplier inasmuch as it also had an impact on contract administration. Clearly, the goal was appropriate contract performance and, in more complex projects, it might be necessary to have in place a proper project management approach covering variations, late payments, and how to deal with disputes in the relevant procurement contracts.

Those issues were simply not addressed in the Model Law, although they received some attention in the Legislative Guide on Privately Financed Infrastructure Projects. The question for the Commission was therefore to what the extent such issues could be regulated in a legislative instrument. The Commission might also discuss the extent to which contract administration and management required work on contract terms because one issue that arose was the extent to which contractual elements could be varied through different terms and conditions. The commentary stated that the procurement cycle did not end on completion of the contract but, as necessary, when the relevant assets had been disposed of. Some procurement laws, in particular in Africa, did deal with disposal of assets but, because the Model Law did not, the Commission had been requested to consider whether or not it wished to take up the question.

9. As to procurement planning, both Transparency International and the Working Group had noted that, along with the contract administration cycle and the contract administration phase, procurement planning was particularly susceptible to abuse. The Model Law addressed some aspects of procurement planning, such as the drafting of specifications, but generally, the questions of budgeting future work and future procurement were not dealt with. Failure to regulate those matters created certain risks. The main issue was whether or not procurement law would be the appropriate place to address the aspects of procurement planning that were not currently dealt with under the Model Law.

10. Another subtopic concerned suspension and debarment. Article 21 of the Model Law provided for exclusion from procurement proceedings, but did not contemplate exclusion for an indefinite period or from all Government procurement. Paragraphs 13 to 18 of the note by the Secretariat (A/CN.9/755) contained a detailed description of various systems for debarment; in its future work the Commission might wish to tackle such issues as due process; ensuring consistency in application; ensuring proportionality and fairness; whether debarment should be mandatory or discretionary and the risks of a discretionary debarment; transparency; time periods; and what had become known in the European Union as the process of “self-cleaning”, in

which a supplier found guilty of a misdemeanour provided an explanation for its conduct and described the measures it had taken to prevent a recurrence, which could result in the removal of the supplier from the blacklist.

11. **Mr. Wallace** (United States of America) said that the Commission was at its best when it worked on law. The Commission had already been active in the field of contract administration; before dealing with procurement, the Commission had started with the Legal Guide on Drawing up International Contracts for the Construction of Industrial Works, which addressed contracts and their administrative aspects. International Federation of Consulting Engineers contracts were guided by documents that gave information on how to administer contracts. If the Commission wanted to take up the topic, it must therefore, at the very least, take into account the Federation’s work.

12. With regard to project management, the issue was largely one of technique, best practices and training. He agreed that planning was an issue; many countries ran out of money in the middle of a budget year, infuriating the contractors who had brought equipment onto the site. The Commission should have worked on the topic of suspension and disbarment because it covered such things as blacklisting, but it was now too late to do so.

13. **Mr. Fruhmenn** (Austria) said he agreed with the United States representative that contract administration was mainly about best practices, not legal matters. How to handle contracts was not an appropriate topic for the Commission. Issues of sustainability and the environment were interesting, but it was too late to deal with them, since in the Guide to Enactment and in the Model Law they were left to individual States. Those issues could be the subject of a background paper on best practices but should not be main topics for the Commission.

14. **Mr. Ezech** (Nigeria) said that the selection of service providers depended on how well procurement planning was done. Therefore, it was important that the Commission should consider incorporating the rudiments of procurement planning as part of its Model Law. He did not agree that that was the same as contract administration, which, as the representative of the United States had observed, fell outside the core competence of the

Commission. Procurement planning work was required, especially in developing economies, where corruption could begin at that level, and could focus on including details in the Guides to the Law itself.

15. **Mr. Grand d’Esnon** (France) said that preparation of a model law on public-private partnerships (PPPs) would make sense for the simple reason that such arrangements were relatively new and were coming into worldwide use; in many countries investments took the form of PPPs without a legal framework to govern the related procurement, a situation that undermined legal certainty for both administrations and bidders. Therefore, for such new contracts involving private pre-financing, it would be logical for the Commission to engage in the same exercise that it had carried out for public procurement. The European Union was working on a directive on concessions that would cover public-private partnerships. The Commission should wait until that work had been concluded before taking up the topic itself, perhaps towards the end of 2013.

16. **Mr. Wallace** (United States of America) said that, concerning the comments by the representative of Nigeria, it was too late to work on a model law but there were other ways of moving forward. One option would be for the Secretariat to prepare papers on specific subjects, which could be posted on the UNCITRAL website to trigger reactions from readers, and could lead to further work on a law, guide or regulations. With respect to budgeting and planning, mentioned by the representative of Nigeria, if the Secretariat had the capacity, a paper on the subject would be welcome. The Commission could work together with other organizations such as the regional banks or the Vale Center, to prepare papers on such topics with a view to stimulating discussion. However, the Commission must be realistic and should not return to the Model Law itself.

17. **Mr. Bonilla Muñoz** (Mexico) said that future work must not ignore the work being carried out by other groups. Technological advances and technical standards relating to commercial matters had a direct bearing on procurement. It would be useful to foster a discussion of the matter through a blog in order to have a clear idea of the state of play in areas related to procurement. It would also be good

to know when it would be appropriate to have experts prepare a consolidated input document for a future meeting.

18. **Mr. Imbachi Cerón** (Colombia) said that his Government took a keen interest in procurement issues and had always taken into account the Commission’s proposals, such as the model laws, when adopting national regulations.. Colombia and other Latin American countries, where procurement was not centralized and could be undertaken at the regional level, had experienced problems with collusion in public bidding processes and competitions. Small and medium-sized companies faced obstacles when it came to participating in public processes because large companies were on a procurement merry-go-round, sharing out available contracts. The studies made so far on the issue of collusion had focused exclusively on prevention. Although the 2011 Model Law and the related Guide to Enactment dealt with the issue from the point of view of the public authorities, a study would be welcome regarding ways in which businesses and procuring entities could avoid problems related to free competition. Countries that were facing such problems would welcome assistance from the Commission in that regard.

19. **Ms. Nicholas** (Secretariat) said that, regarding the rules on corporate compliance, the Model Law regulated the actions of the Government and the procuring entity. However, it regulated suppliers only through sanctions that could be imposed under article 21. It had been suggested to the Working Group that there was growing support for addressing the behaviour of suppliers through rules on corporate compliance. In particular, there had been moves in some parts of the world to encourage suppliers and contractors to look at their own procedures because of the risk of prosecution should something go wrong. The Working Group had so far not considered that it would be appropriate to extend the scope of the Model Law in that way because it would then require a much more holistic approach to the behaviour of suppliers. However, if the Commission considered that suspension and debarment were topics that it wished to take up, it could then deal with the behaviour of suppliers.

20. Under the heading of sustainability and environmental issues, it had been proposed that the

preamble to the Model Law should identify sustainable procurement as a desirable objective, but the Working Group had rejected that proposal. Nevertheless, the importance of sustainability and environmental issues was growing and the Model Law was extremely flexible in that regard. The Working Group had crafted the provisions relating to qualifications of suppliers in such a way as to allow environmental and sustainable issues to be taken into consideration in the selection of the successful supplier. Therefore, the Commission was invited to consider whether additional work on the Model Law was required or whether attention should simply be drawn in any discussion of the Model Law to the great flexibility of its provisions in that regard.

21. **Mr. Fruhmenn** (Austria) said that making the Model Law as flexible as possible had been intentional so that contracting entities might take up sustainable, social or green issues, according to their priorities. Efforts should be undertaken to increase awareness of that flexibility and to provide guidance to States perhaps through a blog promoting an exchange of views on best practices or new experiences relating to the use of the Model Law to ensure sustainable procurement.

22. Corporate compliance was not a legal matter or problem of concern to the Commission but one of behaviour and best practices.

23. **Ms. Nicholas** (Secretariat) said that the issue of harmonization was extremely straightforward. The selection method for the concessionaire under the Privately Financed Infrastructure Project Guide, was not exactly the same as the request for proposals with dialogue and perhaps there was no reason to retain slightly different methods that could give rise to confusion and undermine the best practice approach. The Commission might therefore wish to instruct the Working Group to harmonize those two procurement methods and to update the PFIP Guide accordingly.

24. **The Chair** suggested that, instead of referring the matter to the Working Group, the Commission could ask the Secretariat to harmonize the two methods.

25. **Mr. Wallace** (United States of America) said that, as the representative of France had said, if the

Commission were to work on a model law on public-private partnerships/privately financed infrastructure projects, it would be considering the selection of the concessionaire, the procurement aspect of privately financed infrastructure, and the legislative provisions. The issue had more than just a legal dimension. The Commission might look into the lessons to be learned from the Model Law with respect, for example, to selection in the field of competitive negotiation with dialogue and other complex methods. With respect to harmonization of the Model Law and the Guide, such a minor detail should not be a project for the Working Group, but as suggested by Austria, could be dealt with in a paper.

26. **Mr. Zhao Yong** (China) said that procurement practices and legislation needed time to develop. China's legislation on public procurement had benefited from the guidance provided by the Model Law. China was interested in the issues of contract administration, debarment and suspension, corporate compliance, and environmental protection. As China developed its legislation in the years ahead it would welcome further work by the Commission on those issues, whether in the form of an amended Model Law, environmental protection legislation or anticorruption legislation.

27. **Mr. Maradiaga** (Honduras) said that the mission of UNCITRAL was strictly legal. In developing model laws, whose provisions were necessarily general, the Commission must strive to guarantee harmony, transparency and effectiveness and to accommodate different national systems. The instruments produced by the Working Group on Procurement over the years had had an enormous impact in many countries, including Honduras.

28. **Ms. Nicholas** (Secretariat) said that if the Commission were to consider further work on, inter alia, the privately financed aspects of infrastructure development and public-private partnerships, it should identify the subjects on which additional provisions would be necessary in a modern text addressing such transactions. The first such subject suggested at the Working Group meeting was oversight. The Model Law did contain a reference to the maintenance of a record of proceedings. The Legislative Guide also noted, referring to specific projects and regulatory change and issues affecting

the performance of a project, that an exhaustive discussion of legal issues would exceed its current scope. The Commission was invited to consider whether or not such issues should be explored in more detail in the light of the experience acquired in such projects since it had adopted the Privately Financed Infrastructure Project Guide.

29. The second topic related to promoting dispute resolution measures in domestic rather than international forums. Under the Legislative Guide, the current approach was to give guidance on how to deal with the potential for disputes and actual disputes in the contract management or project management period. The Secretariat understood that certain delegates considered that appropriate investment and participation at the domestic level should involve a more articulate recommendation to promote domestic dispute resolution rather than using international forums such as the International Centre for Settlement of Investment Disputes.

30. **Mr. Wallace** (United States of America) said that oversight and the domestic resolution of disputes could be subsumed into a general discussion on privately financed initiatives. Those two topics had been addressed jointly at the UNCITRAL Congress on Modern Law for Global Commerce in 2007. Currently, major disputes between procuring entities and contractors were handled in international forums, such as the Permanent Court of Arbitration and under the UNCITRAL Arbitration Rules, which had helped to publicize the work of the Commission. However, he considered that it was important for States to establish effective domestic arbitration machinery. The Commission should therefore produce model laws to that end. It was also vital to address the prevention of such disputes by introducing oversight mechanisms and by involving investors and businesses in the drafting of relevant legislation, as was the case in the United States where a process of “notice-and-comment” was widely used. The domestic resolution of disputes was therefore a legitimate future topic for the Commission; however, it should not be considered in isolation, but in conjunction with work on PFIPs and PPPs.

The meeting was suspended at 11.35 a.m. and resumed at noon.

31. **Ms. Nicholas** (Secretariat) said that proposals on possible future work in section 4 of A/CN.9/755 included follow-up to the Commission’s decision to consolidate UNCITRAL PFIPs instruments. The proposal contained in section 5 was more general as the scope of PPPs and PFIPs had expanded considerably in recent years and the existing Legislative Guide on Privately Financed Infrastructure Projects did not cover service delivery for PPPs without infrastructure development, the divestment of State-owned assets or enterprises, while natural resource concessions had been specifically excluded. The current trend whereby Governments granted natural resource concessions in return for private companies investing in infrastructure had raised numerous concerns owing to the lack of transparency of such transactions. The Secretariat had participated in a colloquium organized by the International Institute for the Unification of Private Law (UNIDROIT) and had suggested that many of the proposals contained in the Legislative Guide could be applied to natural resource concessions. The Commission might also wish to address how its work might relate to the output of other international organizations on the matter.

32. **Mr. Wallace** (United States of America) said that the proposal to consolidate UNCITRAL PFIPs instruments was simply a question of physically combining the two separate volumes. The Commission had resolved to consolidate the instruments in 2001 and, in fact, the process was almost complete. It was not necessary to produce a commentary and hence the topic need not be referred to a working group. On the question of broadening the scope of PFIPs instruments, it was important not to become confused by the plethora of different terms that existed in various countries for PFIPs. If a colloquium were to be held in order to define the scope of a future project, it would have to set specific and well-defined terms of reference and limits.

33. **Ms. Leblanc** (Canada) said that it was important that the work of UNCITRAL should be carried out in working groups, rather than by groups of experts or the Secretariat, including the identification and choice of possible topics for future work. Such an approach would ensure transparency and inclusiveness, in keeping with the

Commission's main objectives. It would, however, be difficult to have an in-depth discussion on the proposed topics without discussing strategic planning for UNCITRAL and the rule of law.

34. With regard to the consolidation of the PFIPs instruments, she noted that the European Union was currently working on that topic and an UNCITRAL project could be launched within a year. Her country supported such a project and the proposed timetable would allow the Secretariat enough time to undertake research and organize a colloquium on the work done in other organizations, including the European Union, on related subjects. It would also be useful to undertake a project to address various aspects that had been omitted from the Legislative Guide on PFIPs. A working group could draft guidelines that could be used when drawing up contracts to prevent the private sector from selling concessions to a private company without the Government's consent. The Secretariat should carry out more research or organize a colloquium in order to ensure that the scope of such guidelines was well defined. Therefore, the working group should not meet before autumn 2012 or even spring 2013.

35. **Mr. Fruhmann** (Austria) said that work by the Commission on the proposal contained in section 5 of the note by the Secretariat (A/CN.9/755) would be useful; however, it was important to define the scope of any guidelines, through a colloquium if necessary. As a member of the European Union working group engaged in the drafting of a directive on the award of concession contracts, he considered that it was possible that a European legal framework could be in place by 2015. It was therefore essential to time the work of the UNCITRAL Working Group so that it could take advantage of the European experiences and expertise. In the meantime, it would be a good idea to signal the Commission's interest in the matter. With regard to the proposal contained in section 4, he concurred with the United States that consolidating PFIPs instruments was a straightforward process.

36. **Ms. Laborte-Cuevas** (Philippines) said that the suggestion to broaden the scope of UNCITRAL PFIPs instruments to cover PPPs was a matter of particular interest for developing countries like her own.

37. **Ms. Johnson** (Observer for the Vale Columbia Center on Sustainable International Investment) said that the Vale Columbia Center, operated jointly by Columbia Law School and the Earth Institute of Columbia University, was a leading applied research centre and forum for the study, practice and discussion of sustainable international investment. Its interests and expertise inc. Under the Privately Financed Infrastructure Project Guide, included work on PPPs in the form of natural resource concessions and PFIPs, two areas that were increasingly interrelated and with major implications for sustainable development.

38. Countries with natural resource endowments had tremendous opportunities to use their resource wealth to promote effective and sustained economic development that was inclusive and helped to reduce poverty through the development of infrastructure, links with local industries, capacity building, the creation of jobs and the transfer of capital and technology. Ensuring that extractive industries fulfilled their transformative potential and contributed to sustainable and equitable development would benefit both Governments and companies in the long term. However, the extent to which those benefits were actually realized largely depended on both Government and investor policy and the national institutions in place. In the light of the opportunities and challenges that natural resource wealth posed for developing countries, the Center had developed a workstream to identify effective policy frameworks that allowed Governments, citizens and investors to maximize benefits from natural resource concessions. It included, among other things, examining contract formation, design, review and enforcement from the angle of sustainable development.

39. Privately financed infrastructure projects were also crucial for development because the availability of good and reliable transportation, telecommunications and energy infrastructure were vital for economic growth and a key determinant of foreign direct investment. Many countries, particularly resource-rich countries, were increasingly turning to private investment to fund necessary infrastructure projects. The Center had been studying various economically viable strategies that countries could use to leverage extractive-industry-related infrastructure investments for

sustainable development projects, including identifying legal frameworks that would encourage a move toward a model conducive to the shared use of infrastructure rather than the more traditional “enclave” model. The Center hoped to be able to assist the Commission and the Working Group in their work on those issues.

40. **Mr. Bloomsbury** (Observer for the New York State Bar Association) said that the outcome document of the recent United Nations Conference on Sustainable Development (A/CONF.216/L.1) had strongly recommended the promotion of public-private partnerships and had emphasized the private sector’s contribution to the achievement of sustainable development. Given that endorsement from such a high-level political forum, it was up to the Commission to identify how it could help to achieve the vision of the future set out in the outcome document.

41. **Mr. Pérez-Cadalso Arias** (Observer for the Central American Court of Justice) said that the Court, as one of the organs of the Central American Integration System, was competent to judge cases involving any of the seven member States, namely Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, brought either against or by another member State, a non-member State that accepted the Court’s jurisdiction and any natural or legal person resident in a member State. The Court also had jurisdiction to harmonize legislation between member States and to propose conventions and laws to enforce such conventions in the region. It was also competent to arbitrate trade disputes arising from regional trade agreements. The Court had much to learn from the Commission and hoped to contribute in equal measure to its future work.

42. **Mr. Imbachi Cerón** (Colombia) said that ten years earlier his Government had initiated efforts to use private financing to fund public infrastructure projects. Those efforts had culminated in January 2012 with the adoption of Act No. 1508 establishing the legal framework for PPPs. It would therefore be beneficial if a Working Group were instructed to look into public-private partnerships.

43. **Mr. Ezeh** (Nigeria) said that when his Government had enacted a law in 2007 based on the

1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services, the major challenge was implementing the law. He considered that UNCITRAL should not only concern itself with providing model laws, but that the experiences of different countries could be used to help guide those in similar situations. The Commission should also provide national regulators with support to ensure that procurement rules were rigorously enforced and complied with, as currently there were no provisions in place to protect regulators, who were at the mercy of political authorities. Many in government sought to circumvent procurement laws, which they considered to be too restrictive and would prevent them from seeing through vote-winning infrastructure projects. On a positive note, a number of high-ranking government officials were currently on trial for violating procurement rules and one person had been sentenced to two and half years in prison. The only way to stamp out corruption was to ensure that there were serious consequences and that the law was applied rigorously.

44. The Bureau of Public Procurement was working in conjunction with the United Nations Office on Drugs and Crime (UNODC) to tackle the problem of corruption in public expenditure projects, notably by introducing e-procurement systems. Such systems could help to address those problems as they increased transparency and reduced the need for human contact. The Bureau was under the direct authority of the President of the Republic, which ensured that it was protected from attempts to whittle down its purview; however, he considered that it would be useful and would serve to encourage others if the legislative guides included best practices from other countries.

45. **Ms. Nicholas** (Secretariat) said that UNODC was the custodian of the United Nations Convention against Corruption, article 9 of which dealt specifically with public procurement. The project in Nigeria had been undertaken as part of efforts under the Convention to reform procurement systems. The Secretariat worked closely with UNODC on all procurement related matters.

The meeting rose at 1 p.m.

**Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law
on Public Procurement** (*continued*)

Future work in the area of public procurement and related areas

**Summary record of the 948th meeting, held at Headquarters, New York,
on Wednesday, 27 June 2012, at 3 p.m.**

[A/CN.9/SR.948]

Chair: Mr. Wiwen-Nilsson (Vice-Chair) (Sweden)

Mr. Wiwen-Nilsson (Sweden), Vice-Chair, took the Chair.

The meeting was called to order at 3.15 p.m.

**Finalization and adoption of a Guide to the
Enactment of the UNCITRAL Model Law on
Public Procurement** (*continued*)
(A/CN.9/XLV/CRP.1/Add.2)

1. **The Chair** drew attention to document A/CN.9/XLV/CRP.1/Add.2 which had just been distributed and invited the members of the Commission to familiarize themselves with its contents.

The meeting was suspended at 3.20 p.m. and resumed at 3.45 p.m.

**Future work in the area of public
procurement and related areas** (*continued*)
(A/CN.9/755)

2. **Ms. Nicholas** (Secretariat) said that paragraphs 38 and 39 of the note by the secretariat on possible future work in the area of procurement and infrastructure development (A/CN.9/755) raised questions about how to ensure that the Model Law was widely enacted, implemented and interpreted, and also about the use of modern communication methods to publicize UNCITRAL material that supported the Model Law. The secretariat wished to determine how much flexibility there was within the United Nations publications operation for interactive and user-friendly versions of the Guide and other subsequent papers.

3. Several delegations had suggested specific topics, such as suspension and debarment, and procurement planning, which could be dealt with in supplementary papers. However, a more systematic

approach might be required in order to identify appropriate areas and the Commission might consider that, without a better understanding of what publications other bodies in related fields might be working on, it would be premature to take too many specific steps.

4. **Mr. Imbachi Cerón** (Colombia) said that he would be interested to hear the secretariat's opinion regarding his delegation's proposal regarding competition in public procurement. Electronic public procurement mechanisms had created problems for some companies with limited technological capabilities. Thus, it would be important for the Commission to develop a mechanism that could be used by the public and the private sector to establish policies to prevent unfair competition prior to the award of contracts.

5. Colombia continued to support the work of UNCITRAL in other areas, but considered that regulating competition was extremely important. A definite policy could give assurances to companies that they were all competing under the same conditions.

6. **Mr. Loken** (United States of America), referring to the dissemination of the Model Law, said that he wished to call the secretariat's attention to the Global Information Network (GLIN), a project of the United States Library of Congress. Its ambition was to be a comprehensive and universally accessible online collection of treaties, statutes, regulations, judicial decisions and principal secondary materials. The Network was currently trying to establish a base in every country, usually within the national legislature. It might be possible for UNCITRAL to involve domestic institutions in

its work as a means of augmenting its internal capacity.

7. **Mr. Fruhmann** (Austria) said that the secretariat might consider bilateral agreements with institutions in different enacting States that would provide information on public procurement and relevant jurisprudence, thus creating a network of States where the Model Law was being implemented so as to provide feedback to guide revisions of the Law and future work.

8. The idea that the Guide to Enactment should be a work in progress that could be updated and enriched through the Internet could contribute real added value, and he asked what its status was.

9. **The Chair** said that a network of Governments in connection with the Case Law on UNCITRAL Texts (CLOUT) was already in existence and provided information about the Model Law and other issues. Also, the draft decision adopting the Guide to Enactment (A/CN.9/XLV/CRP.2) provided for feedback and updating of the Guide, as mentioned by Austria.

10. **Mr. Wang** (Norway) said that he agreed that any future work in the area of public procurement should take into account other international instruments relevant to that particular area, including the existing and future initiatives of the European Union.

11. Norway supported the idea that the topics of sustainability and environmental issues should be considered, either among the proposals for additional work on public procurement not addressed in the Model Law, or in any other appropriate manner.

12. **Mr. Zhao Yong** (China) said he supported the ideas proposed by Colombia. Furthermore, it was very difficult for developing countries to know which method of procurement to use in each specific case. Therefore, as part of its future work, UNCITRAL should study the costs and benefits of, and the infrastructure needed for, each procurement method in order to provide guidance to developing countries.

13. **Ms. Leblanc** (Canada) said that the secretariat had noted that the 2011 Model Law would rarely be enacted without some sort of tailoring to local

circumstances, but local circumstances were not unique, and States frequently shared very similar legal frameworks. UNCITRAL staff were frequently asked to provide technical assistance to States with regard to enactment, and it would be useful to know whether the report of their work could be published so that best practices could be shared among States with similar legal frameworks.

14. **The Chair** said that it was emerging from the discussions that member States would be interested in receiving information on the experiences of others in implementing the Model Law and it might be useful to hear the secretariat's views on how that aspect could be undertaken.

15. **Mr. Loken** (United States of America) said that the United States Institute of Peace (USIP) had a programme relating to security, police work and the rule of law. Its main product was a collection of best practices on a global scale, which appeared to be very similar to the idea being discussed.

16. Regarding future work, some years earlier UNCITRAL had organized a colloquium on commercial fraud and the misuse of UNCITRAL instruments. However, the topic had not been assigned to a working group and he was unaware of the results.

17. **The Chair** said that the results of the colloquium had been indicators of commercial fraud, which could be of interest to members of the Commission as reference material. However, delegations should keep in mind that UNCITRAL focused on law, and some proposals possibly exceeded its mandate and resources.

18. **Mr. Sorieul** (Secretary of the Commission) said that UNCITRAL naturally wanted its work to be disseminated as widely as possible. Some excellent ideas had been put forward, which would require the secretariat to undertake new activities and provide various types of services. The secretariat was also expected to provide follow-up on previous work, while preparing future work; as time went by, an increasing number of texts required more extensive dissemination and implementation. The secretariat's capacity was, however, limited. In 2012, the secretariat was the same size and had the same resources as in 1968 when it had been set up.

19. The CLOUT system compiled case law in the six languages of the United Nations and the limits of the secretariat's capacity in that respect had been reached. It would be useful if the States themselves would contribute to the compilation of case law on procurement. The secretariat would still require additional resources at the stage of disseminating the information in the form of a summary of case law.

20. **Ms. Mokaya-Orina** (Kenya) said that the Model Law had formed the bedrock for procurement reform in many countries including her own; nevertheless, it needed to be updated to cover certain issues, such as electronic communication in public procurement.

21. **Mr. Mugasha** (Uganda) said that, although the Commission was currently dealing with public procurement, interest had been expressed in areas such as microfinance and international contracts. The different proposal would have to be assessed in order to establish priorities and it would be useful to know when the Commission would undertake such an exercise.

22. **Mr. Wallace** (United States of America) said that some of the additional topics relating to procurement set out in document A/CN.9/755 did not lend themselves readily to treatment in the Model Law and it was not practical to reopen the issue at the current stage. Several delegations had expressed great interest in continuing to work in specific areas that they considered of value to their own and other countries, and the secretariat could perhaps undertake certain work in the area of procurement that would address those concerns.

