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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT ON THE WORK OF THE UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

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(Deliberated)

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REPORT ON THE WORK OF THE UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

I. INTRODUCTION

A. Background

1. The issues concerning International Trade Law were first included in the agenda of the Asian-African Legal Consultative Organization (AALCO) at the Third (Colombo) Session in 1960, pursuant to a reference made by the Government of India. At the Fourth Session, 1961 (Tokyo), the topic "Conflict of Laws relating to Sales and Purchases in Commercial Transactions between States or their Nationals" was considered by the Member States.

2. The United Nations Commission on International Trade Law (UNCITRAL), which was constituted by the United Nations General Assembly resolution No. 2205 (XXI), held it's First Session in New York in 1968 and the major items which were selected for study and consideration by the UNCITRAL included the topic of "International Sale of Goods". At the Second Session of the UNCITRAL in 1969, the representatives of Ghana and India suggested that the then Asian-African Legal Consultative Committee (AALCC) should revive its consideration of the subject of the International Sale of Goods so as to reflect the Asian-African view point in the work of the UNCITRAL.[1] Upon that request, the then AALCC considered it as priority item at the Eleventh Session held in Accra (Ghana) in 1970.

3. At its Eleventh Session (1970), the Organization also decided upon the establishment of a Standing Sub-Committee to deal with economic and trade law matters as a regular feature of its activities and official relations were established with the UNCITRAL in the year 1971, which have since resulted in fruitful and effective collaboration between the two Organizations in several areas of trade law. From then onwards, AALCO started considering the issues pertaining to international trade law and the international organizations dealing with such matters, viz., United Nations Conference on Trade and Development (UNCTAD), International Institute for the Unification of Private Law (UNIDROIT) and Hague Conference on Private International Law (HCCH).

4. Until 2003, the Organization considered the agenda entitled, "Progress Report concerning the Legislative Activities of the United Nations and other Organizations in the field of International Trade Law". At the Forty-Third (Bali) Session, 2004, the title had been changed to the "Report on the Work of UNCITRAL and other International Organizations in the Field of International Trade Law" so as to focus more upon the work of UNCITRAL.[2]

5. The forty-third session of the UNCITRAL was held in New York from 21 June to 9 July 2010. The Commission had on its agenda, *inter alia*, the following topics for consideration:

[1] AALCC Report of the Eleventh Session held in Accra (Ghana), 19-29 January 1970, p. 259.

[2] For the other agenda items on this topic, See, Table-III- Substantive Matters Considered at the AALCO Annual Sessions, in *Fifty Years of AALCO: Commemorative Essays in International Law* (New Delhi, 2007).

(i) Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules,

(ii) Finalization and adoption of a draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions with Security Rights in Intellectual Property, and

(iii) Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency.

6. This brief report's primary focus is to examine the UNCITRAL's deliberations at its forty-third session on the above topics. Some of the notable achievements of this session, *inter alia*, were the finalization and adoption of a revised version of the UNCITRAL Arbitration Rules; finalization and adoption of a draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions with Security Rights in Intellectual Property; and finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency. Apart from examining UNCITRAL related developments, the report also made an attempt to look at the developments of the other international trade law organizations, viz., UNCTAD, UNIDROIT and HCCH.

7. It is important to mention that the forty-third Session of the UNCITRAL was attended by AALCO as an Observer. The Organization was represented by Mr. Sundra Rajoo, Director of the Kuala Lumpur Regional Arbitration Centre (KLRCA) of AALCO.

B. Issues for Focused Consideration at the Fiftieth Annual Session of AALCO

8. As the issues relating to the UNCITRAL and other International Organizations in the field of international trade law are significant to the Member States, the Fiftieth Annual Session of AALCO may be focused on issues such as:

(i) sharing the best experiences of Member States on the implementation aspects of the UNCITRAL instruments as well as the challenges they face;

(ii) combined efforts to frame or adopt a unified/harmonized financial architecture favouring developing countries so that, in future, financial crisis must be adequately tackled with, considering that it has severe implications on development and trade; and

(iii) essential factors leading to utilization of other international trade law organizations for the benefits of Member States.