23. As to various issues relating to public-private partnerships (PPP) and privately financed infrastructure (PFI), there appeared to be broad interest in pursuing work in that area. A colloquium might be held to identify work that UNCITRAL might usefully undertake in that regard. If the Working Group were to be asked to undertake further work in that area, it would need a clear mandate.

The meeting was suspended at 4.35 p.m. and resumed at 4.55 p.m.

24. **The Chair**, summarizing the discussion, said that, when deciding on future work, it should be

recalled that the UNICTRAL mandate related to legal matters and products. That said, there appeared to be a common view that work should continue on PPP/PFI issues, the scope of such work to be defined by a colloquium.

25. The Commission had also expressed a desire to gather information on the implementation of the Model Law and any problems that might be encountered, and to make such information accessible to States through UNCITRAL. However, there was a limit to what UNICTRAL could do and the Commission should not underestimate the resources required to perform that task.

26. As to specific aspects of the Model Law, such as the costs and benefits of using certain methods of procurement, and sustainability or sustainable procurement, while the Commission had expressed interest in considering such topics, there were limitations imposed by resource constraints and the UNCITRAL mandate. The United Nations International Development Organization was examining the socioeconomic aspects of sustainability and was better placed to do so.

27. In conclusion, regarding future work, the secretariat should be instructed to make preparations for a colloquium, in consultation with members, which would provide the basis for a decision by the Commission in 2013 on the content and scope of its future work. In relation to the collection and dissemination of information on the implementation of the Model Law, the secretariat should be instructed to examine the matter and define what was feasible in terms of resources, and experience gained from the CLOUT system.

28. Consequently, the Commission would not consider contract management or procurement planning. Although suspension and debarment could be seen as a follow-up to the Model Law, it was not the moment to undertake new work aimed at adding to or amending the Model Law. Lastly, sustainability could not be considered a legal issue.

29. **Ms. Nicholas** (Secretariat) asked whether the secretariat should assess whether some of the topics that would not be included as future work on the Model Law might be addressed in a paper, and ascertain whether relevant documentation had been prepared by other organizations working in the area.

30. **The Chair** said that he understood that the secretariat should not be preparing papers, but merely collecting and disseminating information concerning the Model Law and its implementation.

31. **Mr. Wallace** (United States of America) said that, for many years, the possibility of preparing papers had been before the Working Group and had never been rejected, although it had never been discussed at length. The obvious constraint was lack of resources and it was therefore an issue of resource allocation within the secretariat. It appeared that, based on the interest expressed by China, Colombia and Norway, cost/benefits, sustainability and competition were important topics. They should not be ruled out entirely, but their relative merit should be weighed and a determination should be made as to whether they fell within the UNCITRAL mandate.

32. **The Chair** said that the mandate of UNCITRAL was not to delve into issues such as costs/benefits and sustainability; rather, its efforts should focus on the Model Law.

33. **Ms. Nicholas** (Secretariat) said that the secretariat might look at what was available on such topics and report back to the Commission, which could then decide whether sufficient guidance existed in specific areas.

34. **Mr. Wallace** (United States of America) said that the work of the Office of Technology Assessment of the United States Congress could provide a useful example, as it did not do original research, but assessed the value of existing research in order to advise Congress.

35. **The Chair** said that if there were no objections to summary of the discussion, he would take it that the Commission wished to adopt the conclusions set out in it.

36. *It was so decided.*

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*)
(A/CN.9/XLV/CRP.1/Add.1 and CRP.2)

37. **Mr. Mugasha** (Uganda), Rapporteur, introducing the section of the draft report on agenda item 4 (A/CN.9/XLV/CRP.1 and Add.1 and 2), said

that it summarized the Commission's consideration of proposals for the Guide to Enactment of the UNCITRAL Model Law on Public Procurement and focused on the decisions taken.

38. **Mr. Wallace** (United States of America), noting the use of "more user-friendly" in both paragraph 1 of A/CN.9/XLV/CRP.1/Add.1 and paragraph 19 of addendum 2, asked whether a more general observation could be made.

39. **Ms. Nicholas** (Secretariat) said that at an early stage in the deliberations, it had been stated that the Commission would return to the issue of ensuring user-friendliness. So the simplest solution would be to eliminate the first reference, and to leave paragraph 19 of addendum 2 unchanged.

40. **Mr. Wallace** (United States of America) said that paragraph 2 stated that the Commission had "approved the text of the draft Guide contained in document A/CN.9/WG.1/WP.79", which suggested that it had approved the entire draft Guide, whereas the Commission had only approved that document, but not the 19 addenda. He suggested that the text should be amended to read "approved that part of the text of the draft Guide contained in ...".

41. **Ms. Nicholas** (Secretariat) said that the secretariat understood that the terminology should be consistent throughout the report. Therefore, each addendum would refer to "that part of the text ...".

42. **Mr. Fruhmann** (Austria) said that paragraph 3 (c) stated that "collusion would probably violate the law of the State", but should read "collusion would violate the law of the State". Subparagraph (e), which referred to a point raised by Austria, stated that "the procuring entity's complicity in collusion was not uncommon". However, to be technically correct, it was not the procuring entity, which was the State, but rather the State's representatives that might be in collusion with the bidder. Thus the subparagraph should read: "the complicity in collusion of the representatives of the procuring entity is not uncommon".

43. **Mr. Wallace** (United States of America) said that the second sentence of paragraph 9 needed redrafting in order to ensure greater accuracy. He proposed that it be amended to read: "... electronic reverse auctions would be included, analogous to the discussion of the potential advantages of using

centralized purchasing agencies ...”, thereby eliminating the reference to subparagraph 4 (a). Reference should be made to “in subparagraphs 4 (g) and (i)”, since they were the only ones relevant to the discussion.

44. **The Chair** said that subparagraph 4 (a) had been mentioned by Austria and the reference to it should therefore not be eliminated.

45. **Mr. Wallace** (United States of America) said that his observations referred to drafting problems. The reference to administrative efficiency in 4 (a) was not about third party advisers, but rather the administrative efficiency of centralized purchasing.

46. **Ms. Nicholas** (Secretariat) proposed that the paragraph could be amended to read “analogous to the discussions of administrative efficiency in subparagraph 4 (a) and the potential advantages in using centralized purchases under the other subparagraphs”.

47. **Mr. Fruhmenn** (Austria) requested clarification of how paragraph 8 would be worded in view of the observations on paragraph 2.

48. **Ms. Nicholas** (Secretariat) said that the current instructions were that the secretariat should redraft paragraph 2 to read: “The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79”. In addition, for the sake of consistency and to avoid any misunderstandings, paragraph 8 would be revised to read: “The Commission approved that part of the text of the draft Guide contained in document A/CN.9/WG.I/WP.79/Add.10.”

49. **Mr. Zhao Yong** (China) said that the words “electronic reverse auctions” and “auctions” had been used interchangeably in paragraph 9, and the text should be amended in line with paragraph 17 of addendum 2, which correctly reflected the concerns expressed by the Chinese delegation.

50. *A/CN.9/XLV/CRP.1/Add.1, as orally amended, was adopted.*

51. **Mr. Wallace** (United States of America) requested clarification regarding paragraph 3 of A/CN.9/XLV/CRP.1/Add.2.

52. **Ms. Nicholas** (Secretariat) said that, if members found the wording to be too obscure, it

could be amended to read: “The Secretariat was instructed to ensure consistency in the discussion of similar issues throughout part III of the Guide, ensuring that the relative emphasis on the constituent elements remained the same throughout.”

53. **Mr. Wallace** (United States of America) asked for clarification regarding the phrase “avoid the use of the word ‘author’ when amending paragraph 29” in paragraph 4 (d).

54. **Ms. Nicholas** (Secretariat) said that the instruction had been to use the term “issuers of documents” or some similar term.

55. **Mr. Wallace** (United States of America) said that the last sentence of paragraph 5 described what seemed to him to be a rather ambitious task and he asked for some clarification.

56. **Ms. Nicholas** (Secretariat) said that Colombia had raised the issue of adapting the Model Law to local circumstances. She suggested that the text be amended to read: “The Commission also confirmed that the discussion in the Guide should remain ...”.

57. **Mr. Grand d’Esnon** (France) said that paragraph 6 (a) might be interpreted to mean that the Model Law authorized a State not to uphold international standards.

58. **Ms. Nicholas** (Secretariat) said that the English version would be revised to read: “... risks violating free trade commitments”.

59. **Mr. Zhao Yong** (China) said that the last sentence of paragraph 8 expressed only one of the purposes of tender security, the main purpose of which was to reduce the risk of tendering and to avoid irresponsible bids. The purpose of the performance guarantee was to allay concerns as regards the qualification and capacities of the supplier.

60. **Ms. Nicholas** (Secretariat) said that the text would be amended to read “one purpose of tender security ...”.

61. **Mr. Wallace** (United States of America) said that the phrase “the Guide would state clearly that requiring tender security should not be considered the norm” appeared to be somewhat stronger than the position emerging from the discussion.

62. **The Chair** said that the report was supposed to reflect the actual conclusions reached, and the Commission had concluded that tender security “should not be the norm”.

63. **Mr. Wallace** (United States of America) said that paragraph 11 did not accurately reflect the Commission’s position and should be amended accordingly. Noting that paragraph 19 stated that “the Commission approved the remaining parts of the Guide”, he asked whether the Commission had to take any further legal action in that regard.

64. **Ms. Nicholas** (Secretariat) said that the text in paragraph 19 was required for the formal adoption of the Guide.

65. **The Chair** said that, since a formal acknowledgement of the work of the secretariat could not be included in the Guide, he wished to place on record the Commission’s gratitude to the secretariat.

66. **Mr. Fruhmann** (Austria) said that the first operative paragraph of the draft decision of the adoption of the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/XLV/ CRP.2) should include a reference to addenda 1 to 3, because those documents reflected the deliberations that led to the amendment and finalization of the text.

67. While paragraph 5 endorsed efforts to establish a mechanism for monitoring practices in the use of the Model Law and the Guide, it did not go far enough in envisaging the Guide as a work in progress, which could be continually updated.

68. Lastly, he requested clarification of the reference to “other agencies and mechanisms” in paragraph 6.

69. **Ms. Nicholas** (Secretariat), replying to the representative of Austria, said that the Guide to Enactment would be adopted at the current session and the documents summarizing the Commission’s deliberations would be cited. On his second point, updating the Guide would require a further decision by the Commission, which explained the wording used.

70. The manner of dissemination had not been addressed in the draft decision. If the Commission considered that the secretariat should be authorized to arrange for the appropriate means of publication, a provision to that effect should be included in paragraph 2.

71. As to paragraph 6, similar language had been used when the Commission had adopted the Model Law. “Procurement reform agencies” referred to multilateral development banks, the Organization for Economic Cooperation and Development and others, while “mechanisms” included the United Nations Office on Drugs and Crime, the United Nations Convention against Corruption, and other conventions.

72. If the Commission considered that significant redrafting of the proposed text was required, a decision could be postponed to the following day.

73. *It was so decided.*

The meeting rose at 6.05 p.m.

**Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law
on Public Procurement** (*continued*)

Future work in the area of public procurement and related areas (*continued*)

**Summary record of the 949th meeting, held at Headquarters, New York,
on Thursday, 28 June 2012, at 3 p.m.**

[A/CN.9/SR.949]

Chair: Mr. Sikirić (Croatia)

The meeting was called to order at 3.20 p.m.

Other business

1. **The Chair** invited the Commission to hear a presentation on a proposal to replace written summary records of its meetings with digital recordings.

2. **Mr. Fruhmenn** (Austria), supported by **Mr. Bellenger** (France), said that the Commission should have been informed of the change in its programme of work. It would be preferable to first complete discussion of document A/CN.9/XLV/CRP.2.

3. **Mr. Zhao** Yong (China) said that his delegation had planned its participation in the work of the Commission on the basis of the approved agenda. It would be helpful if the Commission could proceed with its work accordingly.

4. **Mr. Sorieul** (Secretary of the Commission) said that the Chief of the Conference Management Services at the United Nations Office in Vienna was unable to give the presentation at any other time.

5. **The Chair** said that he took it that the Commission agreed to hear the presentation.

6. *It was so decided.*

Presentation entitled “Review of the use of summary records of UNCITRAL” and demonstration of the digital recording system as used by the Committee on the Peaceful Uses of Outer Space and its Legal Subcommittee

7. **Mr. Karbuczky** (Chief of the Conference Management Service at the United Nations Office at Vienna) said that digital audio recordings of

meetings were an inexpensive alternative to costly summary records. Audio recordings offered an authentic record of the proceedings in the original language, unmediated by précis-writers, and unlike summary records, were available immediately. In adopting the new cost-efficient and “green” system, the Commission would contribute greatly to the reform of the United Nations.

8. **Ms. Leblanc** (Canada) wished to know what the next step was with respect to the proposed digital recording system.

9. **Mr. Fruhmenn** (Austria) said that an executive summary of a full day’s worth of discussions, such as the one prepared by the Secretariat, was much more useful for an interested reader than an audio recording of the meetings. He wished to know whether digital recordings would eventually replace both summary records and conference room papers such as those prepared by the secretariat.

10. **Mr. Sorieul** (Secretary of the Commission) said that the proposed digital recording system would replace only summary records, not the documents prepared by the secretariat. The audio files would be made available together with a list of speakers, to help a user know who was speaking at what time. Summary records of the Commission’s meetings would continue to be prepared during its next session, in parallel with audio recordings. Commission members would then be able to evaluate the digital recording system and decide whether it could replace summary records.

11. **Mr. Shautsou** (Belarus) said that summary records were more useful than audio recordings for delegates trying to prepare for the Commission’s meetings. It would be more difficult to find a

specific statement in the audio files than to find the same information in a summary record. Would the audio files be organized by agenda item or organized chronologically so as to enable a researcher to follow the evolution of a topic from year to year?

12. **Mr. Sorieul** (Secretary of the Commission) said that ease of use was critical, which was why summary records would not be eliminated until it was certain that the audio recordings could be used effectively for research. He noted that the low cost of audio recordings also made it possible to record the meetings of the Working Groups, which currently did not receive summary record coverage.

13. **Mr. Bellenger** (France) deplored the meeting time lost to the presentation and the discussion and asked the Secretariat to avoid changing the Commission's programme of work without prior approval from the Commission.

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/XLV/CRP.2; A/CN.9/WG.I/WP.79)

A/CN.9/XLV/CRP.2 (continued)

14. **The Chair** said that the Secretariat had incorporated the words "as recorded in this report" at the end of paragraph 1 of the draft decision, as requested by the representative of Austria at the previous meeting.

15. **Mr. Fruhmann** (Austria), responding to the Chair's question with respect to paragraph 6 of the draft decision, said that the explanation provided by the secretariat was sufficient.

16. **Mr. Grand d'Esnon** (France) said that he shared the opinion of the United States representative that the first sentence of paragraph 6 was unclear. Since the wording had been used previously, according to the secretariat, he was willing to let the sentence stand for the sake of consistency.

17. **Ms. Leblanc** (Canada), referring to the last preambular paragraph, said that the words "understanding, enactment, interpretation and application" should be put in a more logical order.

18. **Ms. Nicholas** (Secretariat) said that that was a set phrase that had been used in previous Commission documents.

19. **Mr. Loken** (United States of America) said that, contrary to what was stated in paragraph 1, the editing and finalization of the text done by the secretariat was not based exclusively on the deliberations on the Commission but also on the report of the last meeting of the Working Group (A/CN.9/745), which contained the decisions taken by the Working Group regarding changes to the text but did not always contain the final wording.

20. **Ms. Nicholas** (Secretariat) said that the words "at this session and those set out in document A/CN.9/745" could be added at the end of the paragraph.

21. **Mr. Loken** (United States of America) said that it was unclear what was meant by the phrase "other stakeholders dealing with public procurement proceedings" at the end of paragraph 4.

22. **Ms. Nicholas** (Secretariat) said that the text had been taken from the previous year's resolution. The intention had been to include both the State and the suppliers involved in the proceedings. The phrase could be replaced with "others involved in public procurement proceedings".

23. **Mr. Loken** (United States of America) said, with regard to paragraph 5, that it was unclear whether it was necessary to suggest the establishment of a formal mechanism within or by the secretariat for monitoring practices with regard to the Model Law and the Guide. He proposed replacing the first part of paragraph 5 with the following wording: "Endorses efforts by the Commission's secretariat to monitor practices and disseminate information with regard to the use of the Model Law and the Guide".

24. *It was so decided.*

25. **Mr. Loken** (United States of America) said that it was unclear whether the word "coordination" in paragraph 6 referred to procurement reform agencies or to coordination with other mechanisms, or if the aim was to highlight the importance of those mechanisms.

26. **Ms. Nicholas** (Secretariat) said that the intention was to stress the importance of the

mechanisms. She proposed adding “of” before “other mechanisms” for greater clarity.

27. **Mr. Loken** (United States of America) said that, the phrase starting with “aimed at achieving the increased coordination” should be replaced with the simpler wording that had been used in the previous year’s decision.

28. *A/CN.9/XLV/CRP.2, as orally amended, was adopted.*

29. *The Guide to Enactment of the UNCITRAL Model Law on Public Procurement as a whole, as orally amended, was adopted.*

Future work in the area of public procurement and related areas (*continued*)

(A/CN.9/XLV/CRP.1/Add.3)

A/CN.9/XLV/CRP.1/Add.3

30. **The Chair** invited the Rapporteur to introduce the section of the draft report of the Commission on the work of its forty-fifth session relating to future work in the area of public procurement and related areas.

31. **Mr. Mugasha** (Uganda), Rapporteur, introduced document A/CN.9/XLV/CRP.1/Add.3.

32. **Mr. Loken** (United States of America) said that the word “possible” should be added before the words “future work” in paragraph 1.

33. *It was so decided.*

34. **Mr. Wallace** (United States of America) said that a model law did not directly regulate anything, but rather provided the basis for the enactment of laws that did. It would be more accurate to say that a model law provided guidance on procurement planning.

35. **Ms. Nicholas** (Secretariat) said that the word “regulating” could be replaced with “addressing”.

36. **Ms. Nicholas** (Secretariat), replying to the question put by the representative of France, said that FIDIC was the French acronym for the International Federation of Consulting Engineers; an explanation to that effect would be given earlier in the text.

37. **Mr. Sorieul** (Secretary of the Commission) said that FIDIC was a non-governmental

organization active in the production of model contracts in the field of international engineering and had participated in the work of UNCITRAL in the past.

38. **Mr. Wang** (Norway) said that paragraph 5 should include sustainability and environmental protection among the guidance paper topics being considered by the Commission, as there had been no opposition to including that topic during prior discussion. Accordingly, the second half of the last sentence in paragraph 4 (e), which suggested that capacity-building was considered more important than providing guidance on the topic of sustainability and environmental protection, should be deleted.

39. **Mr. Loken** (United States of America) said that a period could be inserted after the word “necessary” in paragraph 4 (e) and a separate sentence could be constructed out of the last clause, in order to preserve the idea that building required capacity was important.

40. **Mr. Wallace** (United States of America) said that the issue of a contractor being prevented from selling the subject of a concession to another entity without the consent of the Government was already addressed in the Model Law, contrary to what was suggested in paragraph 14.

41. **Ms. Nicholas** (Secretariat) said that the text reflected what had been said in the discussion. She suggested that the paragraph should read: “The Commission also noted that other issues not currently addressed in the UNCITRAL PFIPs instruments might also be appropriately included in any future work on PPS, together with other issues such as whether to prevent a contractor from selling the subject of a concession to another entity without the consent of the Government”.

42. **Mr. Wallace** (United States of America) proposed the insertion of the word “possible” before “work and primary issues to be addressed” in the third and fourth lines of paragraph 15.

43. **Mr. Bellenger** (France) said that in paragraph 13 of the French version, “élaborer des règlements” should be replaced by “élaborer des règles”. He wished to know what was understood by “engaging investors in the development” of rules and regulations applicable to them. Did it mean that

investors would be called on to participate in the Commission's work? He also requested clarification of the "other bodies" referred to in the eighth line of paragraph 15.

44. **Mr. Wallace** (United States of America) said that in several countries, including his own, "notice and comment" process for the adoption of draft regulations afforded interested parties an opportunity to state their views. He suggested that investors might similarly be asked to comment on rules and regulations that were applicable to them, rather than being engaged in their development.

45. **Ms. Nicholas** (Secretariat) suggested the following wording: "... by allowing investors an opportunity to comment on rules and regulations ...". In response to the question put by the representative of France, she said that the other bodies in paragraph 15 referred to non-governmental and intergovernmental organizations present at the current session. She could provide a list, if required.

46. *A/CN.9/XLV/CRP.1/Add.3, as orally amended, was adopted.*

The meeting was suspended at 4.50 p.m. and resumed at 5.10 p.m.

Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts (A/CN.9/748)

47. **Mr. Lemay** (International Trade Law Division), introducing the note by the Secretariat on the system for collecting and disseminating case law on UNCITRAL texts (CLOUT) (A/CN.9/748), said that, at the time the note had been drafted, 116 issues of case-law abstracts dealing with 1,134 cases had been prepared for publication. The network of national correspondents, which was the backbone of the system, was being streamlined in order to strengthen its sustainability and make it more responsive to changing circumstances. States had accordingly been requested to appoint or reappoint their national correspondents with effect from the first day of the current session; 28 States had complied with that request.

48. The note also reported on the preparation of a digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency. The Commission might wish to consider the desirability of such a project,

while the Secretariat might suitably explore the possibility of collaborating with national correspondents and other experts to that end. He reminded the Commission of the resource-intensive nature of CLOUT. In the absence of any increase in resources, the secretariat had refined a project proposal to secure the additional funding required to maintain and develop the system. The project would also pilot a "community of practice" for the benefit of members of the legal community insufficiently aware of UNCITRAL texts, which would be particularly valuable for developing countries and economies in transition. The secretariat was accordingly seeking assistance from States and other donors.

49. **Mr. Wallace** (United States of America) said that the International Institute for the Unification of Private Law (UNIDROIT) had recently discontinued its database, which had been very incomplete. The fact was that a legal database was useful to lawyers only if it covered all cases. The problem was lack of resources, for UNCITRAL just as much as for UNIDROIT. He reminded the Commission of the Library of Congress's Global Information Network (GLIN), whose aim was to make every treaty, regulation, statute and judicial decision available online. Other countries, such as Chile, were involved in similar efforts.

50. **Mr. Sorieul** (Secretary of the Commission) said that the Commission could not offer to take over any aspect of the UNIDROIT database, owing to its own lack of resources. GLIN was of great interest, but it had its own funding problems which could call into question its future existence in its present form. Ideally, CLOUT might be able to develop closer ties with that network; however, caution was in order.

51. **The Chair** raised the question whether the time had come for the Commission to expand its work relating to digests and whether there was a consensus to give a mandate to the secretariat to draft a digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency.

52. **Mr. Loken** (United States of America) expressed support for the idea of such a digest, subject to resource constraints.

53. **Mr. Sorieul** (Secretary of the Commission) said that it was easier to obtain contributions from

outside experts for digests than it was to maintain the CLOUT system. The first two digests had benefited from the cooperation of universities and research institutions, which had added material to the CLOUT collection. While digest-related work was not an added burden but served as a spur to the secretariat, it nevertheless remained in the interest of the Commission to attract the free collaboration of outside experts.

54. **Mr. Maradiaga** (Honduras) said that an essential first step would be to secure the involvement of all universities in the Commission's work and thereby help to give more universal coverage to UNCITRAL texts.

55. **Mr. Pérez-Cadalso Arias** (Observer for the Central American Court of Justice) inquired about the approach that was to be adopted to the question of cross-border insolvency, in view of its important implications for criminal law. The Central American Court of Justice was currently setting up a criminal chamber specifically to combat impunity in cases of cross-border crime for which extradition could not be obtained.

56. **Mr. Sorieul** (Secretary of the Commission) said that the UNCITRAL Model Law served as the basis for the Commission's work on insolvency, which was aimed essentially at promoting mutual legal assistance. Future work in that area was yet to be discussed, but States shared an extremely guarded approach to the Commission's possible involvement in criminal law, which was the province, in particular, of the United Nations Office on Drugs and Crime. The Commission had compiled indicators of fraud and did make comments on criminal matters, but it could not go beyond its mandate.

57. **The Chair** said that he took it that the Commission wished to mandate the secretariat to undertake work to prepare a digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency, within the limits of available resources.

Relevant General Assembly resolutions

58. **Ms. Musayeva** (Secretariat) said that the Commission might wish to take note of General Assembly resolutions 66/94, 66/95 and 66/96, which related directly to its work. She noted that

resolution 66/102, on the rule of law, was also relevant to the Commission's work and would be considered under agenda item 21.

59. **Ms. Millicay** (Argentina) regretted that resolution 66/94 merely noted the tradition of alternating the Commission's sessions between New York and Vienna, as that made it difficult to obtain increased funding to maintain that practice. Her delegation considered that, whenever a reference was made to the Commission's operational needs, including the alternation of venues for its sessions, the wording adopted for the resolution should take the form of a recommendation.

60. **Mr. Maradiaga** (Honduras) said that his delegation had made a request to that effect in Vienna in 2011. He endorsed the Argentine suggestion.

61. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat was grateful to delegations that had been seeking to maintain the practice of alternation. The observations of the representative of Argentina had been duly noted by the secretariat, which was open to all suggestions as to how to persuade the General Assembly to continue that practice and maintain and even enhance the Commission's current resource allocation.

62. **Ms. Musayeva** (Secretariat) recalled that, in addition to the aforementioned resolutions, adopted on the recommendation of the Sixth Committee, the General Assembly had in 2011, on the recommendation of the Fifth Committee, adopted resolution 66/246, paragraph 48 of which provided for an increase in non-post resources in order to service the work of the Commission and retain the rotation scheme between Vienna and New York.

63. **The Chair** took it that the Commission wished to take note of General Assembly resolutions 66/94, 66/95 and 66/96.

64. **Ms. Millicay** (Argentina) regretted the Commission's decision to work within existing resources, one of whose effects was to limit the number of printed documents available to delegations. Her delegation called on conference services to make every effort to provide all the necessary documentation.

The meeting rose at 6 p.m.

Finalization and adoption of the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010

Arbitration and conciliation: progress report of Working Group II

**Summary record of the 952nd meeting, held at Headquarters, New York,
on Monday, 2 July 2012, at 10 a.m.**

[A/CN.9/SR.952]

Chair: Mr. Sikirić (Croatia)

The meeting was called to order at 10.30 a.m.

Finalization and adoption of the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010 (A/CN.9/746 and Add.1 and A/CN.9/747 and Add.1)

1. **Ms. Gross** (Secretariat), introducing the draft revised Recommendations (A/CN.9/746 and Add.1), said that the Commission had instructed the secretariat to revise the existing Recommendations after adopting revised UNCITRAL Arbitration Rules in 2010. In accordance with its mandate, the secretariat had followed the pattern of the 1982 Recommendations, which meant that the documents mirrored their format. A new section, contained in A/CN.9/746/Add.1, covered arbitral institutions acting as appointing authorities. In the course of its work, the secretariat had consulted with arbitral institutions around the world. Where appropriate, the revised Recommendations provided examples of actual practice, footnoted with links to the websites of the respective organizations. In that connection, she noted that, in footnote 4, the Qatar Chamber of Commerce and Industry should be added to the list of the arbitral institutions involved in the consultation process and that the following footnote should be inserted in paragraph 17, after the phrase “the provisions of article 40 (f) would not apply”: “An arbitral institution, may, however, retain article 40 (f) for the case where the arbitral institution would not act as appointing authority. For example, the Qatar Chamber of Commerce and Industry (QICCA) states in article 43 (2) (h) of its Arbitration Rules, which are based on the UNCITRAL Arbitration Rules (as revised in 2010): ‘Any fees

and expenses of the appointing authority in case the Center is not designated as the appointing authority’.”

2. **Ms. Nesdam** (Norway) said that the secretariat had asked her to submit Norway’s comments orally, since its e-mailed submission had apparently been blocked. In her country’s view, paragraphs 7 and 8 of the revised Recommendations should clearly state that institutions could draft their arbitration rules in the form best suited to their legal traditions as long as they remained faithful to the substance of the Arbitration Rules. Furthermore, because institutional arbitration rules were subject to national law, a discussion on tailoring the UNCITRAL Rules to the law of the applicable jurisdiction should be incorporated in paragraphs 9 to 17.

3. **Mr. Sorieul** (Secretary of the Commission) said that, like all UNICTRAL texts, the Arbitration Rules were soft law. Thus, it was already tempting for adopting institutions to rewrite them to suit a particular set of users, which would defeat their normative purpose. Considerable time and effort had been devoted to ensuring that the Rules were acceptable to all as written. The Commission had a duty to remind users to adhere as closely as possible to the text and should not encourage them to take greater liberties.

4. **Ms. Gross** (Secretariat) said that the secretariat’s mandate called for it to follow the same pattern as the 1982 Recommendations, which, in paragraphs 10 and 11, appealed to adopting institutions to leave the UNCITRAL Arbitration Rules unchanged. Straying too far from the 1982 Recommendations might suggest that the revised

Arbitration Rules contained more revisions than they actually did.

5. **Mr. Bellenger** (France) expressed surprise that the revised Recommendations had not been submitted to the Working Group. Meeting as the Commission, the delegations did not have the expertise required to discuss them. His delegation was therefore not in a position to comment on the Norwegian proposal.

6. **Ms. Gross** (Secretariat) said that the secretariat had acted in accordance with paragraph 189 of the Commission's report on its forty-third session (A/65/17), which asked the secretariat to draft revised Recommendations and present them to the Commission, not the Working Group.

7. **Mr. Schoefisch** (Germany) said that, as a non-expert, he could not judge the merits of the Norwegian proposal. Perhaps the Commission should agree on a procedure for giving due consideration to comments that had not been submitted earlier because of technical problems.

8. **Ms. Matias** (Israel) said that her delegation did not support the changes proposed by Norway. Since the purpose of the Arbitration Rules was to ensure that the courts were uniformly able to deal with the issues addressed in them, it was important to have countries adopt essentially identical texts.

9. **Ms. Sabo** (Canada) said that the purpose of the Recommendations was to facilitate the use of the Arbitration Rules as they had been adopted by the Commission, and her delegation could not support changes to the text that would in essence approve modifying the Rules.

10. **The Chair** said that he took it that the Commission had rejected the Norwegian proposal.

11. *It was so decided.*

12. **Ms. Escobar Pacas** (El Salvador) said that, as her country's comments had also not been received, she would submit them orally. First, paragraph 11 of the revised Recommendations stated that article 1, paragraph 2, of the Arbitration Rules defined the date of effect of the Rules, when it actually defined the date after which parties to an arbitration agreement would be presumed to have referred to the UNCITRAL Arbitration Rules in effect. To avoid

confusion, she suggested the following wording: "Article 1, paragraph (2), of the 2010 UNCITRAL Arbitration Rules defines the date after which the parties to an arbitration agreement are presumed to have referred to the Rules in effect on the date of commencement of the arbitration. Obviously, the institutional rules based on the UNCITRAL Arbitration Rules will have their own specific date after which the parties will refer to the current version of the institutional rules. In the interest of legal certainty, the institutional arbitration rules should indicate the date after which the parties will be presumed to have referred to the rules in effect, so that it is absolutely clear which version is applicable."

13. Second, to avoid the impression that the model arbitration clause in the Arbitration Rules had been revised, the Spanish text of the draft model clause in paragraph 26 of the Recommendations should be brought into line with the Spanish-language wording of the model arbitration clause on which it was based.

14. **Mr. Madrid Parra** (Spain) said that Spain had submitted the same comment regarding paragraph 26 (A/CN.9/747). He concurred with the representative of Germany that a procedure should be adopted to allow proper consideration of comments presented orally because of technical difficulties.

15. **Ms. Sabo** (Canada) said that the issues raised by El Salvador and Spain appeared to involve drafting changes and could be resolved by the secretariat.

16. **The Chair** said that, in the absence of objections, he would take it that the Commission wished to entrust the required changes to the secretariat.

17. *It was so decided.*

18. **Mr. Loken** (United States of America), referring to document A/CN.9/746/Add.1, paragraph 40, said that it was necessary to clarify the meaning of the sentence "That mechanism is not supposed to create delays, as the appointing authority is requested to intervene in the appointment process". For it to make sense, the words "is requested to intervene" should be replaced by "will, in any event, have to intervene". In

paragraph 44, which contained recommendations on appointing a presiding arbitrator, the phrase “factors to take into consideration” was too prescriptive and should be replaced with “factors that might be taken into consideration”. Paragraph 44 also indicated that the arbitrator’s nationality should be different from that of the parties, while the Rules said only that the appointing authority should “take into account the advisability” of appointing an arbitrator of a different nationality. The best solution was probably to delete the phrase “as well as his or her nationality, which is recommended to be different from that of the parties”.

19. **Ms. Sabo** (Canada) said that her delegation did not think that the recommendation in paragraph 44 differed significantly from what was stated in the Arbitration Rules, but that if the reference to nationality was deleted in paragraph 44, it would also need to be deleted in paragraph 38.

20. **The Chair** suggested that the secretariat should be requested to adjust paragraph 38.

21. *It was so decided.*

22. **Mr. Loken** (United States of America) said that the last sentence in A/CN.9/746/Add.1, paragraph 53, relating to the exceptional circumstances under which a party might be deprived of its right to appoint a substitute arbitrator, gave the following examples of such circumstances: “if a party used dilatory tactics with respect to the replacement procedure of an arbitrator [or] if the improper conduct of the arbitrator is clearly attributable to the party”. He did not recall any mention during the Working Group’s deliberations of the example of a party using dilatory tactics with respect to the replacement of an arbitrator and suggested eliminating it.

23. **The Chair** proposed that the last sentence in paragraph 53 should be revised to read: “Such exceptional circumstances could include cases of improper conduct of a party or of an arbitrator, for example, improper conduct of an arbitrator that is clearly attributable to the party.”

24. **Ms. Sabo** (Canada) said that her delegation did not object to the example of a party using dilatory tactics, although other illustrations were possible. However, the example involving the improper conduct of an arbitrator shifted the focus of the

paragraph, which was on the improper conduct of the party. The “arbitrator” example should be replaced or, if not, rephrased to stress that the fault lay with the party.

25. **Mr. Loken** (United States of America) objected to the example of dilatory conduct on the grounds that depriving a party of such a basic right as its right to appoint an arbitrator should be reserved for truly egregious behaviour.

26. **Mr. Maradiaga** (Honduras) said that the purpose of the Arbitration Rules was to facilitate the rapid settlement of disputes. If a party deliberately attempted to delay the settlement of a case, such behaviour constituted sufficient grounds for the appointing authority to deprive it of its right to appoint an arbitrator.

27. **Mr. Loken** (United States of America) noted that paragraph 53 already stated that the decision to deprive a party of its right to appoint an arbitrator “should be based on the faulty behaviour of the party” and “should not be subject to defined criteria”. The best solution would be simply to delete the last sentence.

28. *It was so decided.*

29. **Mr. Loken** (United States of America), referring to paragraph 54 on how an appointing authority should go about deciding whether to permit a truncated tribunal to proceed with arbitration under article 14, paragraph 2 (b), questioned the statement in the first sentence that the “appointing authority must take into consideration the stage of the proceedings”. In his understanding, it was permissible to proceed with a truncated tribunal only if the proceedings had been closed, and it would therefore be more precise to replace “take into consideration the stage of the proceedings” with “first confirm that all hearings have already been closed”. Also, in the last sentence of the same paragraph, “relevant applicable law” should be replaced by “relevant law” in order to avoid introducing issues of applicable law.

30. **Ms. Gross** (Secretariat), referring to the proposed change in the first sentence of paragraph 54, agreed that a truncated tribunal could not proceed unless the hearings had already closed. However, the intent of the paragraph would be better served by leaving the first sentence unchanged and,

at the beginning of the second sentence, replacing the phrase “If the hearings are closed” with “Bearing in mind that the hearings are closed”.

31. *It was so decided.*

32. **Mr. Loken** (United States of America) wished to propose two more changes in document A/CN.9/746/Add.1. In the penultimate sentence of paragraph 58, the phrase “If the appointing authority fails to act” should be replaced by “If the appointing authority has not yet been designated or fails to act”, and in the first sentence of paragraph 60, the words “in its review” should be clarified to read “if adjustment of fees and expenses is necessary”.

33. **The Chair** said that he would make sure that all of the different views expressed, especially with respect to the Norwegian proposal, were reflected in the Commission’s report. As he heard no further objections to the United States proposals, he took it that the Commission wished to adopt them as orally revised.

34. *It was so decided.*

35. *Documents A/CN.9/746 and Add.1, as orally revised, were adopted.*

The meeting was suspended at 12.30 p.m. and resumed at 12.40 p.m.

Draft decision on adoption of the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010 (A/CN.9/XXXXV/CRP.3)

36. **Ms. Mwaura** (Kenya) proposed that the words “interested circles” should be replaced by “interested bodies” and that the reference to the annex to the report should be replaced by a reference to the specific annex, which, according to the Chair, would be annex I.

37. *It was so decided.*

38. *Draft decision A/CN.9/XLV/CRP.3, as orally amended, was adopted.*

Arbitration and conciliation: progress report of Working Group II (A/CN.9/736 and A/CN.9/741)

39. **The Chair**, drawing the Commission’s attention to the reports of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth and fifty-sixth sessions (A/CN.9/736 and A/CN.9/741), which had been devoted to the preparation of a legal standard on transparency in treaty-based investor-State arbitration, said that the Commission was called upon to take note of that work.

40. **Mr. Schoefisch** (Germany) said that, in taking note of the Working Group’s progress, his country wished to request that it finish its work by the Commission’s forty-sixth session.

41. **Ms. Sabo** (Canada) said that Canada was satisfied with the Working Group’s progress thus far on what her Government considered a very important project. She urged the member States to seek creative solutions that would allow States to apply the rules on transparency in treaty-based investor-State arbitration not only to future treaties but also to existing ones.

42. **Mr. Bellenger** (France) was somewhat concerned about the Working Group’s slow progress and preoccupation with technical details, such as the scope of application of article 1 of the draft rules, to which it seemed to have devoted most of its fifty-sixth session. The Commission should express concern, remind the Working Group of its mandate and encourage it to adopt more efficient working methods. Having apparently reached a consensus on matters of substance, it should move quickly to finalize the draft standard.

The meeting rose at 1 p.m.

Arbitration and conciliation: progress report of Working Group II (continued)**Preparation of a guide on the 1958 New York Convention****International commercial arbitration moot competitions****Online dispute resolution: progress report of Working Group III****Summary record of the 953rd meeting, held at Headquarters, New York,
on Monday, 2 July 2012, at 3 p.m.**

[A/CN.9/SR.953]

Chair: Mr. Sikirić (Croatia)*The meeting was called to order at 3.20 p.m.***Arbitration and conciliation: progress report
of Working Group II (continued)** (A/CN.9/736
and A/CN.9/741)

1. **Mr. Loken** (United States of America), referring to the concerns expressed by the representative of France at the previous meeting, said that, while the pace of Working Group II had been slow, it had made real progress, having regard to the sensitivity of the issues and the fact that transparency in arbitration was a new idea for many delegations. Complex matters of treaty interpretation and policy had to be addressed; moreover, questions of application could not be divorced from the content of the standards being developed. In view of the differences that had emerged within the Working Group on questions of form, his delegation supported the call for creative solutions so as to enable it to complete its work by the following summer.

2. **Ms. Escobar Pacas** (El Salvador) expressed the same concern about the pace of work. The Working Group must go to the essential issues in order to speed up and complete its work on time.

3. **Ms. Matias** (Israel), supporting the call for timely completion, concurred that the complex new issues required careful attention, as they had broad effects in terms of retroactivity and applicability to existing treaties.

4. **Ms. Malaguti** (Italy) said that, in view of the transfer of competencies to the European Union, the question of any national position within the region

no longer arose. Member States were currently seeking common solutions and should arrive very shortly at a joint position on the subject.

5. **Ms. Millicay** (Argentina) said that it was difficult for many delegations to reach an agreement on the rules, in view of the distinction between form and content: the content of transparency rules would be determined by their scope. She noted that it was on record (A/CN.9/741, para. 59) that proposals were expected from delegations at the next meeting of the Working Group.

6. **Mr. Zhang Chen Yang** (China) said that, following adoption of the new transparency rules, sufficient time must be given to the question of their application, which must be gradual. Because of the differing situations and needs of countries, those rules would be interpreted in different ways. His delegation supported option 2 under article 1 (1) of the draft rules (A/CN.9/WG.II/WP.169, para. 8), to the effect that the rules would apply where expressly provided for by the treaty under which investor-State arbitration was initiated.

7. **Mr. Sorieul** (Secretary of the Commission) said that as the application and interpretation of existing treaties went beyond the issue of arbitration and touched on substantive issues of treaty law, it was important for delegations to secure the support of experts in public international law.

8. **The Chair** proposed that, in its report, the Commission should support the work of the Working Group; express appreciation for the work of the secretariat; and request the Working Group to pursue its efforts and produce a text on transparency

rules for consideration by the Commission at its next session.

9. **Ms. Sabo** (Canada) questioned the wisdom of requiring the Working Group to come up with a final text by the next session. She suggested that it should be encouraged, rather, to complete its work by that session.

10. **Ms. Matias** (Israel) concurred and suggested in turn that the Working Group should be requested to make substantial progress by the next session, rather than to produce a final text.

11. **Mr. Maradiaga** (Honduras) said that it would be more prudent to request the Working Group to complete its work as soon as possible.

12. **Mr. Loken** (United States of America), supported by **Ms. Millicay** (Argentina), **Mr. Zhang Chen Yang** (China) and **Mr. Madrid Parra** (Spain), suggested that in its report the Commission should reaffirm its mandate to ensure transparency in treaty-based investor-State arbitration and, in that context, encourage the Working Group to continue to make progress towards the timely adoption of the necessary rules.

13. **Mr. Schoefisch** (Germany) said that it was not enough simply to encourage the Working Group to pursue its efforts; it should be requested to produce proposals by the next session.

14. **Mr. Sánchez Contreras** (Mexico) said that, following adoption of the proposed standard, his delegation considered that the new transparency rules should be applicable to all arbitration processes, subject to national law. It was also of the view that the applicability of those rules should be determined by States and not by investors. Lastly, he raised the question of the cost of a public repository of information on the arbitration process and suggested a deadline of two years for completion of the Working Group's work.

15. **Mr. Mazzoni** (Observer for the International Institute for the Unification of Private Law (UNIDROIT)) said that the main issue, which was one of policy, was not being addressed. There could be no progress at the technical level without the necessary political choices. In the case of the European Union States, investment treaties had become subject to Community rules: bilateral

investment treaties had been replaced by European Union treaties. The moot question was whether the new transparency rules would apply to treaties concluded before the adoption of those rules.

16. **The Chair** said he took it that the Commission wished to reaffirm the importance of ensuring transparency in investor-State arbitration and request the Working Group to pursue its efforts and complete its work on the rules on transparency for consideration by the Commission preferably at its next session.

17. *It was so decided.*

18. **Mr. Sorieul** (Secretary of the Commission) reminded the Commission that it had agreed (A/CN.9/WG.II/WP.168, para. 18) at its forty-fourth session that the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings needed to be updated, possibly as part of the future work of Working Group II.

19. **Ms. Sabo** (Canada) said that her delegation continued to believe it important to revise those Notes but that the Commission should wait until next year to decide whether the task should be entrusted to the secretariat or to the Working Group.

20. **The Chair** said that, in any case, the task could not be undertaken until the Working Group had concluded its work on transparency.

21. **Mr. Loken** (United States of America) requested clarification of the respective roles of the secretariat and the Working Group. He had initially understood that the secretariat would undertake a draft revision, which could be submitted to the Working Group before being considered by the Commission. His delegation did not support the suggestion that the Working Group might undertake the revision and considered that, when the time came to decide, it would be more appropriate for the work to be initiated by the secretariat.

22. **Mr. Sorieul** (Secretary of the Commission) said that what was important was that there was agreement on the need to undertake the work of revision as soon as possible. The modalities would be determined in 2013.

23. **Mr. Madrid Parra** (Spain) said that, irrespective of the secretariat's role, the Commission

still needed to decide whether the mandate should be given to the Working Group or to the Commission.

24. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat's work would remain the same in any case. If the Commission were to deem it necessary to draw on the expertise of non-governmental experts, at least one meeting of the Working Group would be required.

25. **The Chair** said he took it that the Commission wished to take note that the next project for the secretariat would be to proceed with the revision of the Notes on Organizing Arbitral Proceedings, as previously decided, and that it would decide at a future session whether the draft revised Notes should be examined by the Working Group before being considered by the Commission.

26. *It was so decided.*

Preparation of a guide on the 1958 New York Convention

27. **Ms. Gross** (Secretariat) informed the Commission that a website had been established in order to make publicly available the information gathered in preparation of the guide on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The UNCITRAL secretariat planned to maintain close links between the cases collected in the system of Case Law on UNCITRAL Texts (CLOUT) and the cases covered in that website.

International commercial arbitration moot competitions

28. **Ms. Gross** (Secretariat) reported on three moots that had taken place in 2012, co-sponsored by the Commission: the Nineteenth Willem C. Vis International Commercial Arbitration Moot in Vienna, the Ninth Willem C. Vis (East) International Commercial Arbitration Moot in Hong Kong and the Fourth International Commercial Arbitration Competition in Madrid.

The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.

Online dispute resolution: progress report of Working Group III (A/CN.9/739, A/CN.9/744)

29. **Mr. Lemay** (International Trade Law Division), introducing the reports of Working Group III on its twenty-fourth and twenty-fifth session (A/CN.9/739 and A/CN.9/744, respectively), noted a number of editorial corrections to the latest report of the Working Group: the second sentence of paragraph 132 (a) duplicated paragraph 35 and had been struck from the text in the latest version of the document published on the Commission's website. In addition, references to working paper 109 in that report had been changed to refer to working paper 112, which contained the latest version of the draft procedural rules governing online dispute resolution for cross-border electronic commerce transactions, as discussed at the twenty-fifth session of the Working Group.

30. Progress had been made with regard to the development of the draft procedural rules since the Working Group's twenty-third session. In addition, the Working Group had touched on other issues pertaining to online dispute resolution such as the principles used for deciding cases and enforcing decisions. One outcome was the decision taken to split article 4 of the draft rules into two parts dealing with claimants and respondents separately and to consider the article anew at the Working Group's next session. He referred delegates to paragraph 16 of the report on its twenty-fifth session (A/CN.9/744) for the Working Group's position on the binding nature of the Rules and its consensus that "the Rules could not in effect prevent parties having access to the courts in those jurisdictions where such access was ensured by domestic law". In response to the Commission's request at its forty-fourth session, the Working Group had considered the impact of its deliberations on consumer protection and stated its position in paragraph 132 (a) to (c) of the report.

31. **Mr. Edokpa** (Nigeria) said that Internet use was growing at a fast pace in developing countries and held enormous potential for generating wealth. Although trade on the Internet was growing dramatically and offered access to foreign markets to traders in the most remote regions, the perceived risks of e-commerce and consumer scepticism were keeping many in Nigeria, the country with the most

Internet users on the African continent, from using it to make purchases. Studies had shown that addressing the concerns associated with online transactions was likely to increase domestic e-trade in Nigeria.

32. Greater access to justice and affordable and fair dispute resolution systems that provided quick resolution and enforcement of decisions in cross-border, high-volume business-to-business and business-to-consumer disputes, particularly in the context of small-value transactions, would build consumer and vendor confidence. The Working Group had previously observed that consumer protection was a regional and international issue; that online dispute resolution could promote economic growth in post-conflict countries and in developing countries; and that procedural rules should benefit developing countries, where online dispute resolution was sometimes the only option available to the claimants in developing countries — often small and medium enterprises that played a vital role in developing economies such as Nigeria's — putting them at a disadvantage compared to buyers in developed countries.

33. In the absence of a system that provided final and binding arbitration, African consumers would not be able to pursue vendors in other countries, while African vendors would find it prohibitively expensive to seek redress against foreign consumers. The proposed mechanism should give both consumers and vendors, particularly those in the developing world, access to justice and relative confidence in the transaction and the outcome of a potential dispute. Meanwhile, the effectiveness of mediation and other non-binding mechanisms, in the absence of a binding final arbitration mechanism, was highly questionable in the context of cross-border disputes. The binding nature of the arbitral decision was key to a comprehensive and effective dispute resolution process and should be reflected in the Rules. The Working Group should report on the manner in which the proposed Rules addressed the needs of developing countries, in particular with respect to the issue of arbitration as an important element of the mechanism.

34. **Ms. Matias** (Israel) said that her delegation supported the position expressed by the Nigerian representative and recommended that the

Commission relay that message to the Working Group. Noting that one of the objectives of the Rules was to promote economic growth in conflict areas, she read from a letter addressed by International Chamber of Commerce (ICC) Israel to the Commission, according to which the full potential of Israeli-Palestinian trade had not yet been realized, owing to the absence of an effective dispute resolution mechanism, mutual scepticism regarding the neutrality of the other party's court system and the problem of enforceability of judgements. The Jerusalem Arbitration Center, a joint initiative of ICC Israel and ICC Palestine, was being established to address the need for a neutral dispute resolution forum capable of issuing binding decisions that were enforceable in both jurisdictions.

35. Research and experience showed a clear link between increased trade and the perceived reliability and finality of the dispute resolution process. Confidence in the enforceability of transactions was crucial, particularly when the parties came from jurisdictions with very different legal systems. In the absence of a reliable and accessible dispute resolution mechanism, trade, in particular low-value, high-volume cross-border e-commerce transactions, could be hindered. A neutral dispute resolution mechanism also gave people in conflict-torn regions confidence that disputes would be resolved fairly and that their risk was minimized. The enthusiasm with which Palestinian and Israeli stakeholders were participating in the efforts to establish the Center demonstrated the demand for such a mechanism in areas where political or other circumstances made it unrealistic to use the local court systems.

36. **Mr. Schoefisch** (Germany) said that there appeared to be a conflict within the Working Group regarding whether it had sufficiently dealt with the issue of consumer protection, how consumers would be affected by the Rules and whether decisions under the Rules should be binding on the parties.

37. The Working Group clearly stated in its report that its work should be "carefully designed not to affect the rights of consumers" (A/CN.9/744, para. 2). Therefore, it was surprising that, later in the document, it was indicated that consumers would be giving something up by consenting to the use of the Rules (A/CN.9/744, para. 22). The

Commission had also asked the Working Group to report on the ways in which consumers could be affected. Given the aforementioned contradiction, the one-sentence statement in paragraph 132 (a) of the report was insufficient and unacceptable.

38. With regard to the binding effect of the procedural rules, he noted that making the rules binding on consumers meant that a dispute could not be taken to the courts, which meant that protection for consumers everywhere was being taken away. It was possible that individual States in some parts of the world wished to take a different approach and restrict consumers' right to settle disputes through the courts, but that needed to be discussed and included in the report. He also noted that binding decisions could be made compatible with consumer protection if the decisions were binding only on companies, allowing consumers to go to court if needed. The Working Group should come back next year and respond to the Commission's original request to report on the impact of the rules on consumer rights, including the effect of binding decisions on consumer protection.

39. Regarding the editorial change made by the secretariat to transfer the second sentence from paragraph 132 to paragraph 35 of the Working Group's report, he noted that the wording in paragraph 35 had been changed from the wording that had been originally used in paragraph 132. The sentence also had a different impact in its original placement, where it reflected the position of many delegations that the Working Group should discuss the impact of the procedural rules on consumers. Recalling a proposal of working methods made by the French delegation several years earlier and in the light of the discussions that had reportedly taken place within the Working Group, he was puzzled at the change.

40. **Mr. Lemay** (International Trade Law Division) said that the Chair of the Working Group had made the change on the basis of the discussion on that topic and that the contents of paragraph 132 fully reflected that debate.

41. **Mr. Sánchez Contreras** (Mexico) said that access to justice was of essential importance and that the online dispute resolution mechanism would bolster access to justice everywhere, not only in the developing countries. The draft procedural rules,

however, in their coverage of the buying and selling of products and services, did not reflect current market dynamics. In particular, transaction amount limits should be set according to the industry sector and the types of cross-border transactions being targeted, rather than taking a one-size-fits-all approach with the same minimum and maximum limits for all types of transactions. Such an approach would undermine the mechanism and omit common transactions, such as a family's purchase of airline tickets, which would easily exceed the proposed maximum. The issue of forum shopping should also be considered in the context of online dispute resolution, given the potential legal consequences for the vendor and the consumer.