II. REPORT ON THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) AT ITS FORTY-THIRD SESSION (2010)

A. Finalization and adoption of a Revised Version of the UNCITRAL Arbitration Rules

1. Background

9. It may be recalled that the UNCITRAL Arbitration Rules (1976)[3] were recognized as a successful text used for the settlement of a broad range of disputes, including the disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions.

10. In 2006, the Commission decided that the UNCITRAL Arbitration Rules should be revised to meet changes in arbitral practice over the last thirty years. The revision was also aimed at enhancing the efficiency of arbitration under the Rules and does not alter the structure of the text, its spirit or drafting style.

2. Consideration at the Forty-Third Session (2010) of the Commission

11. At the current session, the Commission had before it the reports of Working Group II (Arbitration and Conciliation) on the work of its fifty-first and fifty-second sessions[4] and the text of the draft revised UNCITRAL Arbitration Rules, as it resulted from the third reading by the Working Group at its fifty-second session.[5] The Commission took note of the summary of the deliberations on the draft revised UNCITRAL Arbitration Rules since the forty-fifth session of the Working Group.[6] The Commission also took note of the comments on the draft revised UNCITRAL Arbitration Rules that had been submitted by Governments and international organizations.[7]

12. Further, the Commission established a Committee of the Whole (hereinafter 'Committee') and referred to it for consideration of this agenda. The Commission elected Michael Schneider (Switzerland) to chair the Committee of the Whole in his personal capacity. The Committee of the Whole met from 21 to 25 June 2010 and held 10 meetings to consider the text of the draft revised UNCITRAL Arbitration Rules.[8] The relevant portion of the report of the Committee of the Whole has been reproduced below.[9]

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[3] Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), para. 57.
[4] A/CN.9/684, Vienna, 14-18 September 2009 and A/CN.9/688, New York, 1-5 February 2010.
[5] A/CN.9/703 and Add.1.
[6] Vienna, 11-15 September 2006
[7] A/CN.9/704 and Add.1-10
[8] See the text of the draft Revised UNCITRAL Arbitration Rules, 2010 in Annex I of the Report of the United Nations Commission on International Trade Law, Forty-Third Session, 21 June – 9 July 2010, A/65/17, pp. 79-98.
[9] The details herein are drawn from: Report of the United Nations Commission on International Trade Law, Forty-Third Session, 21 June – 9 July 2010, Official Records of the General Assembly, Sixty-Fifth Session, Supplement No. 17, A/65/17.

Section I. Introductory Rules

Draft article 1: Scope of Application

13. The Committee agreed that the words in brackets in paragraph 2 should be replaced with the words "15 August 2010". The Committee agreed that the revised Rules should be effective as from that date. With that modification, the Committee adopted the substance of draft article 1.

Draft article 2: Notice and Calculation of Periods of Time

14. The Committee considered draft article 2 and noted that it was one of the provisions that had not been fully considered by the Working Group during the third reading of the draft revised Rules.

15. A number of concerns were raised regarding draft article 2. As a matter of structure, it was suggested that it was preferable to describe first the acceptable means of communication, as currently laid out in paragraph 3, and only thereafter to deal with issues regarding receipt of a notice delivered through such means of communication. For that reason, it was proposed to place paragraph 3 as a first paragraph in draft article 2.

16. It was said that the requirement in paragraph 3 for the communication to provide a record of the information contained therein would seem to rule out many commonly used methods of verifying that a communication had been received, such as courier receipts. In addition, the requirement that the means of communication provide a record of its receipt was said to appear inconsistent with the purpose of paragraphs 1 (b) and 2, which dealt with deemed receipt. That requirement was said to be unusual and likely to give rise to practical difficulties. It was proposed to refer instead to the "transmission", "delivery" or "sending" of the notice and to avoid any reference to the notion of receipt in paragraph 3. It was said that, in cases where the addressee denied that a notice had been received, that matter would have to be dealt with by the arbitral tribunal, according to draft article 27, paragraph 1, on the burden of proof.

17. In relation to paragraph 2, the view was expressed that the provision should be augmented to deal with the situation where the addressee would refuse to take delivery or receive a notice as it was not viewed as covering that situation. Support was expressed for draft article 2, as it appeared in document[10], which was said to follow more closely the language of the 1976 version of that article in the Rules.