42. **Mr. Bellenger** (France) agreed with the position expressed by the representative of Germany and said that his delegation had reservations regarding the work of the Working Group. There was no international legal framework capable of forming the basis for the procedural rules governing online dispute resolution. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 was not appropriate for that purpose, as the proposed rules would not offer the procedural guarantees that met the true definition criteria for arbitration with respect to the recognition and enforcement of decisions taken under the rules. The second major issue was that arbitration in the context of consumer disputes threatened the rights of consumers. Many countries had consumer protection laws that could not be circumvented, and the proposed rules would be difficult to reconcile with French or European regulations on the topic. The Working Group needed to conduct extensive research regarding the impact the rules might have on consumers.

43. **Mr. Reyes Villamizar** (Colombia) said that he supported Nigeria's position, particularly with regard to the importance to the developing countries of an online dispute resolution mechanism in the settlement of cross-border consumer disputes. The rules would protect small and medium-sized enterprises, which were the principal generators of growth in developing countries and had difficulties accessing justice there, owing to the fragility of local judicial systems. The online dispute resolution mechanism needed to be binding, while also protecting the basic rights of consumers. However,

allowing the parties the option of resolving their disputes through the courts after a decision had been handed down by the arbitrator was illogical, as it multiplied the costs of arbitration and created legal uncertainty. Moreover, in support of the representative of Mexico, he said that the issue of the choice of forum for online dispute resolution should be further examined.

44. **Mr. Madrid Parra** (Spain) said that he agreed with the position and the concerns expressed by the Colombian and Nigerian delegations, and that tools were needed to help certain countries that lacked the means to do so to take full advantage of electronic commerce. The preceding speakers had illustrated how the rules governing online dispute resolution would promote cross-border trade by providing a system for streamlining dispute resolution. While Spain also had consumer protection laws, its delegation did not share the concerns of the delegations of other members of the European Union, because the rules did not contravene those laws. He noted that the Commission had previously elaborated rules that could have affected consumers, such as the Model Law on Electronic Commerce, but had included provisions to ensure that the rules could not be interpreted as contradicting national consumer protection laws. He urged delegates to recognize that there were many more points of agreement within the Working Group than there were points of disagreement. Online dispute resolution offered a tool to those who needed it, without imposing its use on those who did not.

45. **Mr. Wijnen** (Observer for the Netherlands), agreeing with the representatives of Germany and France, said that the report of the Working Group and the current discussion showed that the Working Group should do further work on the topic and report to the Commission the following year. It was clear that the Commission was not ready to take a decision on the matter.

46. **Mr. Maradiaga** (Honduras) said that a uniform international legal framework was needed to deal with the issue of online dispute resolution. The Commission was responding to the needs of society in its work on the topic of consumer protection, which should be given as an example of the Commission's work when reporting to the General Assembly.

47. **Ms. Mokaya-Orina** (Kenya) said that her Government had undertaken reforms that sought to take into consideration the issues of consumer rights and consumer protection. An online dispute resolution mechanism would revolutionize business transactions involving small and medium-sized enterprises and microfinance institutions in her country. As a developing country, Kenya, like Nigeria, first needed to build people's confidence in e-commerce and address capacity-building issues before it could discuss online dispute resolution with its population. She noted that online dispute resolution needed to be affordable, or its purpose would be defeated. Her delegation also believed that online dispute resolution decisions should not be binding and that the option of resolving disputes through the courts, which were superior, should remain. The issue of enforcement of online dispute resolution decisions in various national jurisdictions should also be taken up in future by the Commission. Further work on the topic should be considered in terms of how it enhanced the arbitration aspect of the Commission's work.

48. **Mr. Ivančo** (Czech Republic) said he agreed with the position of the representative of Spain and pointed out that one of the key ideas voiced at the International Online Dispute Resolution Forum held in Prague in 2012 was that the process should be as simple as possible to establish a practical, effective system. That could be achieved only through arbitration and a mechanism that would issue a quick and binding solution.

49. **Ms. Sabo** (Canada) said that her delegation shared the concerns expressed by the representatives of Germany and France, together with the Nigerian delegation's concerns with regard to access to justice and the need for a simple dispute resolution mechanism. Most of the difficulty lay in the business-to-consumer aspect of the issue. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 was not an appropriate model: the Working Group was trying to come up with a one-size-fits-all solution, and she was pessimistic regarding the likelihood of success of that approach. To avoid having the project take years to complete, the Commission could postpone consideration of the business-to-consumer aspect and focus on the business-to-business aspect instead.

50. **Mr. Leinonen** (Observer for Finland) agreed with the German delegation's position and said that his delegation was very optimistic that the online dispute resolution project could benefit many people and meet the needs of those countries whose economies needed a tool to promote domestic or cross-border e-commerce. Answers were needed to key questions, such as what was meant by "access to justice" and the difference between arbitration and online dispute resolution. In Finland, as in many jurisdictions, having "access to justice" meant having access to the court system. The Working Group should continue its discussions and report the following year, at which point the Commission would be better able to take a decision on the matter.

51. **Ms. Cap** (Austria) said the discussion showed that a positive outcome for the online dispute resolution project was in everyone's interest. The topic of consumer protection, however, was a politically sensitive one. The Working Group should continue its work and report to the Commission on the impact of the online dispute resolution

mechanism on consumer protection law. It was important for all delegations to be able to speak on all aspects of the proposed rules that were important to them.

52. **Ms. Escobar Pacas** (El Salvador) said he agreed with the positions of the representatives of Nigeria and Spain. He pointed out, moreover, that the Working Group had never lost sight of consumer protection in its discussions.

53. **Mr. Weise** (Observer for the American Bar Association) said that, since online dispute resolution was so important, with the potential to benefit all stakeholders, his organization urged the Working Group to continue its search for solutions to the issues raised during the preceding discussion.

The meeting rose at 6 p.m.

Online dispute resolution progress report of Working Group III (*continued*)

Electronic commerce: progress report of Working Group IV

Possible future work in the area of international contract law

Summary record of the 954th meeting, held at Headquarters, New York, on Tuesday, 3 July 2012, at 10 a.m.

[A/CN.9/SR.954]

Chair: Mr. Sikirić (Croatia)

The meeting was called to order at 10.15 a.m.

Online dispute resolution: progress report of Working Group III (*continued*) (A/CN.9/739 and A/CN.9/744)

1. **Mr. Wallace** (United States of America) said that his delegation endorsed the previous day's statement by the Nigerian delegation, in particular its reference to the vital role of small and medium-sized enterprises (SMEs) and its assertion that procedural rules would especially benefit developing countries, where online dispute resolution (ODR) might be the only option available for settling cross-border consumer disputes.
2. He agreed with Israel's assertion, also made the day before, that ODR offered people living in conflict-torn regions and the many millions of people around the world who were deprived of access to justice the only chance to settle such disputes. He noted that ODR addressed global rather than local concerns, in keeping with the Commission's overarching aims.
3. The premise underlying the creation of the Working Group was that meaningful judicial remedies were not available for settling most low-value cross-border e-commerce disputes. Whereas traditional mechanisms did not offer adequate and swift solutions for cross-border e-commerce disputes, ODR might do so.
4. Moreover, since ODR could not override or displace domestic law, those States offering access to justice and comprehensive consumer protection would lose nothing if ODR extended such access and protection to the billions of people around the world deprived of them.
5. Concerns that the application of ODR would impose arbitration processes that were incompatible with national legislation overlooked the fundamental requirement that all parties must agree to arbitration before it could go forward. Every State that had raised an objection to arbitration had laws that permitted such agreements when disputes arose. Moreover, no State had asserted that a final and binding outcome should not follow.
6. Since arbitration and consumer protection were not opposites, his delegation fully agreed with the Spanish delegation that the UNCITRAL rules did not contravene domestic consumer protection legislation; concerns that they would do so were unfounded and prejudiced.
7. He recalled that consumers should be protected not only in the developed world but also in countries and regions where consumer protection was weaker or access to justice was restricted. Those billions of consumers might have access to justice with regard to e-commerce only through ODR. Moreover, ODR provided not only for the quick and effective resolution of disputes but also aimed to protect the weaker party through the option of arbitration.
8. He agreed with the representative of Nigeria that the Working Group should report back to the Commission on the manner in which the proposed Rules addressed the needs of developing countries, in particular with respect to the issue of arbitration as an important element of the mechanism. The requirement that the Working Group should report on the issue would help the Working Group to move forward on the basis of reality and not prejudice.
9. His delegation disagreed with the German delegation's claim that the mention of consumer

protection in the Working Group reports was insufficient. Consumer protection was at the forefront of the Working Group's work, as was reflected in the proposed rules, and would continue to be examined. In response to the German delegation's reference to a one-sentence statement in the Working Group report, he drew attention to paragraphs 15 and 16 of the secretariat's note on ODR for cross-border electronic commerce transactions (A/CN.9/WG.III/WP.113), which had been approved by the Commission and entered into far greater detail.

10. It should always be borne in mind that consumer protection was not a local but a regional and international issue. ODR would encourage e-commerce and economic growth at the regional level, in particular in post-conflict countries and developing countries.

11. **Mr. Decker** (Observer for the European Union) agreed with the other delegations that the legal standard on which the Working Group was working should foster greater confidence in cross-border online transactions. He expressed gratitude to the delegations of Kenya and Nigeria, in particular, who had emphasized the need to increase that confidence; he noted, however, that there remained some uncertainty and confusion within the Commission about how to attain that goal.

12. He agreed that the Working Group had not fully implemented its mandate to report on the impact of deliberations on consumer protection. He understood the German delegation's statement to mean that the impact on consumer protection had not been properly addressed by the Working Group and agreed that paragraph 132 (a) of the Working Group report (A/CN.9/744) was too concise and cryptic. The Commission should ask the Working Group to discuss further the impact of its deliberations on consumer protection in situations where the consumer was the respondent party in an ODR process and to report back to the Commission at its next session.

13. A distinction needed to be made between business-to-business and business-to-consumer disputes with regard to the question of arbitration in the ODR process. Arbitration as the final stage of the ODR process related to business-to-consumer disputes only. Moreover, arbitration was a public

means of enforcing outcomes, and private enforcement approaches had not been fully examined. It was too early to say that arbitration should be the final stage of ODR when other ways of enforcing ODR process outcomes had yet to be examined. He supported those delegations who had requested a more detailed analysis of the ways in which compliance with ODR outcomes could be enforced and whether it could be enforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

14. With regard to the nature of ODR and its outcomes, he suggested that the Commission should instruct the Working Group to consider flexible ways of designing the procedural rules for business-to-consumer disputes in order to accommodate consumer protection concerns. It should consider the possibility of designing a separate set of procedural rules for business-to-consumer disputes.

15. **Ms. Sabo** (Canada) and **Mr. Schoefisch** (Germany) endorsed the call by the observer for the European Union for the Working Group to be instructed to consider the possibility of designing a separate set of procedural rules for business-to-consumer cases.

16. **Ms. Millicay** (Argentina), supported by **Mr. Schoefisch** (Germany), **Mr. Maradiaga** (Honduras) and **Mr. Madrid Parra** (Spain), called on the secretariat to be careful in its references to categories of countries and regions. It was acceptable to use the habitual United Nations terms "developing countries", "conflict situations" and "post-conflict situations", but not to refer to "conflict-torn regions", "areas of conflict" or "post-conflict countries".

17. **Mr. Madrid Parra** (Spain), agreeing with the United States delegation, reiterated his delegation's view, expressed the day before, that the draft rules governing ODR did not contravene consumer protection laws. The belief that they did appeared to be the result of a difference of interpretation, which pointed to the need for simple, unambiguous rules.

18. **Mr. Wallace** (United States of America) reiterated his opposition to asking the Working Group to conduct another study on consumer protection. The secretariat had already produced a report on the issue in response to a request by the

Commission at its previous session, and it had been examined, as was correctly reflected in the report of Working Group III. While the Working Group would undoubtedly continue to address consumer protection in its work, no further report was needed.

19. In any case, the Commission should not instruct the Working Group to reach pre-set outcomes or take specific action on controversial aspects of its work. It was for the experts on ODR to reach their own decisions in the Working Group sessions, and the Commission should show more confidence in them.

20. On the question of developing a separate set of procedural rules for business-to-consumer cases, he recalled that, at the Commission's session establishing the Working Group, some delegations had argued that the Working Group should consider only business-to-business cases, but the prevailing view had been that business-to-consumer cases should also be looked at, owing to their volume and the difficulty in drawing a distinction between the different types of cases. The Working Group had also decided to include consumer-to-consumer transactions, with the Commission's agreement. Bearing in mind, *inter alia*, the different national definitions of "consumer", to have separate rules for business-to-consumer and consumer-to-consumer cases would only further complicate the ODR process, in direct contravention of the declared objective of simplicity and efficiency.

21. With regard to the New York Convention and the issue of final and binding outcomes, he drew attention to the Working Group's report, which reflected the consensus within the Working Group. Although some delegations might disagree with the decisions it had reached, it was for the Working Group to resolve any disagreement, not the Commission.

22. **Mr. Maradiaga** (Honduras), agreeing with the delegations of Spain and the United States, said that the procedural rules must be absolutely unambiguous in the area of consumer protection, in the interests of all concerned. Recalling that the New York Convention was one of the instruments with the broadest application in the enforcement of foreign arbitral decisions, he reaffirmed that a uniform international legal framework for ODR was needed.

23. **Ms. Talero Castro** (Colombia), also agreeing with the Spanish and United States delegations, said that consumer protection issues could be adequately solved in the Working Group. Since mechanisms like ODR would be very useful in countries such as hers, she supported Nigeria's calls for the Commission to continue to develop them.

24. **Mr. Ivančo** (Czech Republic), further agreeing with the representatives of Spain and the United States, said that the ODR system needed to be as simple as possible.

25. **The Chair** said he took it that the Commission wished to call for the Working Group to consider and report back at a future session of the Commission on how the draft procedural rules governing dispute resolution for cross-border electronic transactions responded to the needs of developing countries and conflict and post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; to continue to include in its deliberations the effects of ODR on consumer protection; to continue to explore a range of means of ensuring that ODR outcomes were effectively implemented, including possible alternatives to arbitration.

26. He also took it that the Commission reaffirmed the mandate of Working Group III on ODR in respect of low-value, high-volume cross-border electronic transactions and encouraged the Working Group to continue to conduct its work in the most efficient manner possible.

27. *It was so decided.*

28. **Mr. Decker** (Observer for the European Union), supported by **Mr. Wijnen** (Observer for the Netherlands), wished to clarify the situation concerning arbitration. While it was true that document A/CN.9/739 referred to a commitment to arbitration as the final stage of ODR proceedings, opinions had evolved considerably since then. Consequently, paragraph 128 of the latest Working Group report (A/CN.9/744) contained a different wording that had been deliberately chosen after lengthy discussions: "The Working Group agreed that ODR is a process involving three stages, and that the stage of decision by a neutral is part of that process". In other words, there was no agreement in the Working Group on arbitration and it was not

appropriate for the Commission to make a commitment to arbitration for business-to-consumer disputes.

29. **Mr. Wallace** (United States of America), disagreeing with the observer for the European Union on the issue of arbitration, said there was no consensus on the issue of consumer protection but agreed that the Working Group would continue to consider it.

30. **Ms. Matias** (Israel) said that there was broad consensus for the proposal made by the Nigerian delegation in favour of continuing consideration of arbitration as an important element of the ODR mechanism, with the Working Group reporting back to the Commission. Although concerns had been expressed by some delegations, none had voiced an outright objection; that consensus should be reflected positively in the report.

31. **The Chair** said that when the secretariat drafted its report it would ensure that it accurately reflected the views expressed by all delegations.

Electronic commerce: progress report of Working Group IV (A/CN.9/737)

32. **Mr. Lee Jae Sung** (Office of Legal Affairs), introducing the report of Working Group IV on its forty-fifth session (A/CN.9/737), recalled that at its previous session the Commission had mandated Working Group IV to undertake work in the field of electronic transferable records, possibly to include identity management, the use of mobile devices in e-commerce and electronic single window facilities. The Working Group had begun its work on electronic transferable records at its forty-fifth session; however, its forty-sixth session, scheduled to take place in early 2012, had been cancelled to allow the secretariat to gather the information needed to prepare the working documents and owing to the uncertainty over the pattern of UNCITRAL meetings.

33. He drew attention to resolution 68/3, adopted by the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) at its sixty-eighth session, on enabling paperless trade and the cross-border recognition of electronic data and documents for inclusive and sustainable intraregional trade facilitation. The resolution

encouraged all ESCAP members and associated members to take into account or adopt international standards prepared by the United Nations and other international organizations to facilitate interoperability. The secretariat would work closely with ESCAP, inter alia through its Regional Centre for Asia and the Pacific.

34. Recalling the ongoing cooperation between the secretariat and other organizations with respect to legal issues relating to electronic single window facilities, he drew attention to a capacity-building guide on the subject, prepared by the United Nations Network of Experts for Paperless Trade in Asia and the Pacific (UNNExT), ESCAP and the United Nations Economic Commission for Europe with a substantive contribution from the UNCITRAL secretariat.

35. With regard to recent developments concerning cooperation between the Commission and the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), in particular the Signed Digital Document Interoperability Recommendation, he drew attention to the recent proposal by UN/CEFACT to establish a framework for the ongoing governance of signed digital interoperability in coordination with the Commission and the International Organization for Standardization (ISO). The secretariat would take the appropriate steps to cooperate with UN/CEFACT, possibly involving Working Group IV.

36. With respect to legal issues relating to identity management, he told the Commission that the American Bar Association had submitted a paper for possible discussion at the forty-sixth session of Working Group IV, providing an overview of identity management and its role in e-commerce.

37. **Mr. Castellani** (Observer for the World Customs Organization (WCO)), noting that his organization's work and that of the Commission were complementary, said that cooperation between them had been extremely valuable. WCO was especially encouraged by the work of Working Group IV on electronic transferable records and had been pleased to attend the Group's session, at which topics of considerable importance to WCO and the international trading community had been identified. WCO looked forward to the next session, at which it

planned to submit a document for the Working Group's consideration.

38. He noted the growing importance of single window facilities for trade facilitation, including at the cross-border level and with respect to business exchanges. They helped to reduce import-export costs, enhance global security and increase the effectiveness of trade facilitation, of special importance for developing countries. WCO therefore welcomed the Commission's contribution to establishing uniform and predictable legal standards in that regard. It also welcomed the two bodies' joint work to provide guidance on electronic single window facilities and the global trend towards paperless trade.

39. WCO appreciated the Commission's role in coordinating the various United Nations and other international bodies active in the field of legal standards for e-commerce and preparing a harmonized legal framework to complement similar efforts taking place at the technical level. His organization looked forward to continuing positive cooperation with the Commission.

40. **Mr. Schoefisch** (Germany) said that a cross section of German industry had been asked whether they saw the need for electronic transferable records. Only two answers had been received and both had been negative. The reason given was that such records would be easy to falsify or manipulate. His delegation had therefore concluded that the subject need not be discussed further.

41. **Ms. Sabo** (Canada) said that while there was understandable support on the Commission for continuing work on e-commerce, her delegation was concerned that the Working Group was using valuable secretariat and national resources to address an interesting but rather vague issue.

42. Nonetheless, the secretariat had been mandated to examine electronic transferable records further, and States had been invited to consult with industry in the hope of pinpointing a problem that needed solving. Her delegation looked forward to hearing the results at the next Working Group session and to receiving the next Working Group report to the Commission in 2013. However, if no specific problem could be identified, no further Working

Group sessions should be scheduled and a more worthwhile topic should be sought instead.

43. **Mr. Madrid Parra** (Spain) welcomed the strong support shown by WCO for the Commission's work on electronic transferable records and the desire for cooperation expressed by other organizations. He recognized that some countries, such as his own, might detect a greater need than others for harmonizing international commercial law with regard to the issue. As was stated in the report, various delegations were producing documents on the basis of national consultations with industry, while the secretariat was itself compiling the existing legislation in different countries.

44. Provisions relating to credit transfers in the United Nations Convention on the Use of Electronic Communications in International Contracts had been excluded from the scope of its application, which meant that many of the fundamental principles of UNCITRAL texts on e-commerce had yet to be implemented. Moreover, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules"), which complemented the Model Law on Electronic Commerce, referred to the issue; its application, however, was limited to transportation documents alone.

45. If the secretariat carried out the tasks entrusted to it in paragraphs 93 to 95 of the report, the Working Group would be able to fulfil its mandate.

46. **Mr. Kim Jong Woo** (Republic of Korea) agreed that Working Group IV should continue its work.

47. **Mr. Loren** (United States of America), supported by **Mr. Zhang** Chen Yang (China) and **Ms. Matias** (Israel), also agreed that Working Group IV should continue to work on electronic transferable records. He believed that an international legal framework in that regard would be beneficial to international trade. A useful discussion had been held at the Working Group's only meeting on the topic to date, with many questions being raised about the domestic practices and legal systems applicable to electronic transferable records.

48. He thanked the secretariat for its timely response to the Working Group's requests and recalled that several working documents on the issue had been or were being drafted, including a joint study by Colombia, Spain and the United States based on the consultations held in those countries. He looked forward to reviewing the documents and discussing further the responses received from German industry representatives.

49. Welcoming the WCO statement, which demonstrated not only the importance of the Working Group's work on electronic transferable records and related issues but also the need to coordinate with other organizations, he added that continuous cooperation with WCO and other bodies, such as ISO and UN/CEFACT, would be very useful.

50. **Mr. Bellenger** (France) expressed scepticism about Working Group IV's work on electronic transferable records. The issue was too vague and unlikely to be satisfactorily covered by an international legal framework. He agreed with those speakers who had asked for a more specific agenda to be set.

51. **Mr. Maradiaga** (Honduras) expressed his delegation's support for asking the Working Group to continue its work on electronic transferable records, in view of the topical importance of the issue. An international legal framework, in keeping with the Commission's declared goals, could only boost international e-commerce.

52. **Mr. Ivančo** (Czech Republic), concurring with previous speakers on the need for Working Group IV to continue its work on electronic transferable records, agreed with those calling for a sharper focus on more specific aspects.

53. **Mr. Chan** (Singapore), expressing his delegation's full support for inviting Working Group IV to continue its work on electronic transferable records, because an international legal framework would help to promote international e-trade, said that the Working Group's first meeting had been a disappointment. Nevertheless it had been prudent to ask member States to consult further in order to identify specific problems. He looked forward to the outcome of the studies being conducted by different

countries and to their discussion at the next Working Group meeting.

54. **The Chair** said he took it that the Commission reaffirmed the mandate of Working Group IV relating to electronic transferable records and requested the secretariat to continue reporting on relevant developments relating to electronic commerce.

55. *It was so decided.*

Election of officers

56. **The Chair** said that the delegation of the Bolivarian Republic of Venezuela, on behalf of the Group of Latin American and Caribbean States, seconded by the delegations of Argentina, Brazil and El Salvador, had nominated Mr. Maradiaga (Honduras) for the office of Vice-Chair of the forty-sixth session of the Commission.

57. *Mr. Maradiaga (Honduras) was elected Vice-Chair by acclamation.*

58. **The Chair** said that the delegation of the Republic of Korea, on behalf of the Asian Group, seconded by the delegation of Singapore, had nominated Ms. Laborte-Cuevas (Philippines) for the office of Vice-Chair of the forty-sixth session of the Commission.

59. *Ms. Laborte-Cuevas (Philippines) was elected Vice-Chair by acclamation.*

The meeting was suspended at 11.50 a.m. and resumed at 12.15 p.m.

Possible future work in the area of international contract law (A/CN.9/758)

60. **The Chair** recalled that the Commission had agreed to add a new item to its agenda, following item 12 of the provisional agenda, as proposed by Switzerland.

61. **Ms. Jametti Greiner** (Observer for Switzerland) invited the Commission to study her delegation's ambitious proposal, prepared in the spirit of the Commission's stated aim of facilitating international trade by eliminating legal obstacles. Further harmonization of international contract law would break down the trade obstacles resulting from the variety of national legal systems.

62. **Ms. Schwenzer** (Observer for Switzerland), recognizing the Commission's contributions to harmonization in the field of international contract law, stressed that the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) had had a global impact by unifying the law on contracts for the sale of goods. However, many areas relating to contracts for the sale of goods and to contract law in general had been left to domestic law, which had created an obstacle to international trade by multiplying potentially applicable legal regimes and associated transaction costs.

63. Moreover, the need to gain access to legal materials on foreign laws in different languages or to seek expert advice from a foreign jurisdiction created additional challenges and expenses. Those expenses were particularly onerous on SMEs, whereas larger companies could wield overwhelming bargaining power when negotiating contracts. Consequently, her delegation predicted that multinationals and English-speaking countries with similar contract laws would probably reject the proposal to harmonize international legislation. In terms of capacity-building, predictability and cost-saving, the rest of the world would, however, benefit greatly from more unification in international contract law and a filling of the gaps left by CISG.

64. **Ms. Jametti Greiner** (Observer for Switzerland) added that, with a view to allowing the Commission to make an informed decision on possible future work with regard to the further harmonization of international contract law, the secretariat could organize colloquiums and other meetings as appropriate and within available resources, and report at a future Commission session on the desirability and feasibility of such work. Such exploratory activities should not only take into account but build on existing instruments, such as CISG and the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts. Moreover, they could usefully complement ongoing efforts to modernize contract law at the regional and national levels.

65. **Mr. Dennis** (United States of America) thanked the Swiss delegation for its contribution

but, having examined the proposal and consulted domestic stakeholders, his delegation did not believe that there was a need for a global reflection on the further unification of international contract law beyond the endeavours already carried out by the Commission.

66. Not only were CISG and the UNIDROIT principles perfectly adequate in practice, but the Swiss proposal might also overlap with the Institute's efforts and even cause friction with it. Above all, the proposal was too ambitious; international agreement could not realistically be reached on all the issues identified in the document. Similarly, developing regulations on such a wide range of issues would be a major undertaking, with considerable resource implications, at a time when, according to the secretariat's own strategic planning note, the resources required to implement the Commission's existing work plan were barely sufficient.

67. Although it might reconsider the issue at a future date in the light of international law developments, his delegation could not support the Swiss proposal at the present time.

68. **Mr. Watanabe** (Japan) expressed his delegation's backing for the timely Swiss proposal. Japan had begun revising its domestic contract legislation in 2009, to take into account the globalization of markets. International contract law needed to be further harmonized in the light of recent developments in international trade. He therefore supported holding discussions on the scope, nature and form of future work on the proposal.

69. **Mr. Sánchez Contreras** (Mexico) said that his delegation was not in a position to decide. The Swiss proposal, although highly interesting, was extremely complex and called for detailed study and consultations at the national level before any further action could be taken.

70. **Ms. Cap** (Austria) said that although the Swiss proposal was worth considering it was very ambitious and a universally acceptable outcome was uncertain. She agreed with the United States that it might overlap with the endeavours of UNIDROIT and regional efforts. Moreover, attempts to agree on a general contract law at the European level had

been thwarted. The success of any instrument would depend on common ground being found.

71. **Mr. Schoefisch** (Germany) pointed out that no immediate decision had to be made. He shared other delegations' concerns about overlap, in view of the existence of the UNIDROIT principles, and agreed that resources were an issue. He suggested holding a colloquium on the Swiss proposal.

72. **Mr. Sorieul** (Secretary of the Commission) agreed that the duplication of efforts must be avoided and the mandate of UNIDROIT must be respected. The secretariat was conscious of the need to cooperate closely with UNIDROIT and would avoid any competition or friction with the Institute.

73. **Ms. Malaguti** (Italy) said that her delegation fully shared the concerns expressed by the United States representative and agreed with the Austrian delegation's remarks about the European Union. International contract law had deliberately been left outside CISG precisely because no common solutions could be agreed upon. Although predictability was desirable, the many differences between national contract law systems might be what enriched international trade and enabled the principles to work. Her delegation would prefer the Commission to take up other future work, for example in the area of microfinance, which was more realistic and a better use of resources.

74. **Ms. Sabo** (Canada) said that she shared other delegations' concerns and felt that the time was not right to pursue the Swiss proposal. It might, however, be useful for the secretariat to hold a colloquium in 2013 in order to generate ideas for future work. The colloquium should not address international contract law in general but should focus on specific topics, such as the execution of commercial judgments; the provision of models for the expeditious enforcement of such judgments might be beneficial.

75. **Mr. Chan** (Singapore) said that, as an English-speaking country, Singapore theoretically belonged to one of the groups which, according to the Swiss delegation, might reject its proposal. However, Singapore thrived on international trade and would welcome any initiative to remove obstacles in its way. Concerns had been raised when CISG had been first proposed and certain issues had

been omitted because no compromise had been possible. However, in the many years since the Convention's adoption many issues had been cleared up, and further harmonization of international contract law could be envisaged. While he understood other delegations' fears that the exercise might prove futile, he would support at least a feasibility study. Endorsing the proposal to ask the secretariat to hold seminars or workshops on the subject, he specifically welcomed the idea of holding a colloquium in 2013 to further examine the Swiss proposal and related initiatives, provided there were sufficient resources.

76. **Mr. Madrid Parra** (Spain) said he shared the concerns of many delegations about the scope and complexity of the Swiss proposal. Given that the Commission had endorsed the various versions of the UNIDROIT trade principles, he welcomed the proposed cooperation with the Institute and would willingly examine any joint proposal that the secretariat and UNIDROIT might present to the Commission.

77. **Mr. Leinonen** (Observer for Finland) agreed with other delegations that the Swiss proposal was very ambitious and might not be realistic. However, it was too soon to make a decision, as more analysis was needed. He, too, was in favour of holding a seminar or colloquium on the issue, as long as sufficient resources were available.

78. **Mr. Zhang** Chen Yang (China) praised the inspirational spirit of the Swiss proposal; however, in view of the complexity of the issue, he agreed that no decision either way needed to be taken. The document had laid the foundations for further work, which should be carried out within the limits of available human and financial resources. He felt that a workshop or colloquium on the subject would be appropriate.

79. **Ms. Matias** (Israel) said that although the aim of the Swiss proposal was worthwhile, her delegation shared the concerns expressed by the delegations of Austria, Canada, Italy and the United States. Not only were the Commission's financial and human resources limited but so were those of the member States, which could support proposals only when they were likely to succeed.

80. **Mr. Estrella Faría** (Observer for the International Institute for the Unification of Private Law (UNIDROIT)), referring to past cooperation and complementarity between UNCITRAL and UNIDROIT on contract law, welcomed the reassurance given by the Swiss delegation and the Commission's secretariat that any work undertaken on international contract law would be conducted in cooperation with UNIDROIT and in full recognition of its work.

81. Should the Commission wish merely to modernize or complement CISG or fill in any gaps, the Institute would help it to identify possible solutions, on the basis of the UNIDROIT principles. However, if it decided to aim for a broader

unification of international contract law, it should bear in mind that it had taken three decades to develop the UNIDROIT principles.

82. UNIDROIT would be willing to contribute to any feasibility study or other preparatory work needed to clarify the issue. He was unsure whether the Commission would be able to make an informed decision after only one colloquium, but the Institute was ready to cooperate with the Commission to organize workshops or other meetings.

The meeting rose at 1 p.m.

Possible future work in the area of international contract law**Insolvency law: progress report of Working Group V****Security interests: progress report of Working Group VI****Possible future work in the area of microfinance****Summary record of the 955th meeting, held at Headquarters, New York,
on Tuesday, 3 July 2012, at 3 p.m.**

[A/CN.9/SR.955]

Chair: Mr. Sikirić (Croatia)*The meeting was called to order at 3 p.m.***Possible future work in the area of international
contract law (continued) (A/CN.9/758)**

1. **Ms. Narbuada** (Philippines) thanked the Swiss delegation for its proposal but said that, as expressed by other delegations, the Philippines would prefer the Commission to take up other future work, for example in the area of microfinance, as suggested by Italy.
2. **Mr. Silverman** (Observer for the International Bar Association) said he believed that international trade would benefit from harmonization of international trade law and, in particular, from a reduction of the number of international trade-related laws with which his Association's clients must familiarize themselves. It was for the Commission to decide if adoption of the Swiss proposal would further those goals.
3. **Mr. Nama** (Cameroon) said that the Swiss proposal was welcome because his country, with its dual legal legacy, wished to harmonize international trade law and thereby promote trade.
4. **Ms. Talero Castro** (Colombia) shared the concerns of other delegations that the Swiss proposal might overlap with the endeavours of the International Institute for the Unification of Private Law (UNIDROIT). Colombia had started to apply UNIDROIT principles and was doing so efficiently, and felt that the proposed work should be carried out in conjunction with the Institute.
5. **Mr. Ivančo** (Czech Republic) said that his delegation supported the Swiss proposal but

believed that the views of the observer for UNIDROIT must also be taken into account.

6. **Mr. Weise** (Observer for the American Bar Association) said that, as others had remarked, the availability of resources of the secretariat and of States must be considered. How the project contained in the Swiss proposal could supplement the excellent work already performed by UNIDROIT and others should be first evaluated.

7. **The Chair** said the discussion had shown that the Commission should deliberate on the proposal further and that it should request the secretariat to organize a seminar or colloquium to discuss its feasibility. The UNIDROIT proposal of collaboration had been noted.

8. **Mr. Loken** (United States of America) said that his delegation did not share the Chair's understanding that there was consensus on the way forward and could not support the Swiss proposal for work on the topic.

9. **The Chair** said that the request that the secretariat should look into the matter further reflected the prevailing view of the Commission. The different views expressed would be duly noted in the report.

10. **Ms. Sabo** (Canada) said that her delegation did not share the Chair's view. As had been said by the United States delegation, States had clearly expressed other points of view and there had not been prevailing support for the Swiss proposal. The report should reflect that there had been clear opposition to proceeding with the proposal and that there had been strong reservations.

11. **Mr. Reyes Villamizar** (Colombia) endorsed the position of the United States and Canada because, in his view, there had not been sufficient support for a colloquium, despite the importance of the matter. He shared the opinion that it would be preferable to wait for a future opportunity and that the general consensus was not to go ahead with a colloquium.

12. **The Chair** said that his conclusion regarding the prevailing view had been based on his calculations and that the report would reflect the fact that different views had been expressed.

13. **Mr. Loken** (United States of America) concurred with the statements by the delegates from Canada and Colombia regarding their assessments of the views expressed. It should be recorded that there was opposition to the proposal and that there was disagreement concerning the prevailing view.

14. **Mr. Schoefisch** (Germany) agreed that there had been strong opposition, as well as support, for the proposal. He would be interested in knowing how a colloquium would be financed and when it would be held.

15. **Mr. Sorieul** (Secretary of the Commission) said that it was too early to discuss a calendar. For some delegations, microfinance was more of a priority than contract law, but in either case any undertaking would be substantial. The organization of a colloquium would benefit from the assistance of UNIDROIT and university bodies. A regional meeting could also be a possibility.

16. **Mr. Ivančo** (Czech Republic) said that his delegation would prefer a colloquium to be organized on microfinance.

17. **Ms. Matias** (Israel) said that her reading of the views expressed in the room was similar to that of the United States, Germany, Canada and others. Given the budget, her country's preference would be for a colloquium to be held on the theme of microfinance. Regarding the Swiss proposal, there were concerns regarding the question of feasibility and timing.

18. **Ms. Escobar Pacas** (El Salvador) said that, given the feasibility of the proposal, as mentioned by Israel, priority must be given to microfinance.

19. **Mr. Sorieul** (Secretary of the Commission) said that certain delegations had made it clear that any colloquium should be on microfinance or contract law, not both. The decision to consider either or both areas, was one for the Commission to take.

20. **Mr. Loken** (United States of America) said that it was premature to reach the conclusion expressed by the Chair because a number of delegations had expressed a clear preference for work in the area of microfinance. The document on strategic planning suggested that existing resources were scarce and, therefore, it would be more appropriate to wait until the group had discussed microfinance before drawing conclusions regarding recommendations on future work.

21. **The Chair** said that the conclusion stood. If the Commission decided there was also a need for the secretariat to organize a colloquium or seminar or research on microfinance, then the Commission could decide on its priorities.

Insolvency law: progress report of Working Group V (A/CN.9/738; A/CN.9/742)

22. **Mr. Lemay** (Secretariat) said that the Commission had endorsed the recommendation by Working Group V (Insolvency Law) that activity should be initiated on two topics, namely: guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests and possible development of a model law or provisions on insolvency law addressing selected international issues; and responsibility of directors of an enterprise in the period approaching insolvency.

23. Progress had been made with respect to both topics, and the work on the first was well advanced and might be completed in time for consideration and adoption by the Commission at its forty-sixth session. Although there would be revisions of the Guide to Enactment of the Model Law, the text of the Model Law itself would not change.

24. While the Working Group had considered adding material on enterprise groups to the Guide to Enactment of the Model Law, it had been agreed

that references could be included to part three of the UNCITRAL Legislative Guide on Insolvency Law.

25. The Commission further considered the draft text on the first topic that had been discussed by the Working Group at its forty-first session. That text had drawn upon material contained in the UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective, adopted by the Commission in 2011. Because the text currently being developed by the Working Group built upon and revised material included in the judicial perspective, in particular with respect to the centre of main interests, the Commission agreed that the judicial perspective should be revisited in parallel with the current work of the Working Group to ensure consistency.

26. **Mr. Redmond** (United States of America) said that his delegation hoped that work could be completed on the centre of main interests, so that the matter could be taken up by the Commission at its following session. The corporate group aspect of the work, including jurisdiction, access and recognition, would be addressed based on the prior mandate, once the single company issue had been addressed. A more balanced view of pre-insolvency issues had emerged from the most recent meeting of the Working Group and it was hoped that there would be progress in that regard.

27. **Mr. Bellenger** (France) requested clarification concerning future work and any mandate regarding the area of enterprise groups.

28. **Mr. Lemay** (Secretariat) said that work concerning corporate groups would update the judicial perspective, and would not be done by the Working Group itself.

29. **Mr. Redmond** (United States of America) said that the issue of enterprise groups had been addressed by the Working Group, in line with the mandate it had received from the Commission in 2008, and single companies would be addressed first. He added that his delegation would support coordination between the judicial perspective and current work.

30. **Ms. Jamschon Mac Garry** (Argentina) supported the coordination called for by the United States, to ensure coherence and to maximize the efficiency of the Group's work.

31. **The Chair** proposed that in its report the Commission should commend the Working Group for the progress made in the concept of the centre of main interest; that it should express its appreciation to the secretariat for the quality of the working papers and reports; that the Commission should agree that the material containing the judicial perspective paper should be revised in parallel with the current work of the Working Group to ensure consistency; and that the Commission should agree that revisions of the judicial perspective paper should be submitted to the Commission for adoption at the same time as the new text on centre of main interest being prepared by the Working Group.

Security interests: progress report of Working Group VI (A/CN.9/740; A/CN.9/743)

32. **Mr. Lee** (Office of Legal Affairs) said that Working Group VI had continued its work on the registration of security rights in movable assets. It had considered the draft text prepared by the secretariat and had agreed that it should take the form of a guide with commentary and recommendations along the lines of the UNCITRAL Legislative Guide on Secured Transactions. The Working Group had approved the substance of the recommendations of the draft registry guide and examples of registration forms. It also had agreed that the draft registry guide should be finalized and submitted to the Commission for adoption at its following session.

33. Regarding future work, the Working Group had agreed to propose to the Commission that it should mandate the development of a model law on secured transactions based on the general recommendations of the Legislative Guide on Secured Transactions and consistent with all UNCITRAL texts on secured transactions. It had also been proposed that the topic of security rights in non-intermediated securities which the Commission, at its forty-third session, decided to retain in the future programme of Working Group VI, should continue to be retained on its agenda to be considered at a future session, possibly based on a note by the secretariat that should review the issues to be covered so as to avoid overlap and inconsistency with other texts and the work of other organizations.

34. **Ms. Sabo** (Canada) said that a decision on future work for the Working Group was not an essential issue for the Commission. There was merit to the proposal that a model law should be developed to help implement the Legislative Guide.

35. **Mr. Redmond** (United States of America) said that the Commission should take a decision to establish a mandate for consideration of a model law on secured transactions by the Working Group. Such a model law would complement the Guide and help States in implementing the Guide; provide guidance to States in revising their laws; address access to credit; and be adapted to different legal traditions.

36. Based on the Organization of American States (OAS) Model Registry Regulations, the United States had assisted States in the region. However, there was no similar international instrument, and Working Group IV should therefore undertake to develop one. The United States also supported future work in non-intermediate securities.

37. **Mr. Sánchez Contreras** (Mexico) said that his delegation supported work on a guide during the following session of the Working Group. The Model Inter-American Law on Secured Transactions would be a good foundation for that work. Mexico had made great progress with its own related legislation, covering over 130,000 transactions and 72,705 registrations and saving those using its registry, which was free, almost \$4 billion in fees.

38. The Working Group should follow the Guide yet remain flexible in its approach to unresolved political issues, in order to provide States with an easily implemented product.

39. **Ms. Matias** (Israel), **Mr. Madrid Parra** (Spain), **Ms. Talero Castro** (Colombia), **Mr. Zhang** (China), **Ms. Escobar Pacas** (El Salvador), **Mr. Maradiaga** (Honduras) and **Ms. Bonilla Robles** (Observer for Guatemala) joined the United States and Mexico in supporting the request for such a mandate.

40. **Mr. Bellenger** (France) said he supported the preparation of a simple, short and concise model law with a very specific mandate, in line with paragraphs 74 and 76 of the most recent report by the Working Group.

41. **Mr. Otis** (Observer for the New York State Bar) said that his organization offered the Working Group whatever help it might be able to provide, based on its experience.

42. **Mr. Tata** (World Bank) said there was no one-size-fits-all solution when it came to modernizing the legislation of developing countries related to trade, commerce and finance, and a great deal of variation was acceptable to reflect local needs.

43. **Mr. Weise** (Observer for the American Bar Association) agreed that it would be profitable to move forward with a model law and for the secretariat to begin planning that work. Such a model law must be adaptable to national, societal and economic cultures while being faithful to the principles, statements and suggestions in the Legislative Guide.

44. **Mr. Kohn** (Observer for the Commercial Finance Association) said that a model law would provide States with a tool to modernize their own laws in order to promote low-cost, secured credit for small and medium-sized enterprises that would build on the Legislative Guide.

45. **Ms. Kasule Kaggwa** (Uganda) said she supported the granting of a mandate to the Working Group for the drafting of a short, concise model law on secured transactions. Her delegation had had initial misgivings regarding the undermining of efforts in the area of capacity-building and home-grown legislation but, while the Guide helped States to update existing laws, a short and concise model law would assist those countries that lacked such frameworks.

46. **Mr. Pérez-Cadalso Arias** (Observer for the Central American Court of Justice), while providing information on the functions of the Central American Court of Justice in the field of secured transactions, explained that any notary in the seven countries of the region, plus the Dominican Republic, served by the Court could authorize title deeds for the Central American mortgage scheme.

47. **The Chair** said he took it that the Commission commended the Working Group on its work, expressed its appreciation to the secretariat for the quality of the working papers and reports prepared and requested the Working Group to pursue its

efforts towards the finalization of the draft registry guide in a manner to allow for submission to the Commission for adoption at its forty-sixth session; that the Commission had agreed to give the Working Group a mandate to prepare a simple, short and concise model law on secured transactions based on the general recommendations of the Secured Transactions Guide and consistent with all texts prepared by the Commission; that the Commission had agreed that the topic of security rights in non-intermediated securities should be retained on its future work agenda and be considered at a future session of the Working Group based on the note by the secretariat.

48. *It was so decided.*

Possible future work in the area of microfinance (A/CN.9/756)

49. **Mr. Lemay** (Secretariat) said that the Commission had agreed, at its forty-fourth session, to include microfinance in its future work. With a view to determining the areas where work was needed, a questionnaire had been circulated to collect States' experiences in legislative and regulatory frameworks for microfinance, and the responses would be reported on at the Commission's following session. Research was to be carried out on overcollateralization; electronic money; microfinance dispute resolution; and secured lending.

50. In the area of secured transactions, it was recommended that a security interests registry should be adopted; that the recommendations contained in the Legislative Guide on Secured Transactions should be used to address fair and transparent enforcement practices; that other secured transactions issues should be addressed to facilitate microfinance transactions; and that, together with the World Bank, consideration should be given to how the secured transactions law applied to microfinance.

51. Concerning dispute resolution, together with other organizations and institutions the Commission might wish to assess types and volumes of client complaints to determine if alternative dispute resolution methods were a good approach; and to analyse whether alternative dispute resolution systems would provide viable solutions for the

economic resolution of the low-value disputes of the poor and how they would be financed in order to remain independent. The Commission might wish to study an online dispute resolution facility.

52. The Commission might also wish to explore, with national regulators, how to allow non-bank e-money providers to offer interest-bearing savings accounts and insurance; to support guidelines on e-money platforms and audits; and to consider a study of issues relating to e-money and appropriate legislative guidelines or recommendations for a harmonized approach to regulation of non-bank financial institutions which offered more than only transfers of money.

53. **Mr. Reyes Villamizar** (Colombia) proposed holding a colloquium on the current status and possible harmonization of legislation on closed capital corporations, given the importance of facilitating access to credit by small businesses, which would bring more enterprises into the formal economies of developing countries that were often excluded by obsolete corporate regulations. Such a colloquium on simplified corporations could be decentralized regionally, and his delegation would be pleased to explore financing possibilities for the event.

54. **Mr. Kamau** (Kenya) said that microfinance was growing and would remain important in future financial arrangements in his country. Kenya was also a pioneer in the field of e-money, for which it had developed a control system. Both of those areas had had an impact on development, and guidance would be welcome to assist States in regulating the services provided through new technologies. The Commission should remain seized of the issue and invest in the further study of the subject.

55. **Mr. Redmond** (United States of America) said that the Commission should provide an enabling legal framework for microbusinesses to enable them to compete and improve trade, thereby promoting economic growth. The United States would support a colloquium on the matter because certain issues had not yet been addressed, such as alternative and online dispute resolution with respect to secured transactions. Simplified business registration reform, as mentioned by the representative of Colombia, also merited work, and the United States wholeheartedly supported the proposed colloquium,

which should have priority over any other undertaken by the secretariat.

56. **Ms. Kasule Kaggwa** (Uganda) agreed with the delegates who had spoken previously on the issue, especially regarding support for the Colombian proposal that a colloquium should be held on microfinance. The issue of microfinance and financial inclusion was important in many developing countries, where few people had access to financial services because those provided by commercial banks were too expensive. Initiatives that would inform the development of a legal framework on microfinance were welcome.

57. **Mr. Madrid Parra** (Spain), supported by **Ms. Matias** (Israel), said that the Commission should take all steps necessary to support small and medium-sized enterprises (SMEs), in line with its mandate to bear in mind the interests of all peoples. A colloquium along the lines proposed by Colombia would therefore be useful and should take priority over other proposed colloquiums.

58. **Ms. Sabo** (Canada) said the Commission had long recognized the importance of microfinance and had now finally identified a specific area for further work. Her delegation supported the Colombian proposal for a colloquium on simplified business registration and other aspects of microfinance as a priority.

59. **Mr. Otis** (Observer for the New York State Bar Association) said that the Association supported the Colombian proposal, in line with paragraph 10 of A/CN.9/757.

60. **Mr. Edokpa** (Nigeria), **Ms. Escobar Pacas** (El Salvador), **Ms. Bonilla Robles** (Observer for Guatemala), **Mr. Ivančo** (Czech Republic) and **Ms. Fernandez Sobarzo** (Chile) also expressed support for the Colombian proposal for a colloquium on microfinance as a priority for the future work of the Commission.

61. **Mr. Kohn** (Observer for the Commercial Finance Association) agreed that a colloquium on microfinance should take priority over other proposals for future work of the Commission and that such a colloquium should address effective dispute resolution procedures for all parties in microfinance transactions, as suggested by the United States representative.

62. **Mr. Bellenger** (France) said that perhaps the colloquium should be a regional event, since the proposal made by Colombia seemed to be of particular interest to both North and South American countries.

63. **Ms. Jamschon Mac Garry** (Argentina), supported by **Mr. Maradiaga** (Honduras), said that it would be a positive step to examine other dispute resolution mechanisms in order to identify the best system for helping persons without resources. It would also be beneficial to carry out a study into the modalities for e-money, including the integrity of e-money platforms, privacy protocols, and the possibility of non-bank providers of e-money to pay interest on amounts held.

64. **Mr. Nama** (Cameroon) said that since microfinance was a subject of particular interest and importance for his Government and the African Central Bank, his delegation supported the Colombian proposal.

65. **Mr. Schoefisch** (Germany) said that his delegation supported the organization of a colloquium, possibly regional, on microfinance. He asked if the secretariat had an idea of whether more colloquiums would be held and if a working group would be created to examine the matter.

66. **Mr. Lemay** (Secretariat) said that there appeared to be broad support for a colloquium on simplified administrative systems for small and medium-sized enterprises, alternative dispute resolution mechanisms and methods to facilitate credit for micro, small and medium-sized enterprises. Those issues could therefore provide the basis for ideas for future work.

67. **Mr. Dennis** (United States of America) said that, in his view, the Commission should focus on establishing and enabling legal frameworks for SMEs. Document A/CN.9/757 had identified important issues, in respect of which his delegation supported the excellent Colombian proposal for a colloquium on simplifying business registration. However, since the delegations in favour of that proposal were from all regions of the world, he did not consider microfinance to be a regional issue.

68. **The Chair** said that there appeared to be unanimous support for at least one colloquium — possibly regional in scope — on simplifying

business registration, facilitating credit for SMEs, dispute resolution mechanisms and creating an enabling legal environment for SMEs.

69. **Mr. Loken** (United States of America) said that such a colloquium should be considered a priority for future work in terms of the resources of the Commission.

70. *It was so decided.*

Endorsement of texts of other organizations

71. **Mr. Lee** (Secretariat) said that the Commission had been asked to endorse the new editions of the UNIDROIT Principles of International Commercial Contracts, 2010 and the new Incoterms® 2010 rules produced by the International Chamber of Commerce.

72. **Mr. Estrella Faría** (Observer for the International Institute for the Unification of Private Law (UNIDROIT)) said that the 2010 edition of the UNIDROIT Principles of International Commercial Contracts contained four new chapters on illegality, conditions, the plurality of obligors and of obligees and restitution in case of failed contracts, together with editorial improvements. The text was available in the two official languages of UNIDROIT, English and French, and a number of unofficial translations into other languages were also available on the UNIDROIT website.

73. **Mr. Lee** (Secretariat), reading out a statement on behalf of the International Chamber of Commerce (ICC), said that the new Incoterms® 2010 rules sought to facilitate the conduct of global trade and reduce the risk of legal complications. Since they were first published in 1936, the Incoterms® rules, which were a globally accepted contractual standard, had been regularly updated to keep pace with developments in international trade. The Incoterms® 2010 rules took into account the continued spread of duty-free zones, the increased use of electronic transactions, heightened security concerns with regard to the movement of goods and changes in transport practices. The number of rules had been reduced to 11, offering a simpler and clearer presentation. Moreover, the new edition of the rules had been made gender neutral. The text was the result of comprehensive, worldwide consultations with businesses from all relevant

sectors carried out over several years and therefore reflected common international commercial practices and responded to a need for global standards in the sale of goods. The ICC hoped that UNCITRAL would continue to support its work on international trade transactions.

74. **Mr. Reyes Villamizar** (Colombia) said that it was timely and appropriate for the Commission to endorse the new UNIDROIT Principles of International Commercial Contracts, which had incorporated new articles based on comments and suggestions made further to the previous editions of those Principles. Both UNIDROIT and ICC were highly respected institutions working to advance private international law; the Commission should therefore promote the cause of harmonizing international private law by endorsing those texts, which would be used by international trade operators.

75. **Mr. Chan** (Singapore) asked whether by endorsing the texts the Commission was adopting them as part of its own body of publications or was merely recommending their use.

76. **Mr. Sorieul** (Secretary of the Commission) said that the wording used in the Commission's decision to endorse the texts would be the same as in previous years.

77. **Mr. Madrid Parra** (Spain) said that his delegation supported the texts and the tradition of endorsement; nonetheless, the secretariat should provide copies of the texts or easy access to them prior to asking the Commission to take a decision on endorsement. He understood that there were issues of copyright, particularly with regard to the ICC text; however, delegates should see the texts they were being asked to endorse beforehand.

78. **Mr. Sorieul** (Secretary of the Commission) noted the concerns raised by Spain and said that the text was accessible via the UNCITRAL website; a number of hard copies were also available in the meeting room for delegates.

79. *It was decided to recommend the use of the UNIDROIT Principles of International Commercial Contracts and the Incoterms® 2010 rules.*

Technical assistance to law reform

80. **Mr. Lemay** (Secretariat) said that technical cooperation was dependent on financial support. As outlined in Section V of A/CN.9/753, despite the secretariat's efforts to solicit new donations, funds available in the UNCITRAL Trust Fund for symposia were sufficient only for a very small number of future technical cooperation and assistance activities. The secretariat was examining the use of co-funding and cost sharing to keep the costs of such activities as low as possible, as well as the possibility of appealing to Permanent Missions to the United Nations and other public and private bodies, in order to continue to be able to accede to developing countries' requests for technical assistance and grant travel assistance. He thanked the Government of Indonesia for its recent donation.