18. The Committee considered the following proposal for draft article 2:

> 1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.
> 2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.
> 3. In the absence of such designation or authorization, a notice is:
> a) Received if it is physically delivered to the addressee; or

[10] A/CN.9/WG.II/WP.157.

b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4.

6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

19. General support was expressed for the substance of the proposal. With a view to clarifying the time of delivery where transmission took place by means of electronic communication, the following proposal was made for a possible addition to paragraph 5: "A notice transmitted by electronic means is deemed to have been received on the day it is transmitted." Views expressed earlier in the discussion regarding the possible need to ensure consistency between the revised Rules and other UNCITRAL standards dealing with issues of electronic communication were reiterated. More generally, the discussion focused on whether all notices under the Rules should rely on a receipt or on a dispatch rule. The question whether a specific rule should be designed for the notice of arbitration was also discussed.

20. In that regard, it was noted that paragraph 5 only pertains to the question as to *when* a notice sent by electronic means is deemed received. The question *whether* it is deemed received is governed by paragraph 2, which conditions deemed receipt upon delivery of the notice to the address. It was therefore said that it remained open to a non-sending party to object that a particular notice, even if electronically sent to that party's address at an identified time, was in fact not delivered (and thus could not in the end be "deemed received"). The view was expressed that draft article 2 should be reflective of a practice where reliance on electronic communication was still limited.

21. After discussion, the Committee adopted the following wording to be inserted at the end of paragraph 5: "A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address."

22. It was clarified that the words "specifically for this purpose" in paragraph 2 following the words "designated by a party" should be understood as also including the indication of addresses for general notices in contracts that contained or referred to the arbitration agreement. The Committee confirmed its understanding that the first sentence of paragraph 6 was to be understood as encompassing both actual and deemed receipt of a notice. After discussion, the Committee adopted the substance of draft article 2.

Draft article 3: Notice of Arbitration

23. For the sake of consistency with the provisions of draft article 2, the Committee agreed to replace the word "give" appearing before the words "to the other party" in paragraph 1 with the word "communicate". With that modification, the Committee adopted the substance of draft article 3.

Draft article 4: Response to the Notice of Arbitration

24. The Committee recalled that the purpose of draft article 4 was to provide the respondent with an opportunity to state its position before the constitution of the arbitral tribunal by responding to the notice of arbitration, and to clarify at an early stage of the procedure the main issues raised by the dispute.

Paragraph 1

25. It was observed that the 30-day time period for the communication of the response to the notice of arbitration might be too short in certain cases, in particular in complex arbitration or arbitration involving entities such as States or intergovernmental organizations.

26. In that context, it was pointed out that the specific practices and procedures of the United Nations, including its subsidiary organs, and other intergovernmental organizations might affect the ability of such organizations to take action within such time periods.

27. It was said that extending the time period for the communication of the response to the notice of arbitration would not be a satisfactory solution in relation to purely commercial arbitration between private parties. It was proposed that the concerns raised in relation to arbitration involving States or intergovernmental organizations or complex arbitration could be dealt with by adding language to the effect that the response to the notice of arbitration should be given "as far as possible" within 30 days. Another proposal was made to provide that the response to the notice of arbitration was only indicative.

28. Those proposals were objected on the grounds that, in practice, the notice of arbitration and the response thereto were aimed at clarifying outstanding issues, and that goal might not be reached if the time limit for the communication of response to the notice of arbitration was not mandatory.

29. The Committee agreed that the response to the notice of arbitration was not intended to limit the right of the respondent to respond on the merits of the case at a later stage of the procedure, in particular in its statement of defence as provided in draft article 21. It was further said that the concerns raised in relation to the time period for the communication of the response to the notice of arbitration could be dealt with in practice, by the respondent either requesting an extension of time, or emphasizing the provisional nature of its response. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

30. As a matter of drafting, the Committee agreed to add the words "to be" before the word "constituted" in paragraph 2 (a) and, with that modification, the Committee adopted the substance of paragraph 2.

Paragraph 3

31. The Committee adopted the substance of paragraph 3 without modification.

Draft article 5: Representation and Assistance

32. A proposal was made to modify the second sentence of draft article 5 along the lines of: "The credentials of such persons (representatives) must be certified in due form in accordance with the private law of the country of arbitration, and their names and addresses must be communicated to all parties and to the arbitral tribunal." That proposal did not receive support. The Committee adopted the substance of draft article 5 without modification.