81. *The Commission endorsed the proposals made by the secretariat.*

Status and promotion of UNCITRAL legal texts

82. **Mr. Castellani** (Secretariat) said that the status of conventions and model laws was updated in real time on the UNCITRAL website in all six languages. In practice, the enactment of model laws and the adoption of treaties tended to focus on dispute resolution, e-commerce and the sale of goods. However, enacting States did not always inform the secretariat or provide a copy of the text of the law, so it was not always easy to see if the new legislation was a faithful enactment of the model laws. The production of legislative standards was important, as was the enactment and uniform interpretation of UNCITRAL model laws, a point which had been raised in the note by the secretariat on a strategic direction for UNCITRAL (A/CN.9/752).

83. **Mr. Silverman** (Observer for the International Bar Association) said that the Commission had undertaken work to combat commercial fraud between its thirty-fifth and forty-first sessions, culminating in the colloquium on international commercial fraud in Vienna in April 2004. It was vital that the private sector contributed to efforts to combat that problem, and UNCITRAL could help to focus those contributions by exercising leadership on the matter. He suggested that the secretariat

should be allowed to organize a seminar or colloquium on how to further those efforts.

84. *It was so decided.*

Coordination and cooperation

(a) General

85. **Mr. Lemay** (Secretariat) said that document A/CN.9/749 examined coordination and cooperation activities with a number of organizations both within and outside the United Nations system. Those activities concerned the work of all of the current Working Groups; the secretariat had participated in expert groups, working groups and plenary meetings in order to share information and expertise and to avoid duplication in the resulting products. As a result of that work, the Commission might wish to note the importance of coordination work undertaken by UNCITRAL and affirm its support for the use of official travel funds for that purpose.

86. *It was so decided.*

(b) Coordination in the field of security interest

(c) Reports of other international organizations

87. **Mr. Lee** (Secretariat) said that document A/CN.9/720, approved by the Commission at its last session, had been published by the United Nations under the title "UNCITRAL, Hague Conference and UNIDROIT Texts on Security Interests" and was now available in Chinese, English, Russian and Spanish, with the Arabic and French translations to follow shortly. Pursuant to the Commission's decision at the forty-fourth session, the secretariat had prepared a first draft of the UNCITRAL and World Bank set of principles summarizing the UNCITRAL Legislative Guide on Secured Transactions.

88. Further to the decision taken at the previous session, the secretariat had communicated a request to the European Commission for coordination on the topic of the assignment of receivables. The European Commission had informed the secretariat that the British Institute of International and Comparative Law had been commissioned to conduct a study on the matter, the results of which were currently being analysed by the European Commission. The European Commission's report on

the proprietary aspects of the assignment of claims would be published in 2013. The European Commission welcomed the adoption of a coordinated approach with UNCITRAL. The Commission might wish to request the secretariat to continue cooperating closely with the World Bank and the European Commission on the respective topics.

89. **Mr. Tata** (World Bank), thanking the Commission and the secretariat for their support of the work of the World Bank, particularly in the areas of commercial arbitration, procurement, security interests and insolvency, said that the work of the Commission and its various Working Groups had been of tremendous value to the World Bank and its clients. He invited the Commission to participate in the World Bank's recently established knowledge-sharing network, the Global Forum on Law, Justice and Development.

90. **Mr. Estrella Faría** (Observer for the International Institute for the Unification of Private Law (UNIDROIT)) said that since the Commission's forty-fourth session, UNIDROIT had completed the work started after the Cape Town Summit in 2001 by adopting a Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets. He was pleased to announce that there were now 51 contracting States to the Convention on International Interests in Mobile Equipment, making it one of the most successful international instruments in the field of secured transactions.

91. The governing body of the International Telecommunications Union had been invited to act as the supervisory authority for the Convention. A meeting of the Committee of Governmental Experts would take place in Rome in October 2012 to consider the finalized draft principles regarding the enforceability of close-out netting provisions, which would also be attended by a representative of the Commission.

92. Recently a meeting had been held to follow up on the application of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995), which was an important counterpart to the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit

Import, Export and Transfer of Ownership of Cultural Property (1970). There were now 33 States parties to the UNIDROIT Convention, which provided a private law framework for the restitution of stolen or illegally exported cultural objects.

93. Work had recently been initiated on private law aspects of agricultural development, in cooperation with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), to produce a legal guide on contract farming, which would help to integrate smallholders into the value chains. A colloquium on the topic had been held in Rome in November 2011, attended by, among others, a representative of the Commission. It was hoped that there would be further cooperation activities in that area and others.

94. *The Commission took note of the recommendation by the secretariat.*

(d) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups

95. **Mr. Lee** (Secretariat) said that pursuant to paragraph 9 of the rules of procedure and methods of work adopted at the Commission's forty-third session (A/CN.9/697) and the relevant decision taken at its forty-fourth session, a constantly updated list of non-governmental organizations and other invited organizations that had attended any Working Group or UNCITRAL meeting was available on the Commission's website.

96. **Mr. Sorieul** (Secretary of the Commission) said that, in addition to the issues raised in A/CN.9/752/Add.1 on the coordination of the work of other organizations, the Commission might wish to consider establishing links with legal reviews and encouraging the publication and promotion of the Commission's work. There had also been an increase in requests for observer status from university groups and researchers, including a number of renowned figures, who could contribute a great deal to the Commission's work. However, the same criteria used to grant observer status to non-governmental organizations should be applied to academic applicants, especially as to whether they would make original contributions to the

Commission's work and represented regions or legal systems that were not already well represented.

97. *The Commission took note of the recommendations and information provided by the secretariat.*

UNCITRAL regional presence

98. **Mr. Sorieul** (Secretary of the Commission) said that the first UNCITRAL Regional Centre for Asia and the Pacific had been launched in January 2012 in the Republic of Korea. Discussions were under way with other regions and countries to open other such centres. He thanked the Government of the Republic of Korea for its support and assistance.

99. **Mr. Castellani** (UNCITRAL Regional Centre for Asia and the Pacific) said that the Centre's three staff members were paid from extrabudgetary resources and were assisted by a national expert, seconded from the Ministry of Justice of the Republic of Korea. The Centre sought to identify regional priorities and needs and to organize events, the first of which would take place in autumn 2012. The Regional Centre had mapped the many ongoing projects in the field of private sector development, as well as the States that were active in the region and that could contribute by providing expertise or other resources. Efforts had been made to reach out to States to maximize the impact of the Centre's coordination activities. He called for donations of additional resources, in the form of funds, in-kind services or staff secondments, which would be extremely welcome, not only from countries in the region but also from elsewhere. He noted, lastly, that most of the requests for assistance had been from East Asia in the areas of alternative dispute resolution, sale of goods and e-commerce, and that the Centre would work in close cooperation with the Economic and Social Commission for Asia and the Pacific.

100. **Mr. Chan** (Singapore) said that his Government had been in discussions with the secretariat to establish a regional centre in Singapore. The proposed centre would provide training, which could be broader in scope than UNCITRAL texts, and information and updates on UNICTRAL texts; it would also encourage States in the region to adopt those texts. It would also organize substantive meetings in preparation for

drafting meetings and would facilitate the exchange of information. His Government would offer support, including funding. It was hoped that the centre would be launched in late 2012 or early 2013. A network of regional and subregional centres would assist the Commission in implementing its mandate and would promote global peace and development.

101. **Mr. Kamau** (Kenya) said that since the Commission was a key element within the international trade and employment system, it was essential that it had a presence in Africa. His country hoped to host a regional centre in Nairobi, where more than 25 regional offices of various international organizations, including the United Nations, were located. A regional centre must act as a centre for excellence for the whole continent by providing capacity-building assistance in areas such as information and communications technology and e-money. Although Africa was the fastest integrating continent, its institutional and legal systems were lagging behind. The infrastructure as well as the social and economic atmosphere in Nairobi would create a favourable environment for an UNCITRAL regional centre and ensure that it was strategically linked with other regional centres and the Commission's headquarters. His Government was ready and willing to host such a centre and provide the physical premises.

102. **Mr. Kim Jong Woo** (Republic of Korea) said that regional centres should coordinate their work and activities.

103. **Mr. Maradiaga** (Honduras) said that his Government had expressed interest in hosting a regional centre for Latin America and the Caribbean. He asked what the criteria were for establishing such a centre.

104. **Ms. Narbuada** (Philippines) welcomed the proposal for a regional centre in Singapore and expressed his support for such a centre in Kenya, with the aim of enhancing world trade and development in South-East Asia and Africa.

105. **Mr. Mugasha** (Uganda) expressed support for a regional centre in Kenya, as it would be beneficial to the central-eastern African region and deepen existing East African cooperation.

Strategic planning

106. **Mr. Lemay** (Secretariat) drew the Commission's attention to documents A/CN.9/752 and A/CN.9/752/Add.1 and asked that it take note of matters where the secretariat required additional guidance (paragraph 26, A/CN.9/752/Add.1).

107. **The Chair** said that the Commission had taken note of the documents and that States would send their comments to the secretariat for discussion.

108. **Mr. Bellenger** (France) asked that time be set aside at the end of the current session to discuss the strategic direction for the Commission in greater depth, particularly as the debates on the matter had lasted more than two days at the previous session.

109. **Mr. Sorieul** (Secretary of the Commission) said that unfortunately there would not be sufficient time available to come back to the discussion. The secretariat was not trying to avoid the matter, however. Further in-depth discussions would take place before the next session.

110. *The Commission accepted the proposal of the secretariat.*

Other business

Guiding Principles on Business and Human Rights

111. **Mr. Lee** (Secretariat) said that the Commission might wish to note that the secretariat had received from the Office of the United Nations High Commissioner for Human Rights a copy of the Human Rights Council resolution on human rights and transnational corporations and other business enterprises (A/HRC/RES/17/4) which asked United Nations bodies to promote the effective and comprehensive dissemination and implementation of the Guiding Principles on Business and Human Rights, as annexed to the report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/17/31). The secretariat had also been asked to contribute to the Secretary-General's report on the implementation of that resolution.

112. The secretariat recommended that the Commission should adopt a similar decision to the one it had adopted at its thirty-seventh session on the matter of the Global Compact, where it had

recommended that member States and observers make information on the initiative known to private enterprises and business associations in their countries in order to promote wider adherence to and the application of the initiative.

Internship programme

113. **Mr. Lee** (Secretariat) said that there were 11 new interns working with the UNCITRAL secretariat, however, there had been a number of last minute cancellations from candidates from developing countries, and it had proved difficult to find suitable candidates from African, Latin American and Caribbean States as well as those with Arabic language skills.

Evaluation of the role of the secretariat in facilitating the work of the Commission

114. **Mr. Lee** (Secretariat) said that further to the undertaking by the Commission at its fortieth session in 2007 to provide feedback to the secretariat on its contribution to facilitating the Commission's work, a satisfaction rating questionnaire had been distributed to all members of the Commission at the end of the last session. Six delegations had returned the questionnaire, eliciting an average rating of 4.83 (5 being the highest rating).

Election of UNCITRAL member States

115. **Mr. Lee** (Secretariat) reminded members of the Commission that the mandates of 30 member States would expire on the day before the start of the next session of the Commission in 2013. Elections for new members would be held during the sixty-seventh session of the General Assembly. The election dates had yet to be confirmed, but interested States were advised to consult first with the respective regional groups with regard to nominations. Retiring members were eligible to stand for re-election, and elected member States would serve a six year term.

Summary record coverage

116. **Mr. Sorieul** (Secretary of the Commission) said that, as had been decided at an earlier meeting, the Commission would continue to request summary record coverage but would undertake an experiment

with digital audio recordings in all languages to be provided by the conference management services.

117. **Mr. Loken** (United States of America) said that he had not understood that a decision had been reached on the matter of summary record coverage.

118. **Mr. Sorieul** (Secretary of the Commission) said that there had been no definite decision; but delegates would also be given access to digital audio recordings as a complement to the summary records. A final decision would be made on the basis of the feedback from that experiment.

Strategic framework for 2014/15

119. **Mr. Sorieul** (Secretary of the Commission) said that, if the Commission agreed, the same decision could be taken as that which had appeared in the 2010 session report on the strategic framework for 2012/13, as the concerns raised then with regard to budgetary issues remained the same.

120. **Ms. Jamschon Mac Garry** (Argentina) encouraged the Commission and the observers to disseminate the Human Rights Council's Guiding

Principles on Business and Human Rights to private companies and national chambers of commerce and called for the topic to be included on the Commission's agenda.

121. **Mr. Reyes Villamizar** (Colombia) said that the Colombian Congress had enacted a new law on national and international arbitration in June 2012. With regard to international trade regulations, the new law fully incorporated the UNCITRAL model law.

Date and place of future meetings

122. **Mr. Sorieul** (Secretary of the Commission) drew attention to a number of changes made to the provisional meeting schedule for the Working Groups. The finalized schedule would be distributed at the end of the session, but the dates could be changed easily if necessary, even at the last minute.

The meeting rose at 6.25 p.m.

**Summary record of the 956th meeting, held at Headquarters, New York,
on Friday, 6 July 2012, at 10 a.m.**

[A/CN.9/SR.956]

Chair: Mr. Sikirić (Croatia)

The meeting was called to order at 10.10 a.m.

*The meeting was suspended at 10.10 a.m. and
resumed at 10.20 a.m.*

Adoption of the report of the Commission

1. **The Chair** invited the Rapporteur, Mr. Mugasha (Uganda), to introduce the draft report of the Commission on the work of its forty-fifth session.

2. **Mr. Mugasha** (Uganda), Rapporteur, said that document A/CN.9/XLV/CRP.1 and addenda 1 to 22, together with document A/CN.9/XLV/CRP.2, would form the report of the Commission. Having already adopted addenda 1 to 3 and document A/CN.9/XLV/CRP.2, the Commission would turn its attention to document A/CN.9/XLV/CRP.1 and the remaining addenda.

A/CN.9/XLV/CRP.1

3. **Ms. Gross** (Secretariat) said that Cuba should be added to the list of observers in paragraph 6.

4. *Document A/CN.9/XLV/CRP.1, as orally revised, was adopted.*

A/CN.9/XLV/CRP.1/Add.4

5. *Document A/CN.9/XLV/CRP.1/Add.4 was adopted.*

A/CN.9/XLV/CRP.1/Add.5

6. **Mr. Loken** (United States of America) said that, in paragraph 9, the phrase “a presumption from which date on parties to an arbitration agreement were presumed to have referred to the Rules in effect on the date of commencement of the arbitration” was confusing.

7. **Ms. Sabo** (Canada) proposed that it should be clarified to read: “a presumption with respect to the Rules in effect on the date of commencement of the arbitration”.

8. **Ms. Millicay** (Argentina) said that the last sentence of paragraph 9 — “That proposal did not find support” — was absolutely inappropriate in the context of consensus decision-making bodies such as theirs, where agreement was often measured by the absence of objection rather than active support. The formula “did not find support” should be consistently avoided as a matter of UNCITRAL editorial policy. At the suggestion of the **Mr. Schoefisch** (Germany), she proposed that the sentence should be revised to read: “The proposal was not adopted”. Also, in the same paragraph, for the sake of accuracy, the words “it was proposed” should be replaced by the words “one delegation proposed”.

9. **Mr. Loken** (United States of America) said that, in paragraph 10, in order to be grammatically correct, the agreed correction should read “will, in any event, have to” instead of “will, in any event”. Paragraph 11, regarding revisions to paragraphs 38 and 44 of document A/CN.9/746/Add.1, did not mention that, in paragraph 44, the Commission had also decided to delete the words “as well as his or her nationality, which is recommended to be different from that of the parties” because they did not accurately reflect the sense of the Rules. The Commission had then decided to align paragraph 38 with paragraph 44, as revised. However, paragraph 11 stated that it had been agreed to align paragraph 38 with the wording of the 2010 Rules. The Commission must decide, for both paragraphs, if the language in question was to be revised to adhere to the sense of the Rules or simply deleted, and it must then ensure that the report reflected that decision.

10. **Ms. Sabo** (Canada) had also understood that paragraph 38 would be aligned with paragraph 44.

11. **Mr. Sorieul** (Secretary of the Commission) recalled that the initial objection to the language in paragraph 44 was that the recommendation went beyond what was recommended in the Arbitration

Rules themselves. The Commission could either delete the words or soften them.

12. **Mr. Mugasha** (Uganda), Rapporteur, thought that the Commission had agreed to rework the recommendation, not delete it.

13. **Mr. Loken** (United States of America) suggested that the sentence in paragraph 11 of the Commission's report should be revised to read: "It was also agreed to align the phrase 'which is recommended to be different from that of the parties', as well as similar language in paragraph 38, with article 6, paragraph 7, of the 2010 Rules."

14. *It was so decided.*

15. **Mr. Loken** (United States of America) said that the words "and to delete 'in its review'" should be appended to paragraph 16. In the first sentence of paragraph 22, the phrase "under existing and future investment treaties" inadvertently occurred twice, and the second occurrence should be deleted.

16. **Ms. Jamschon Mac Garry** (Argentina) said that, in paragraph 21, the words "It was proposed that the Working Group should be requested to finish" should be replaced by "Some delegations requested the Working Group to finish", and, in the next sentence, the words "and delicate" should be added after the word "complex". In paragraph 23, "requested" should be replaced by "encouraged".

17. **Ms. Matias** (Israel) said that, according to paragraph 22, the applicability of the rules on transparency under existing and future investment treaties "had to be considered with respect to both". Since that wording might be construed to imply that the Commission favoured some form of retroactive application of the rules to existing treaties, she proposed that the report should be revised to indicate, rather, that it "was a complex and delicate issue and should be carefully considered".

18. *A/CN.9/XLV/CRP.1/Add.5, as orally revised, was adopted.*

A/CN.9/XLV/CRP.1/Add.6

19. **Ms. Trent** (United States of America) said that it was important to ensure that the draft report fully reflected the context of certain comments. To that end, paragraph 7 should become paragraph 6 (c) and should be rephrased to read: "It was also noted that

certain States make decisions binding only upon companies or sellers and not upon consumers, and it was suggested that that approach could be used here."

20. **Ms. Sabo** (Canada) said that paragraph 7 expressed a suggestion and should not be moved to paragraph 6, which dealt with concerns.

21. **Mr. Schoefisch** (Germany), supported by **Mr. Maradiaga** (Honduras), said that he could accept the relocation of the paragraph but that the proposed wording distorted what his delegation had said. The original sentence, however, would be more accurate if the word "would" was replaced by the word "could".

22. **Mr. Madrid Parra** (Spain) also did not object to having paragraph 7 become paragraph 6 (c).

23. **Ms. Aburime** (Nigeria) said that the draft document did not take into account a point made by the Nigerian delegation in its statement on behalf of the African Group. The following sentence should be added to paragraph 7: "However, it was pointed out that it was important to build confidence for consumers and vendors in developing countries and that small businesses would not be able to seek redress against foreign consumers in their domestic States."

24. **Ms. Matias** (Israel) said that the concerns raised by the delegations of the United States and Nigeria went to the underlying issue, namely that the draft text did not reflect the full discussion. She would support the United States proposal if the proper language could be found. In that connection, changing "would" to "could" would be acceptable.

25. **Ms. Trent** (United States of America) said that her delegation's greatest concern was that the report should reflect the nature of the debate. She would be comfortable with changing "would" to "could" if paragraph 7 became paragraph 6 (c). If it was not moved, the language proposed by the representative of Nigeria should be added to it.

26. **Mr. Schoefisch** (Germany), supported by **Ms. Cap** (Austria) and **Mr. Ivančo** (Czech Republic), suggested that the Nigerian text would be more appropriate in paragraph 5 (c).

27. **Ms. Sabo** (Canada), supported by **Mr. Leinonen** (Observer for Finland), said that it

was essential to preserve the coherence of the report. She agreed that the Nigerian point should be added to paragraph 5 (c), since it related to the same topic. However, paragraph 7 dealt with a suggestion, and should not be combined with paragraph 6, which listed concerns.

28. **Mr. Ivančo** (Czech Republic) said that, on the contrary, the United States proposal was logical, because paragraph 6 (a) and paragraph 7 both referred to the rights of consumers.

29. **Ms. Cap** (Austria), supported by **Mr. Wijnen** (Observer for the Netherlands), said that if the Commission replaced the word “concerns” in the chapeau of paragraph 6 with “other views”, paragraph 7 could logically be included as paragraph 6 (c).

30. **Mr. Decker** (Observer for the European Union) endorsed the position of the Canadian delegation, as well as the substitution suggested by the representative of Austria, and agreed that the Nigerian text should be worked into paragraph 5 (c).

31. **Ms. Aburime** (Nigeria) said that her delegation could accept the inclusion of its point in paragraph 5, even though, unlike the rest of the paragraph, it expressed a concern about binding decisions, rather than potential benefits.

32. **Ms. Mokaya-Orina** (Kenya) said she supported the inclusion of the Nigerian text in paragraph 5, although it would have had greater impact in paragraph 7.

33. **Ms. Trent** (United States of America), supported by **Ms. Sabo** (Canada) and **Ms. Matias** (Israel), said that both the Austrian and German proposals should be adopted. In other words, the chapeau of paragraph 6 should be revised to read “Other views were expressed”; paragraph 7 should become paragraph 6 (c), with the word “could” replacing the word “would” in that sentence, and the text proposed by the Nigerian delegation should be included in paragraph 5.

34. **Ms. Sabo** (Canada), supported by **Ms. Cap** (Austria) and **Mr. Schoefisch** (Germany), said that if paragraph 6 were reworded to refer to views rather than concerns, all occurrences of the word “might” should be replaced by the word “would”.

35. **Mr. Madrid Parra** (Spain) said that, as the Czech representative had indicated, paragraph 7 was logically related to paragraph 6 (a). If moved, it should be placed after 6 (a), and the original paragraph 6 (b) should become paragraph 6 (c).

36. **Ms. Cap** (Austria), supported by **Mr. Schoefisch** (Germany), said that paragraph 6 should be further revised to clarify its focus on business-to-consumer (B2C) disputes by prefacing subparagraph (a) with the phrase “As regards B2C disputes” and subparagraph (b) with “If the online dispute resolution (ODR) rules provided for arbitration for B2C disputes”. Also, a reference to consumers in developing countries and post-conflict situations should be added at the end of the first subparagraph.

37. **Ms. Matias** (Israel), supported by **Mr. Madrid Parra** (Spain) and **Ms. Trent** (United States of America), objected to the proposed reference to consumers in developing countries and post-conflict situations. During the session, there had been no specific mention of those consumers in the context of binding decisions.

38. **Mr. Decker** (Observer for the European Union) recalled that, in urging the Working Group to give greater consideration to the situation of consumers who were respondent parties in ODR proceedings, the German representative had specifically stated that the outcome of such proceedings would affect all consumers, whether in developed countries, developing countries or countries in post-conflict situations.

39. **Mr. Schoefisch** (Germany), supported by **Ms. Trent** (United States of America), **Ms. Mokaya-Orina** (Kenya) and **Ms. Cap** (Austria), said that the German delegation’s comments should be reflected in the report, preferably by inserting the phrase “in developed and developing countries” after the words “effects of ODR on consumer protection” in paragraph 9 (b).

40. **Ms. Trent** (United States of America) objected to the Canadian proposal to change “might” to “would” in paragraph 6. “Might” and “would” had very different meanings.

41. **Ms. Sabo** (Canada) said that, in the case of the views expressed, “would” was appropriate; the speakers had indicated certainty, not eventuality.

Her delegation supported the Austrian delegation's proposed revisions to enhance the focus on B2C disputes. The reference to developing countries and post-conflict areas could be placed in paragraph 6 or, as the German representative had suggested, in paragraph 9. The Commission must also decide where to include the discussion of the situation of consumers as respondents.

42. **Ms. Mokaya-Orina** (Kenya) proposed that, in paragraph 6 (b), "enforcement by way of the New York Convention" should be shortened to "enforcement", since the parties to a case might not be parties to the Convention.

The meeting was suspended at 12.25 p.m. and resumed at 12.40 p.m.

43. **Mr. Lemay** (Secretariat), summarizing the revisions on which the Commission appeared to have reached general agreement thus far, said that in paragraph 5 it was proposed that the Nigerian text should be added to the chapeau. In paragraph 6, the chapeau should be changed to read "Other views were expressed that"; the word "might" should be replaced by the word "would"; the phrase "As regards B2C disputes" should be inserted at the beginning of subparagraph (a) and the phrase "If the ODR provided for arbitration in B2C disputes", at the beginning of subparagraph (b). Paragraph 7 should become paragraph 6 (c) and should be revised by replacing the word "would" with the word "could". Lastly, in paragraph 9 (b), the phrase "in developing and developed countries and post-conflict situations" should be added after the words "consumer protection".

44. *It was so decided.*

45. **Mr. Schoefisch** (Germany), supported by **Ms. Sabo** (Canada), said that paragraph 4 of document A/CN.9/XLV/CRP.1/Add.6 should also indicate that views had been expressed that the Working Group had yet to report fully to the Commission on the effects of ODR on consumer protection in cases where the consumer was the respondent party.

46. **Ms. Trent** (United States of America) said that, if that language was added, then paragraph 4 should also indicate that views were expressed that the Working Group's report was sufficient.

47. **Mr. Decker** (Observer for the European Union) suggested avoiding the issue of whether the Working Group had fulfilled its mandate, on which there had been no agreement. A compromise solution might be: "The Commission also took note of the view that the Working Group should consider more carefully the impact of its deliberations on consumer protection in situations where the consumer is the respondent party in the ODR process."

48. **Ms. Trent** (United States of America), supported by **Mr. Madrid Parra** (Spain) and **Ms. Matias** (Israel), objected to the proposal of the observer for the European Union. The Commission had not taken note of that view.

49. **The Chair** said he took it that he should request the secretariat to reflect the views mentioned by the German and United States delegations in the Commission's report.

50. *It was so decided.*

51. **Ms. Sabo** (Canada), supported by **Ms. Cap** (Austria), said that the phrase "including in cases where the consumer is the respondent party in an ODR process" should be added after the new reference to post-conflict situations in paragraph 9 (b). The text after the insertion would then become a separate sentence.

52. **Mr. Schoefisch** (Germany), supported by **Ms. Cap** (Austria), said that in the same paragraph the words "the issues listed under paragraph 5" should be inserted after the words "include in its deliberations".

53. **Ms. Trent** (United States of America) said she could not support the German proposal, since the issues in question were already addressed in section 9 (a). She agreed with the Canadian representative's suggestion, except that, rather than forming a separate sentence, the text following the insertion should be deleted. It instructed the Working Group to report to the Commission on its deliberations and could be misconstrued to indicate that the Working Group should prepare a second report on consumer protection issues, when the Commission had in fact expressly declined to require such a report.

54. **Mr. Schoefisch** (Germany) said that, as both paragraphs 9 (a) and 9 (b) requested the Working Group to report back on the respective issues, the meaning was clear and further changes were unnecessary.

The meeting rose at 1.05 p.m.

**Summary record of the 957th meeting, held at Headquarters, New York,
on Friday, 6 July 2012, at 3 p.m.**

[A/CN.9/SR.957]

Chair: Mr. Sikirić (Croatia)

The meeting was called to order at 3 p.m.

Adoption of the report of the Commission
(continued)

A/CN.9/XLV/CRP.1/Add.6

1. **The Chair** said that the latest version of the text took on board all of the suggestions made at the previous meeting. Delegates were urged to reach agreement on the document to allow the Committee to proceed with its work.

2. **Mr. Lemay** (International Trade Law Division) said that, in accordance with earlier discussions, paragraphs 1 to 3 were left unchanged; two sentences were added at the end of paragraph 4: “Views were expressed that the Working Group had not yet fully reported to the Commission on the effects on consumer protection especially when the consumer was the respondent in a dispute. Views were also expressed that the report of the Working Group to the Commission was sufficient in that regard”; a new beginning sentence was added in paragraph 5: “It was pointed out that it was important to build confidence for consumers and vendors in developing and developed countries and in post-conflict situations and that small businesses would not be able to seek redress against foreign consumers in their States.”; the chapeau of paragraph 6 was replaced with: “Other views were expressed that.”; subparagraph 6 (a) now read “As regards business-to-consumer disputes, a system involving binding decisions to the extent it removes a party’s access to national courts would detract from the rights of consumers”; subparagraph 6 (b) now read “If the online dispute resolution rules provided for arbitration for business-to-consumer disputes, problems would arise at the stage of recognition and enforcement in that the process does not provide for the requisites for enforcement by way of the New York Convention.”; paragraph 7 became subparagraph 6 (c) and now read “A suitable approach could be to make decisions

binding only upon companies and sellers and not upon consumers.”; paragraph 8 was renumbered paragraph 7 and remained unchanged; subparagraph 9 (a) became subparagraph 8 (a) and now read “The Working Group should consider at a future session of the Commission 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.”; subparagraph 9 (b) became subparagraph 8 (b) and now read “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 in post-conflict situations, including in cases where the consumer was the respondent party in an online dispute resolution process”.

3. **Ms. Gontier** (Observer for the European Commission), supported by **Ms. Cap** (Austria) and **Mr. Wijnen** (Observer for the Netherlands), said that the proposed addition in paragraph 5 should be made after the first sentence, not before it, so as to make clear that it related to the relevant view that had been expressed.

4. **Ms. Trent** (United States of America), supported by **Mr. Schoefisch** (Germany), **Ms. Cap** (Austria) and **Mr. Wijnen** (Observer for the Netherlands), said that in the new subparagraph 8 (c) the words “arbitration and possible alternatives to arbitration” should be added to ensure that all options were included and to reflect the discussion.

5. **Ms. Matias** (Israel) said that, by wording the subparagraph in that way, the Commission was sending a message to the Working Group that arbitration could be eliminated from consideration and replaced with alternatives, which did not accurately reflect the discussions that had taken place. Her delegation preferred to stay with the existing text and remove the words “possible alternatives to” and end the sentence in

subparagraph 8 (c) with the words “including arbitration”.

6. **Mr. Bellenger** (France) said that the Working Group had thus far examined only arbitration, so it was time for it to study the alternatives; the wording read out at the start of the meeting was therefore preferable. He also noted that the term “*éventuelles*” in the French version made it seem as if the existence of alternatives to arbitration was in question, and suggested replacing the word with “*possibles*” or deleting it altogether.

7. **Ms. Sabo** (Canada) agreed and said that, in the interest of making progress, the change proposed by the United States representative was acceptable to her delegation. Her delegation did not share the Israeli delegation’s interpretation of the existing text.

8. **The Chair** said that the change proposed by the United States representative to subparagraph 9 (c), supported by Germany and Canada, addressed all the concerns expressed. He suggested the addition should be adopted unless there were objections.

9. *It was so decided.*

10. **The Chair** said that the proposed change to paragraph 5 required more than a reversal of sentences and suggested that the paragraph should be allowed to remain unchanged.

11. **Mr. Schoefisch** (Germany) said that the view expressed in the proposed new first sentence of paragraph 5 was one of several that had been voiced at the meeting, which would be made clear if that sentence were added after the original first sentence.

12. **The Chair** suggested placing the proposed new first sentence of paragraph 5 into a separate paragraph 5 and adjusting the numbering of the paragraphs that followed.

13. *It was so decided.*

14. *Document A/CN.9/XLV/CRP.1/Add.6, as orally amended, was adopted.*

A/CN.9/XLV/CRP.1/Add.7

15. **Ms. Sabo** (Canada) said that “identifying and” should be added before the word “focusing” and the

word “suggested” should be replaced with “urged” in the second sentence in paragraph 4.

16. **Mr. Loken** (United States of America) said that the first sentence of paragraph 4 conveyed the wrong impression of the discussion that had taken place.

17. **Mr. Schoefisch** (Germany) said that his country was the only State that had held consultations, although the representative of Singapore had mentioned that there were ongoing consultations in his country. Further, there had been doubts expressed as to whether the Working Group should continue its work on electronic transferable records. The sentence could be redrafted to read: “While it was noted that consultations evidenced no business demand for electronic transferable records in one State, partly due to the perceived risks of abuse, consultations were ongoing in other States. There was support for the Working Group to continue its work on electronic transferable records”.

18. **Mr. Loken** (United States of America) said that it was not appropriate to delete the word “general”, as comments had been generally supportive of the Working Group’s continued work on the topic. The addition of new language regarding consultations was acceptable to his delegation.

19. **Mr. Madrid Parra** (Spain) said that only three delegations had expressed reservations with regard to the Working Group’s continued work.

20. **Ms. Sabo** (Canada) said that her delegation was in favour of the drafting change proposed by the German delegation. However, given that the United States opposed the deletion of the word “general”, she supported retaining that word.

21. **Mr. Bellenger** (France) expressed support for the Canadian proposal to replace the word “suggested” with “urged” in the second sentence of paragraph 4.

22. **Mr. Lee Jae Sung** (International Trade Law Division) said that the revised first and second sentences of paragraph 4 read: “While it was noted that consultations evidenced no business demand for electronic transferable records in one State, partly due to the perceived risks of abuse, it was further

noted that consultations were ongoing in other States. There was general support for the Working Group to continue its work on electronic transferable records. In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was urged.”

23. *It was so decided.*

24. *Document A/CN.9/XLV/CRP.1/Add.7, as orally amended, was adopted.*

A/CN.9/XLV/CRP.1/Add.8

25. **Mr. Loken** (United States of America) said that, in line with an earlier intervention by his delegation, the following phrase should be added at the end of paragraph 4 following a comma: “which work was previously authorized by the Commission”, to note that the question of considering those issues in the group context had been previously looked at by the Commission.

26. **Mr. Bellenger** (France) said that unless there had been a mandate to carry out the work, the sentence should not be included in the text.

27. **Mr. Sorieul** (Secretary of the Commission) said that a reference to the work of the Working Group was contained in paragraph 37 of the report of Working Group V (A/CN.9/738) in a suggestion for future work made by the Working Group itself. The Commission’s approval would be necessary to authorize that work.

28. **Mr. Loken** (United States of America) said that the Commission had given the Working Group the mandate to carry out the work described in paragraph 259 (a) of the Commission’s report on its forty-third session (A/65/17), which raised the possibility of the development of “a model law or provisions on insolvency law”. Drawing the secretariat’s attention to the United States proposal in that regard, contained in Working Paper A/CN.9/WG.V/WP.93/Add.1, he said that although the words “enterprise groups” did not appear in the Commission’s 2010 report, that report referred expressly to the development of model laws in the context of the report of Working Group V, which mentioned model laws or “model provisions on cross-border insolvency issues affecting enterprise groups”. It was appropriate to draw the conclusion

that the reference included enterprise groups. He proposed softening the original wording proposed by his delegation and adding the phrase “which work was previously endorsed by the Commission” at the end of the last sentence of paragraph 4.

29. **Mr. Bellenger** (France) said that the topic of centres of main interests had not been specifically mentioned in the reference provided by the United States representative and should therefore not be approached in the context of enterprise groups. The proposed addition of a reference to an earlier session of the Commission did not reflect reality, and even the reference to agreement in the Working Group stated in the text seemed improbable.

30. **Ms. Matias** (Israel) said that her delegation had no objection to the proposed addition.

31. **The Chair** said that the secretariat would check the reference provided and add the proposed wording if the reference was clear on the basis of consultations with the delegations that took part in the discussion.

32. *Document A/CN.9/XLV/CRP.1/Add.8, as orally amended, was adopted.*

A/CN.9/XLV/CRP.1/Add.9

33. **Mr. Loken** (United States of America) said that the word “possibly” should be deleted in the last sentence of paragraph 9.

34. *Document A/CN.9/XLV/CRP.1/Add.9, as orally amended, was adopted.*

A/CN.9/XLV/CRP.1/Add.10

35. **Ms. Talero Castro** (Colombia) said that the words “micro and” should be added before “small businesses” in the first sentence of paragraph 3. The phrase “possibly on a regional basis” should be deleted in the following sentence, since the proposal to hold colloquiums had received the support of 15 delegations and only two delegations had said that it was a regional issue. In addition, the phrase “as well as other topics related to” should be deleted and the word “micro” followed by a comma should be added at the end of the second sentence before “small and medium enterprises”.

36. **Mr. Schoefisch** (Germany) said that if the phrase “possibly on a regional basis” was deleted,

the words “or more” would also need to be deleted, since the implication of the first change was that there had been agreement to hold only one colloquium.

37. **Mr. Sorieul** (Secretary of the Commission) said that the words “on a regional basis” were not meant to imply that microfinance was a minor and regional issue; rather, the proposal was to hold decentralized regional colloquiums instead of a single centralized one in Vienna or New York.

38. **Ms. Sabo** (Canada) said that her delegation’s understanding of the discussion was that one colloquium would be held and that additional colloquiums could be held on a regional basis.

39. **Mr. Lemay** (International Trade Law Division) said that the phrase “on a regional basis” could be replaced with “one or more colloquiums be held, possibly in different regions”.

40. **Mr. Bellenger** (France) said it was his delegation’s understanding that the colloquium would be held on the topic of simplified registration procedures for businesses, but that that was one of several topics that would be discussed.

41. **The Chair** said that several topics would be on the colloquium agenda, as detailed in the addendum. He took it that the phrase “on a regional basis” could be replaced with “in different regions”.

42. *It was so decided.*

43. *Document A/CN.9/XLV/CRP.1/Add.10, as orally amended, was adopted.*

A/CN.9/XLV/CRP.1/Add.11

44. **Ms. Sabo** (Canada), supported by **Mr. Loken** (United States of America) and **Ms. Matias** (Israel), said that the phrase “and that there was no certainty” should be replaced with “and that there were significant doubts” in the second sentence of paragraph 4. Also, the words “and two States” should be added after “Commission” at the end of the third sentence. In the fourth sentence, the word “suggested” should be replaced with “urged”, and the word “should” should be deleted.

45. **The Chair** said he took it that the Commission members agreed with the proposed changes to paragraph 4.

46. *It was so decided.*

47. **Ms. Sabo** (Canada) said that a number of changes were needed in paragraph 6 to address a procedural issue raised by some delegations. In the first sentence, the phrase “the prevailing view was that” should be replaced by “it was determined that there was a prevailing view in support of requesting” and the words “should be requested” should be deleted after “secretariat”.

48. The following three sentences should be inserted in place of the last sentence: “However, many delegations urged that priority be given to other work of the Commission, in particular in the area of microfinance. A number of delegations expressed clear opposition and strong reservations to further work in the field of general contract law at this time. In addition, several delegations, noting the significant opposition to the Swiss proposal, objected to the characterization of the debate on this topic as reflecting a prevailing majority view in favour of additional work.”

49. **Mr. Schoefisch** (Germany) said that the proposed changes gave a clear and neutral description of the discussion that had taken place.

50. **Mr. Sollberger** (Observer for Switzerland) said that the first change proposed by the Canadian delegation was not necessary, as a majority had been in favour of the original Swiss proposal. Meanwhile, the first sentence of the proposed addition did not reflect the discussion, during which no priority had been given to either the Swiss or the Colombian proposal. With regard to the third and fourth addition, he noted that it had been stated in the original Swiss proposal that there was minority opposition to it, and the changes were repetitive.

51. **Mr. Loken** (United States of America) said that the drafting changes proposed by the Canadian delegation were accurate and presented a clearer summary of the debate that took place at the 945th meeting of the Commission. A number of delegations had urged giving more attention to other work, especially microfinance, in the context of the discussion of the Swiss proposal and during the discussion of microfinance. Further, the last line of the report on microfinance read that the holding of a colloquium on microfinance should rank as a top priority for the Commission in the coming year.

52. The proposed change was not repetitive: one of the changes concerned the discussion on the merits of the Swiss proposal and the fact that there was opposition to it. The change at the end of the paragraph addressed a procedural issue, namely that strong concerns had been raised at the 945th meeting as to whether, on the basis of an earlier, evenly divided debate, it had been concluded that there was a prevailing view in favour of continued work in the field of general contract law.

53. **Ms. Cap** (Austria), **Ms. Matias** (Israel), **Ms. Talero Castro** (Colombia), **Ms. Escobar Pacas** (El Salvador), **Mr. Sánchez Contreras** (Mexico) and **Mr. Muhumuza Laki** (Uganda) expressed support for the Canadian proposal.

54. *Document A/CN.9/XLV/CRP.1/Add.11, as orally amended, was adopted.*

A/CN.9/XLV/CRP.1/Add.17

55. **Mr. Chan** (Singapore) proposed that paragraph 7 should be amended to read: "In particular, Singapore indicated that, further to its previous expression of interest in hosting an UNCITRAL centre, it had been communicating with the secretariat on that issue and that initial directions and a basic structure for the establishment of an UNCITRAL centre had been identified. Hence, Singapore proposed that an UNCITRAL office should be established in Singapore operating under the Commission's supervision, and that that office should collaborate, as appropriate, with the UNCITRAL Regional Centre for Asia and the Pacific."; in paragraph 9, the word "office" should be replaced by "centre"; and in paragraph 12, "close cooperation" should read "close coordination and cooperation".

56. **Ms. Mokaya-Orina** (Kenya) said that paragraph 11 should be amended to read "an UNCITRAL regional centre in Nairobi", rather than an "UNCITRAL regional presence in Nairobi".

57. *Document A/CN.9/XLV/CRP.1/Add.17, as orally amended, was adopted.*

A/CN.9/XLV/CRP.1/Add.18

58. **Mr. Loken** (United States of America) inquired about the implications, particularly in terms of resources, of the recommendation in paragraph 28

that UNCITRAL should be designated as "a lead agency on commercial law matters".

59. **Mr. Lemay** (International Trade Law Division) said that, following such a designation, which had no resource implications, UNCITRAL could expect to be consulted on all matters relating to commercial law in the United Nations Rule of Law Coordination and Resource Group.

60. **Mr. Loken** (United States of America) requested clarification of the concern with the "coordination of rule-making activities" in paragraph 31, particularly as the regional level was specified.

61. **Mr. Sorieul** (Secretary of the Commission) said that aim of the proposal was to ensure the coordination currently lacking between the Commission's own universal work and the related work of regional United Nations entities and other regional intergovernmental bodies outside the system. Such coordination would require resources that were not currently available; that made it all the more appropriate to draw the Sixth Committee's attention to the matter.

62. **Mr. Pérez-Cadalso Arias** (Observer for the Central American Court of Justice) said that the Central American Court was particularly concerned about matters of coordination. It had a mandate to harmonize legislation within the region, and not just in matters of trade; it proposed treaties for the approval of heads of State and, insofar as it sought to promote the regional integration of South America in such matters, it fulfilled a function comparable at the regional level to that performed by UNCITRAL globally. It would therefore indeed be useful to strengthen links between the Court and the Commission.

63. **Mr. Muhumuza Laki** (Uganda) wondered whether the subtopics proposed in paragraphs 31 to 33 did not exceed the Commission's mandate.

64. **Mr. Bellenger** (France) echoed that sentiment and proposed the addition of "at the international level" to the title of the subtopic proposed in paragraph 32.

65. **Mr. Sorieul** (Secretary of the Commission) said that, while the Commission's mandate, as defined in 1966, did not concern such matters as

criminal law or access to justice, it did cover conciliation, dispute resolution and arbitration. It was often required to intervene in support of both domestic and international dispute resolution. The object of the proposals was, in the light of the Commission's experience, to bring some of its concerns to the attention of the Sixth Committee; they related, in particular, to the coordination of normative activities at international level, alternative means of dispute resolution and the impact of UNCITRAL standards on economic development. There was no need for any change in the wording, since the proposed three subtopics were relevant to the Sixth Committee's rule of law work; it had a broader mandate than the Commission and it would be a pity not to take advantage of that; the proposals did not bear upon the Commission's own future work.

66. **Mr. Schoefisch** (Germany) questioned the value of recommendations by the Commission outside the field of trade law.

67. **Ms. Mokaya-Orina** (Kenya) proposed the insertion, in the title of the subtopic in paragraph 32, of the words "in trade matters, including" so that it would read "Access to justice in trade matters, including through alternative means of dispute resolution".

68. **Mr. Loken** (United States of America) said that the addition of the word "including" would have the effect of broadening the topic of access to justice.

69. **Ms. Mokaya-Orina** (Kenya) agreed that the word "including" in her proposed amendment could be omitted.

70. **Mr. Bellenger** (France) said that, since judicial reforms were a priority, it was not appropriate, in paragraph 32, to raise the question of their cost and time-consuming nature. He proposed the addition in paragraph 32, after "third subtopic", of the words "based on the Commission's experience in international trade law matters".

71. **Ms. Millicay** (Argentina) said that it was not clear from General Assembly resolution 66/102, as referred to in paragraph 30, that it was the Commission's role to suggest possible subtopics for the Sixth Committee; the Commission could,

however, suggest such topics for the consideration of Member States.

72. **Mr. Sorieul** (Secretary of the Commission) said that the invitation had been extended to the Secretary-General; the Commission was required to give advice to the Secretariat for proposals to the Sixth Committee.

73. **Mr. Lee Jae Sung** (International Trade Law Division) said that, following informal consultations, a number of amendments had been proposed to paragraphs 30 to 33. The beginning of the last sentence of paragraph 30 would read: "Based on its experience in international trade law, the Commission invited" (remainder unchanged); paragraph 31 would read: "Based on difficulties encountered by the Commission with the implementation of its mandate to coordinate legal activities in the field of international trade law and its previous decisions in this regard, a subtopic suggested for consideration by the Sixth Committee would be: 'Means to achieve effective coordination of rule-making activities at the regional and international levels'."; the first sentence of paragraph 32 would read "Another subtopic suggested based on the experience of UNCITRAL in international trade law matters was 'Access to justice through alternative means of dispute resolution'."; the first sentence of paragraph 33 would read: "The third subtopic suggested based on the experience of UNCITRAL in international trade law matters was 'Mutually reinforcing impact of economic development and the rule of law'."

74. **Ms. Millicay** (Argentina) suggested that, in order to make it clear that the proposals were being transmitted as information by the secretariat and had not been decided by the Commission, the last sentence of paragraph 30 should read: "The secretariat advised members and observers of the Commission on UNCITRAL-related subtopics, as a contribution to the Secretary-General's report to the Sixth Committee".

75. *Document A/CN.9/XLV/CRP.1/Add.18, as orally amended, was adopted.*

A/CN.9/XLV/CRP.1/Add.19

76. **Mr. Lemay** (International Trade Law Division) informed the Commission of the new

wording proposed for the document that would reflect remarks made by the representative of Canada. New paragraph 3: "Some preliminary proposals were advanced with regard to the strategic directions discussed in the note by the secretariat. One view was that certain options set out therein might serve as the basis for a work programme for UNCITRAL on promoting the rule of law at the national and international levels. It was suggested that such a programme might encompass the following elements: (a) promoting an integrated approach, beginning with development of a project and carrying through to technical assistance and monitoring thereof; (b) developing practice guidelines for judges working in cross-border areas of the law, as was done by Working Group V with regard to cross-border insolvency; (c) formalizing networking by creating a list of participants ("listserve") that would allow experts to meet and exchange information, as well as help States that needed assistance to identify experts in the field. The example was given of a similar mechanism which had been launched by the Hague Conference on Private International Law; (d) setting aside time at UNCITRAL meetings for the sharing of information by States on initiatives being undertaken by them to promote UNCITRAL instruments. This would, inter alia, make States that might be seeking assistance aware of initiatives which they could access for their benefit; (e) further developing the Commission's cooperation with the World Bank on elaborating the links between economic development and trade law and the role of the latter in helping States attract foreign trade and investment."

77. Former paragraph 3 had been renumbered as paragraph 4 and the following new paragraph 5 had been added: "In addition, reference was made to the important work done by UNCITRAL in the field of commercial fraud, in particular the paper on indicators of commercial fraud that was approved by the Commission at its forty-first session. It was said that commercial fraud remained a major obstacle to international trade and, noting the vital role of the private sector in combating commercial fraud, that UNCITRAL was in a unique position to coordinate ongoing efforts in the field and thereby help draw the attention of legislators and policy-makers to this important issue. It was proposed that that secretariat

could organize a colloquium on the topic, availability of resources permitting."

78. **Mr. Bellenger** (France), expressing regret that the issue of strategic planning had not been discussed even though it was on the agenda, said that it should be stated that the proposed additions to the text reflected the views of one particular delegation.

79. **Ms. Millicay** (Argentina) concurred, noting that it was indeed not clear whether the preliminary proposals in question had been put forward by the secretariat or by the delegation of Canada.

80. **Mr. Lemay** (International Trade Law Division) agreed to amend new paragraph 3 to read: "Some preliminary proposals were advanced by one delegation with regard to ... (remainder unchanged)".

81. *Document A/CN.9/XLV/CRP.1/Add.19, as orally revised and as orally amended, was adopted.*

A/CN.9/XLV/CRP.1/Add.20

82. *Document A/CN.9/XLV/CRP.1/Add.20 was adopted.*

A/CN.9/XLV/CRP.1/Add.21

83. **Ms. Millicay** (Argentina) proposed the insertion in paragraph 2 of a sentence to the effect that support was expressed for the inclusion of the topic of business and human rights in the future work of the Commission.

84. **Ms. Matias** (Israel) said it was regrettable that the Commission did not have enough time remaining to discuss fully the proposal by the representative of Argentina.

85. **The Chair** proposed the following wording for the new sentence in paragraph 2: "One delegation suggested that the topic relating to business and human rights should be discussed at a future session".

86. **Mr. Loken** (United States of America) said that, as the Guiding Principles had not been discussed, it was not accurate to say, in paragraphs 2 and 3, that "The Commission noted" and "the Commission recommended".

87. **The Chair**, supported by **Ms. Matias** (Israel), **Mr. Loken** (United States of America) and **Mr. Chan** (Singapore), suggested the deletion of paragraph 3.

88. **Ms. Millicay** (Argentina) said that what was important was to retain the reference in paragraph 2 to the suggestion that the Guiding Principles should be discussed at a future session of the Commission. She proposed the following wording: "Owing to the limited discussion on the topic at this session, one delegation suggested that the Guiding Principles should be discussed at a future session".

89. **Mr. Schoefisch** (Germany), supported by **Mr. Loken** (United States of America), proposed the further addition of the following: "Due to time constraints, there was no opportunity to discuss the matter".

90. **The Chair** said he took it that the Commission agreed to add wording to that effect and to delete the first sentence of paragraph 2 and the whole of paragraph 3.

91. *Document A/CN.9/XLV/CRP.1/Add.21, as amended and subject to agreed redrafting, was adopted.*

A/CN.9/XLV/CRP.1/Add.22

92. *Document A/CN.9/XLV/CRP.1/Add.22 was adopted.*

93. *The draft report as a whole, as orally amended and revised, was adopted.*

94. **The Chair**, following an exchange of courtesies, declared the forty-fifth session of the Commission closed.

The meeting rose at 6.35 p.m.

II. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO WORK OF UNCITRAL

(A/CN.9/750)

[Original: English]

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	Checklist of short titles of UNCITRAL legal texts as cited in this bibliography and their equivalents in full

I. General

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Annex

Checklist of short titles of UNCITRAL legal texts as cited in this bibliography and their equivalents in full

<i>Short title</i>	<i>Full title</i>
CISG (1980)	United Nations Convention on Contracts for the International Sale of Goods (1980) ^a
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ^b
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods, 1974 (New York), ^c and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Vienna) ^d
New York Convention (1958)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) ^{e, f}
Rotterdam Rules (2008)	United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (New York) ^g
UNCITRAL Arbitral Proceedings Notes (1996)	UNCITRAL Notes on Organizing Arbitral Proceedings (1996) ^h
UNCITRAL Arbitration Model Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985) ⁱ
UNCITRAL Arbitration Model Law (as amended in 2006)	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ^j
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules (1976) ^k
UNCITRAL Arbitration Rules (as revised in 2010)	UNCITRAL Arbitration Rules (as revised in 2010) ^l
UNCITRAL Conciliation Model Law (2002)	UNCITRAL Model Law on International Commercial Conciliation (2002) ^m
UNCITRAL Conciliation Rules (1980)	UNCITRAL Conciliation Rules (1980) ⁿ
UNCITRAL Credit Transfer Model Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992) ^o
UNCITRAL Insolvency Guide (2004)	UNCITRAL Legislative Guide on Insolvency Law (2004) ^p
UNCITRAL Insolvency Model Law (1997)	UNCITRAL Model Law on Cross-Border Insolvency (1997) ^q
UNCITRAL Model Law on Electronic Commerce (1996)	UNCITRAL Model Law on Electronic Commerce (1996) ^r
UNCITRAL Model Law on Electronic Signatures (2001)	UNCITRAL Model Law on Electronic Signatures (2001) ^s
UNCITRAL Insolvency Practice Guide (2009)	UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) ^t
UNCITRAL Procurement Model Law (1994)	UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) ^u

Short title	Full title
UNCITRAL Procurement Model Law (2011)	UNCITRAL Model Law on Public Procurement (2011) ^v
UNCITRAL Secured Transactions Guide (2007)	UNCITRAL Legislative Guide on Secured Transactions (2007) ^w
United Nations Convention on Electronic Contracting (2005)	United Nations Convention on the Use of Electronic Communications in International Contracts (2005) ^x
United Nations Guarantee and Standby Convention (1995)	United Nations Convention on Independent Guarantees and Standby Letters of Credit (1995) ^y

^a United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.

^b United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

^c United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3.

^d *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), part I, p. 191.

^e The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) was adopted prior to the establishment of the Commission, and the Commission is entrusted with the promotion and related activities regarding the Convention.

^f United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

^g General Assembly resolution 63/122, annex.

^h *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

ⁱ *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

^j United Nations publication, Sales No. E.08.V.4.

^k *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), para. 57.

^l *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

^m General Assembly resolution 57/18, annex.

ⁿ *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), chap. V, sect. A, para. 106.

^o *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.

^p United Nations publication, Sales No. E.05.V.10.

^q General Assembly resolution 52/158, annex.

^r United Nations publication, Sales No. E.99.V.4.

^s General Assembly resolution 56/80, annex.

^t United Nations publication, Sales No. E.10.V.6.

^u *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

^v *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.

^w United Nations publication, Sales No. E.09.V.12.

^x General Assembly resolution 60/21, annex.

^y United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163.

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>
A. List of documents before the Commission at its forty-fifth session		
1. General series		
A/CN.9/735 and Add.1	Provisional agenda, annotations thereto and scheduling of meetings of the forty-fifth session	Not reproduced
A/CN.9/736	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session (Vienna, 3-7 October 2011)	Part two, chap. I, A
A/CN.9/737	Report of the Working Group IV (Electronic Commerce) on the work of its forty-fifth session (Vienna, 10-14 October 2011)	Part two, chap. II, A
A/CN.9/738	Report of Working Group V (Insolvency Law) on the work of its fortieth session (Vienna, 31 October-4 November 2011)	Part two, chap. III, A
A/CN.9/739	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14-18 November 2011)	Part two, chap. IV, A
A/CN.9/740	Report of Working Group VI (Security Interests) on the work of its twentieth session (Vienna, 12-16 December 2011)	Part two, chap. V, A
A/CN.9/741	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session (New York, 6-10 February 2012)	Part two, chap. I, D
A/CN.9/742	Report of Working Group V (Insolvency Law) on the work of its forty-first session (New York, 30 April-4 May 2012)	Part two, chap. III, E
A/CN.9/743	Report of Working Group VI (Security Interests) on the work of its twenty-first session (New York, 14-18 May 2012)	Part two, chap. V, C
A/CN.9/744	Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session (New York, 21-25 May 2012)	Part two, chap. IV, D

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
A/CN.9/745	Report of Working Group I (Procurement) on the work of its twenty-first session (New York, 16-20 April 2012)	Part two, chap. VI, A
A/CN.9/746 and Add.1	Settlement of commercial disputes: Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010	Part two, chap. I, G
A/CN.9/747 and Add.1	Settlement of commercial disputes: Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010 — Compilation of comments by Governments	Part two, chap. I, H
A/CN.9/748	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts	Not reproduced
A/CN.9/749	Coordination activities	Part two, chap. XI
A/CN.9/750	Bibliography of recent writings related to the work of UNCITRAL	Part three, chap. II
A/CN.9/751	Status of conventions and model laws	Part two, chap. X
A/CN.9/752 and Add.1	A strategic direction for UNCITRAL	Not reproduced
A/CN.9/753	Technical cooperation and assistance	Part two, chap. IX
A/CN.9/754 and Add.1-3	Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement	Not reproduced
A/CN.9/755	Procurement and infrastructure development: possible future work	Part two, chap. VII, A
A/CN.9/756	Selected legal issues impacting microfinance	Part two, chap. VII, B
A/CN.9/757	Selected legal issues impacting microfinance: Observations by the New York State Bar Association (NYSBA) International Section	Part two, chap. VII, C
A/CN.9/758	Possible future work in the area of international contract law: Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law	Part two, chap. VII, D

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
2. Restricted series		
A/CN.9/XLV/CRP.1 and Add.1-22	Draft report of the United Nations Commission on International Trade Law on the work of its forty-fifth session	Not reproduced
A/CN.9/XLV/CRP.2	Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement	Not reproduced
A/CN.9/XLV/CRP.3	Draft decision adopting the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010)	Not reproduced
3. Information series		
A/CN.9/XLV/INF.1	List of participants	Not reproduced
B. List of documents before the Working Group on Arbitration and Conciliation at its fifty-fifth session		
1. Working papers		
A/CN.9/WG.II/WP.165	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.166 and Add. 1	Note by the Secretariat on settlement of commercial disputes: Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration submitted to the Working Group on Arbitration and Conciliation at its fifty-fifth session	Part two, chap. I, B
A/CN.9/WG.II/WP.167	C. Transparency in treaty-based investor-State arbitration — Comments by the International Centre for Settlement of Investment Disputes (ICSID), submitted to the Working Group on Arbitration and Conciliation at its fifty-fifth session	Part two, chap. I, C
2. Restricted series		
A/CN.9/WG.II/LV/CRP.1 and Add.1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session	Not reproduced
3. Information series		
A/CN.9/WG.II/LV/INF.1/Rev.1	List of participants	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
C. List of documents before the Working Group on Arbitration and Conciliation at its fifty-sixth session		
1. Working papers		
A/CN.9/WG.II/WP.168	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.169 and Add.1	Note by the Secretariat on settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration, submitted to the Working Group on Arbitration and Conciliation at its fifty-sixth session	Part two, chap. I, E
A/CN.9/WG.II/WP.170 and Add.1	Note by the Secretariat on settlement of commercial disputes: transparency in treaty-based investor-State arbitration — Comments by arbitral institutions regarding the establishment of a repository of published information (“registry”), submitted to the Working Group on Arbitration and Conciliation at its fifty-sixth session	Part two, chap. I, F
2. Restricted series		
A/CN.9/WG.II/LVI/CRP.1 and Add. 1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session	Not reproduced
A/CN.9/WG.II/LVI/CRP.2	Settlement of commercial disputes — Preparation of a legal standard on transparency in treaty-based investor-State arbitration — Comments of arbitral institutions on the interplay between the draft rules on transparency and their institutional rules	Not reproduced
A/CN.9/WG.II/LVI/CRP.3	Settlement of commercial disputes — Preparation of a legal standard on transparency in treaty-based investor-State arbitration — Proposal received from the Delegation of the United State of America on draft article 2 of the rules on transparency	Not reproduced
3. Information series		
A/CN.9/WG.II/LVI/INF.1/Rev.1	List of participants	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
D. List of documents before the Working Group on Electronic Commerce at its forty-fifth session		
1. Working papers		
A/CN.9/WG.IV/WP.114	Annotated provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.115	Note by the Secretariat on legal issues relating to the use of electronic transferable records, submitted to the Working Group on Electronic Commerce at its forty-fifth session	Part two, chap. II, B
A/CN.9/WG.IV/WP.116	Note by the Secretariat on Legal aspects of electronic commerce — Proposal by the Government of Spain, submitted to the Working Group on Electronic Commerce at its forty-fifth session	Part two, chap. II, C
2. Restricted series		
A/CN.9/WG.IV/XLV/ CRP.1 and Add. 1-4	Draft report of Working Group IV (Electronic Commerce) on the work of its forty-fifth session	Not reproduced
3. Information series		
A/CN.9/WG.IV/XLV/INF.1/Rev.1	List of participants	Not reproduced
E. List of documents before the Working Group on Insolvency Law at its fortieth session		
1. Working papers		
A/CN.9/WG.V/WP.98	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.99	Note by the Secretariat on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI), submitted to the Working Group on Insolvency Law at its fortieth session	Part two, chap. III, B
A/CN.9/WG.V/WP.100	Note by the Secretariat on directors' responsibilities and liabilities in insolvency and pre-insolvency cases, submitted to the Working Group on Insolvency Law at its fortieth session	Part two, chap. III, C

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
A/CN.9/WG.V/WP.101	Proposal for a definition of “centre of main interests” (articles 2 (b) and 16 (3) of the UNCITRAL Model Law on Cross-Border Insolvency) by the delegations of Mexico, Spain and the Union Internationale des Avocats (UIA), submitted to the Working Group on Insolvency Law at its fortieth session	Part two, chap. III, D
2. Restricted series		
A/CN.9/WG.V/XL/CRP.1 and Add. 1-4	Draft report of Working Group V (Insolvency Law) on the work of its fortieth session	Not reproduced
3. Information series		
A/CN.9/WG.V/XL/INF.1	List of participants	Not reproduced
F. List of documents before the Working Group on Insolvency Law at its forty-first session		
1. Working papers		
A/CN.9/WG.V/WP.102	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.103 and Add.1	Note by the Secretariat on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI), submitted to the Working Group on Insolvency Law at its forty-first session	Part two, chap. III, F
A/CN.9/WG.V/WP.104	Note by the Secretariat on directors’ obligations in the period approaching insolvency, submitted to the Working Group on Insolvency Law at its forty-first session	Part two, chap. III, G
A/CN.9/WG.V/WP.105	Proposal for Consideration of the Working Group by the Delegation of the United States, submitted to the Working Group on Insolvency Law at its forty-first session	Part two, chap. III, H
2. Restricted series		
A/CN.9/WG.V/XLI/CRP.1 and Add.1-4	Draft report of Working Group V (Insolvency Law) on the work of its forty-first session	Not reproduced
3. Information series		
A/CN.9/WG.V/XLI/INF.1	List of participants	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
G. List of documents before the Working Group on Online Dispute Resolution at its twenty-fourth session		
1. Working papers		
A/CN.9/WG.III/WP.108	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.109	Note by the Secretariat on Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution at its twenty-fourth session	Part two, chap. IV, B
A/CN.9/WG.III/WP.110	Note by the Secretariat on Online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework	Part two, chap. IV, C
2. Restricted series		
A/CN.9/WG.III/XXIV/CRP.1 and Add.1-4	Draft report of Working Group IV (Online dispute resolution) on the work of its twenty-fourth session	Not reproduced
3. Information series		
A/CN.9/WG.III/XXIV/INF.1	List of participants	Not reproduced
H. List of documents before the Working Group on Online Dispute Resolution at its twenty-fifth session		
1. Working papers		
A/CN.9/WG.III/WP.111	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.112 and Add.1	Note by the Secretariat on Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution at its twenty-fifth session	Part two, chap. IV, E
A/CN.9/WG.III/WP.113	Note by the Secretariat on Online dispute resolution for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework, submitted to the Working Group on Online Dispute Resolution at its twenty-fifth session	Part two, chap. IV, F

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
A/CN.9/WG.III/WP.114	Note by the Secretariat on the proposal on principles applicable to Online Dispute Resolution providers and neutrals — Proposal by the Canadian delegation, submitted to the Working Group on Online Dispute Resolution at its twenty-fifth session	Part two, chap. IV, G
A/CN.9/WG.III/WP.115	Note by the Secretariat on the Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules — Note submitted by the Center for International Legal Education (CILE), to the Working Group on Online Dispute Resolution at its twenty-fifth session	Part two, chap. IV, H
2. Restricted series		
A/CN.9/WG.III/XXV/CRP.1 and Add.1-4	Draft report of Working Group IV (Online dispute resolution) on the work of its twenty-fifth session	Not reproduced
3. Information series		
A/CN.9/WG.III/XXV/INF.1	List of participants	Not reproduced
I. List of documents before the Working Group on Security Interests at its twentieth session		
1. Working papers		
A/CN.9/WG.VI/WP.47	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.48 and Add.1-3	Note by the Secretariat on a draft Security Rights Registry Guide, submitted to the Working Group on Security Interests at its twentieth	Part two, chap. V, B
2. Restricted series		
A/CN.9/WG.VI/XX CRP.1 and Add. 1-4	Draft report of Working Group VI (Security Interests) on the work of its twentieth session	Not reproduced
3. Information series		
A/CN.9/WG.VI/XX/INF.1	List of participants	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
G. List of documents before the Working Group on Security Interests at its twenty-first session		
1. Working papers		
A/CN.9/WG.VI/WP.49	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.50 and Add.1	Note by the Secretariat on the draft Technical Legislative Guide on the Implementation of a Security Rights Registry Guide: Annex I. Terminology and recommendations session	Part two, chap. V, D
2. Restricted series		
A/CN.9/WG.VI/XXI/CRP.1 and Add. 1-4	Draft report of Working Group VI (Security Interests) on the work of its twenty-first session	Not reproduced
3. Information series		
A/CN.9/WG.VI/XXI/INF.1	List of participants	Not reproduced
H. List of documents before the Working Group on Procurement at its twenty-first session		
1. Working papers		
A/CN.9/WG.IWP.78	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.79 and Add.1-19	Note by the Secretariat on the revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement, submitted to the Working Group on Procurement at its twenty-first session	Part two, chap. VI, B
2. Restricted series		
A/CN.9/WG.I/XXI/CRP.1 and Add. 1-4	Draft report of Working Group I (Procurement) on the work of its twenty-first session	Not reproduced
3. Information Series		
A/CN.9/WG.I/XXI/INF.1	List of participants	Not reproduced

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 (as of 2004)
 - (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.

* 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>
1. Reports on the annual sessions of the Commission		
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
A/10017 (eighth session)	Volume VI: 1975	Part one, II, A
A/31/17 (ninth session)	Volume VII: 1976	Part one, II, A
A/32/17 (tenth session)	Volume VIII: 1977	Part one, II, A
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
A/38/17 (sixteenth session)	Volume XIV: 1983	Part one, A
A/39/17 (seventeenth session)	Volume XV: 1984	Part one, A
A/40/17 (eighteenth session)	Volume XVI: 1985	Part one, A
A/41/17 (nineteenth session)	Volume XVII: 1986	Part one, A
A/42/17 (twentieth session)	Volume XVIII: 1987	Part one, A
A/43/17 (twenty-first session)	Volume XIX: 1988	Part one, A
A/44/17 (twenty-second session)	Volume XX: 1989	Part one, A
A/45/17 (twenty-third session)	Volume XXI: 1990	Part one, A
A/46/17 (twenty-fourth session)	Volume XXII: 1991	Part one, A
A/47/17 (twenty-fifth session)	Volume XXIII: 1992	Part one, A
A/48/17 (twenty-sixth session)	Volume XXIV: 1993	Part one, A
A/49/17 (twenty-seventh session)	Volume XXV: 1994	Part one, A
A/50/17 (twenty-eighth session)	Volume XXVI: 1995	Part one, A
A/51/17 (twenty-ninth session)	Volume XXVII: 1996	Part one, A
A/52/17 (thirtieth session)	Volume XXVIII: 1997	Part one, A

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
A/53/17 (thirty-first session)	Volume XXIX: 1998	Part one, A
A/54/17 (thirty-second session)	Volume XXX: 1999	Part one, A
A/55/17 (thirty-third session)	Volume XXXI: 2000	Part one, A
A/56/17 (thirty-fourth session)	Volume XXXII: 2001	Part one, A
A/57/17 (thirty-fifth session)	Volume XXXIII: 2002	Part one, A
A/58/17 (thirty-sixth session)	Volume XXXIV: 2003	Part one, A
A/59/17 (thirty-seventh session)	Volume XXXV: 2004	Part one, A
A/60/17 (thirty-eighth session)	Volume XXXVI: 2005	Part one, A
A/61/17 (thirty-ninth session)	Volume XXXVII: 2006	Part one, A
A/62/17 (fortieth session)	Volume XXXVIII: 2007	Part one, A
A/63/17 (forty-first session)	Volume XXXIX: 2008	Part one, A
A/64/17 (forty-second session)	Volume XL: 2009	Part one, A
A/65/17 (forty-third session)	Volume XLI: 2010	Part one, A
A/66/17 (forty-fourth session)	Volume XLII: 2011	Part one, A

2. Resolutions of the General Assembly

2102 (XX)	Volume I: 1968-1970	Part one, II, A
2205 (XXI)	Volume I: 1968-1970	Part one, II, E
2421 (XXIII)	Volume I: 1968-1970	Part two, I, B, 3
2502 (XXIV)	Volume I: 1968-1970	Part two, II, B, 3
2635 (XXV)	Volume II: 1971	Part one, I, C
2766 (XXVI)	Volume III: 1972	Part one, I, C
2928 (XXVII)	Volume IV: 1973	Part one, I, C
2929 (XXVII)	Volume IV: 1973	Part one, I, C
3104 (XXVIII)	Volume V: 1974	Part one, I, C
3108 (XXVIII)	Volume V: 1974	Part one, I, C
3316 (XXIX)	Volume VI: 1975	Part one, I, C
3317 (XXIX)	Volume VI: 1975	Part three, I, B
3494 (XXX)	Volume VII: 1976	Part one, I, C
31/98	Volume VIII: 1977	Part one, I, C
31/99	Volume VIII: 1977	Part one, I, C
31/100	Volume XIII: 1977	Part one, I, C
32/145	Volume IX: 1978	Part one, I, C

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**5. Documents submitted to the Commission,
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A/CN.9/724	Volume XLII: 2011	Part two, VIII
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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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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

6. Documents submitted to Working Groups

(a) Working Group I

(i) Time-limits and Limitation (Prescription)

A/CN.9/WG.I/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
A/CN.9/WG.I/WP.54	Volume XXXIX: 2008	Part two, II, B
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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

(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
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

(ii) International Contract Practices

A/CN.9/WG.II/WP.33 and Add.1	Volume XII: 1981	Part two, I, B, 1 and 2
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<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
<i>(iii) International Commercial Arbitration</i>		
A/CN.9/WG.II/WP.108 and Add.1	Volume XXXI: 2000	Part two, IV, B
A/CN.9/WG.II/WP.110	Volume XXXII: 2001	Part two, III, B
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
A/CN.9/WG.II/WP.115	Volume XXXIII: 2002	Part two, I, B
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
A/CN.9/WG.II/WP.121	Volume XXXIV: 2003	Part two, III, B
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
A/CN.9/WG.II/WP.128	Volume XXXV: 2004	Part two, II, E
A/CN.9/WG.II/WP.129	Volume XXXV: 2004	Part two, II, F
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
A/CN.9/WG.II/WP.159 and Add.1-4	Volume XLII: 2011	Part two, I, B
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
A/CN.9/WG.II/WP.163	Volume XLII: 2011	Part two, I, F
A/CN.9/WG.II/WP.164	Volume XLII: 2011	Part two, I, G

(c) Working Group III

(i) International Legislation on Shipping

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

(ii) Transport Law

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
A/CN.9/WG.III/WP.27	Volume XXXIV: 2003	Part two, IV, F
A/CN.9/WG.III/WP.28	Volume XXXIV: 2003	Part two, IV, G
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

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
A/CN.9/WG.III/WP.37	Volume XXXV: 2004	Part two, III, H
A/CN.9/WG.III/WP.39	Volume XXXVI: 2005	Part two, IV, B
A/CN.9/WG.III/WP.40	Volume XXXVI: 2005	Part two, IV, C
A/CN.9/WG.III/WP.41	Volume XXXVI: 2005	Part two, IV, D
A/CN.9/WG.III/WP.42	Volume XXXVI: 2005	Part two, IV, E
A/CN.9/WG.III/WP.44	Volume XXXVI: 2005	Part two, IV, G
A/CN.9/WG.III/WP.45	Volume XXXVI: 2005	Part two, IV, H
A/CN.9/WG.III/WP.46	Volume XXXVI: 2005	Part two, IV, I
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
A/CN.9/WG.III/WP.54	Volume XXXVII: 2006	Part two, IV, G
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
A/CN.9/WG.III/WP.57	Volume XXXVII: 2006	Part two, IV, J
A/CN.9/WG.III/WP.58	Volume XXXVII: 2006	Part two, IV, K
A/CN.9/WG.III/WP.59	Volume XXXVII: 2006	Part two, IV, L
A/CN.9/WG.III/WP.61	Volume XXXVII: 2006	Part two, IV, N
A/CN.9/WG.III/WP.62	Volume XXXVII: 2006	Part two, IV, O
A/CN.9/WG.III/WP.63	Volume XXXVII: 2006	Part two, IV, P
A/CN.9/WG.III/WP.64	Volume XXXVII: 2006	Part two, IV, Q
A/CN.9/WG.III/WP.65	Volume XXXVII: 2006	Part two, IV, R
A/CN.9/WG.III/WP.66	Volume XXXVII: 2006	Part two, IV, S
A/CN.9/WG.III/WP.67	Volume XXXVII: 2006	Part two, IV, T
A/CN.9/WG.III/WP.68	Volume XXXVII: 2006	Part two, IV, U
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

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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
A/CN.9/WG.III/WP.82	Volume XXXVIII: 2007	Part two, IV, L
A/CN.9/WG.III/WP.83	Volume XXXVIII: 2007	Part two, IV, M
A/CN.9/WG.III/WP.84	Volume XXXVIII: 2007	Part two, IV, N
A/CN.9/WG.III/WP.85	Volume XXXVIII: 2007	Part two, IV, O
A/CN.9/WG.III/WP.86	Volume XXXVIII: 2007	Part two, IV, P
A/CN.9/WG.III/WP.87	Volume XXXVIII: 2007	Part two, IV, Q
A/CN.9/WG.III/WP.88	Volume XXXVIII: 2007	Part two, IV, R
A/CN.9/WG.III/WP.89	Volume XXXVIII: 2007	Part two, IV, S
A/CN.9/WG.III/WP.90	Volume XXXVIII: 2007	Part two, IV, T
A/CN.9/WG.III/WP.91	Volume XXXVIII: 2007	Part two, IV, U
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
A/CN.9/WG.III/WP.96	Volume XXXIX: 2008	Part two, I, E
A/CN.9/WG.III/WP.97	Volume XXXIX: 2008	Part two, I, F
A/CN.9/WG.III/WP.98	Volume XXXIX: 2008	Part two, I, G
A/CN.9/WG.III/WP.99	Volume XXXIX: 2008	Part two, I, H
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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(d) Working Group IV		
<i>(i) International Negotiable Instruments</i>		
A/CN.9/WG.IV/WP.2	Volume IV: 1973	Part two, II, 2
A/CN.9/WG.IV/CRP.5	Volume VI: 1975	Part two, II, 2
A/CN.9/WG.IV/WP.21	Volume XIII: 1982	Part two, II, A, 2(a)
A/CN.9/WG.IV/WP.22	Volume XIII: 1982	Part two, II, A, 2(b)
A/CN.9/WG.IV/WP.23	Volume XIII: 1982	Part two, II, A, 2(c)
A/CN.9/WG.IV/WP.24 and Add.1-2	Volume XIII: 1982	Part two, II, A, 2(d-f)
A/CN.9/WG.IV/WP.25 and Add.1	Volume XIII: 1982	Part two, II, A, 2(g, h)
A/CN.9/WG.IV/WP.27	Volume XIII: 1982	Part two, II, B, 2
A/CN.9/WG.IV/WP.30	Volume XVII: 1986	Part two, I, A, 3
A/CN.9/WG.IV/WP.32 and Add.1-10	Volume XVIII: 1987	Part two, I, 2
A/CN.9/WG.IV/WP.33	Volume XVIII: 1987	Part two, I, 3
<i>(ii) International Payments</i>		
A/CN.9/WG.IV/WP.35	Volume XIX: 1988	Part two, I, A, 2
A/CN.9/WG.IV/WP.37	Volume XX: 1989	Part two, I, B
A/CN.9/WG.IV/WP.39	Volume XX: 1989	Part two, I, D
A/CN.9/WG.IV/WP.41	Volume XXI: 1990	Part two, I, B
A/CN.9/WG.IV/WP.42	Volume XXI: 1990	Part two, I, C
A/CN.9/WG.IV/WP.44	Volume XXI: 1990	Part two, I, E
A/CN.9/WG.IV/WP.46 and Corr.1	Volume XXII: 1991	Part two, I, D, 1
A/CN.9/WG.IV/WP.47	Volume XXII: 1991	Part two, I, D, 2
A/CN.9/WG.IV/WP.49	Volume XXII: 1991	Part two, I, F
A/CN.9/WG.IV/WP.51	Volume XXIII: 1992	Part two, II, B
<i>(iii) Electronic Commerce</i>		
A/CN.9/WG.IV/WP.53	Volume XXIII: 1992	Part two, V, B
A/CN.9/WG.IV/WP.55	Volume XXIV: 1993	Part two, III, B
A/CN.9/WG.IV/WP.57	Volume XXV: 1994	Part two, III, B, 1
A/CN.9/WG.IV/WP.58	Volume XXV: 1994	Part two, III, B, 2
A/CN.9/WG.IV/WP.60	Volume XXV: 1994	Part two, III, D
A/CN.9/WG.IV/WP.62	Volume XXVI: 1995	Part two, II, B

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A/CN.9/WG.IV/WP.64	Volume XXVI: 1995	Part two, II, D, 1
A/CN.9/WG.IV/WP.65	Volume XXVI: 1995	Part two, II, D, 2
A/CN.9/WG.IV/WP.66	Volume XXVI: 1995	Part two, II, D, 3
A/CN.9/WG.IV/WP.67	Volume XXVI: 1995	Part two, II, D, 4
A/CN.9/WG.IV/WP.69	Volume XXVII: 1996	Part two, II, B
A/CN.9/WG.IV/WP.71	Volume XXVIII: 1997	Part two, III, A
A/CN.9/WG.IV/WP.73	Volume XXIX: 1998	Part two, II, B
A/CN.9/WG.IV/WP.74	Volume XXIX: 1998	Part two, II, C
A/CN.9/WG.IV/WP.76	Volume XXX: 1999	Part two, II, B
A/CN.9/WG.IV/WP.77	Volume XXX: 1999	Part two, II, C
A/CN.9/WG.IV/WP.79	Volume XXX: 1999	Part two, II, E
A/CN.9/WG.IV/WP.80	Volume XXX: 1999	Part two, II, F
A/CN.9/WG.IV/WP.82	Volume XXXI: 2000	Part two, III, B
A/CN.9/WG.IV/WP.84	Volume XXXI: 2000	Part two, III, B
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7. Summary Records of discussions in the Commission

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