Draft article 6: Designating and Appointing Authorities

33. The Committee considered draft article 6, which dealt with designating and appointing authorities. That provision reflected the principle that the appointing authority could be appointed by the parties at any time during the arbitration proceedings, and not only in circumstances currently provided for in the Rules. It also sought to clarify the importance of the role of the appointing authority, particularly in the context of non-administered arbitration.

Paragraph 1

34. The question was raised whether the Secretary-General of the Permanent Court of Arbitration (PCA) should be mentioned in the Rules as one example of who could serve as appointing authority. It was proposed to delete the words "including the Secretary-General of the PCA" in paragraph 1. That proposal did not receive support.

35. It was further suggested that the functions of the Secretary-General of the PCA should be expressly limited under the Rules to those of a designating authority. In response to that suggestion, it was pointed out that there were instances in which the Secretary-General of the PCA had acted also as an appointing authority under the Rules. It was also said that that suggestion, if accepted, would run contrary to that existing practice and entail the risk of invalidating arbitration agreements designating the Secretary-General of the PCA as an appointing authority. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraphs 2 and 3

36. It was stated that the specific practices and procedures of the United Nations, including its subsidiary organs, and other intergovernmental organizations might affect the ability of such organizations to designate an appointing authority within the time period established under paragraph 2 to take action. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Paragraph 4

37. The Committee noted that paragraph 4 did not deal with the consequences attached to a failure to act as an appointing authority in case of challenge of an arbitrator. Since no time limit had been set for an appointing authority to decide on a challenge under draft article 13, that occurrence did not fall under any of the instances listed in paragraph 4. To address that concern, it was proposed to amend the first sentence of paragraph 4 as follows: "If the appointing authority refuses to act, or if it fails to appoint an arbitrator

within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority". That proposal was adopted by the Committee.

Paragraphs 5-7

38. The Committee adopted the substance of paragraphs 5-7 without modification.

Section II. Composition of the Arbitral Tribunal

Draft article 7: Number of Arbitrators

39. The Committee took note of a proposal to the effect that the single arbitrator who would be designated unless the parties had decided otherwise would be entitled, at the request of any of the parties, to determine that the arbitral tribunal should be composed of three arbitrators.[11] No support was expressed for that proposal. The Committee adopted the substance of draft article 7 without modification.

Draft articles 8-10: Appointment of Arbitrators

40. The Committee adopted the substance of draft article 8 without modification.

Draft article 9

Paragraph 1

41. It was said that draft article 9, paragraph 1, did not provide for the possibility of consultation between the arbitrators and the parties prior to choosing the presiding arbitrator. In order to avoid draft article 9 being construed as precluding such consultation, which was said to occur in practice, it was proposed to amend the second sentence of draft article 9, paragraph 1, as follows: "The two arbitrators thus appointed shall, after consultation with the parties should the arbitrators so decide, choose the third arbitrator who will act as presiding arbitrator of the arbitral tribunal."

42. The need to amend paragraph 1 as proposed was questioned. It was said that, while consultations occurred in practice, international arbitral institutions did not provide in the text of their arbitration rules for such consultations. It was also suggested that, before adding such language, more precision was required as to how the arbitrators would carry out such consultations. It was further pointed out that codes of ethics for arbitrators, such as the International Bar Association (IBA) Rules of Ethics for International Arbitrators or the American Association of Arbitration(AAA)/American Bar Association (ABA) Code of Ethics for Arbitrators in Commercial Disputes provided in substance that in arbitrations in which the two party-appointed arbitrators were expected to appoint the third arbitrator, each party-appointed arbitrator might consult with the party who appointed him or her concerning the choice of the third arbitrator. After discussion, the Committee adopted the substance of paragraph 1 without modification.

[11] See A/CN.9/704/Add.6.

Paragraph 2

43. The Committee adopted the substance of paragraph 2 without modification.

Paragraph 3

44. It was pointed out that paragraph 3 (pursuant to which the presiding arbitrator was to be appointed in the same way as a sole arbitrator would be appointed under draft article 8, paragraph 2), appropriately referred to "article 8, paragraph 2". In order to capture in draft article 9, paragraph 3, also the important rule of draft article 8, paragraph 1, according to which the appointing authority should act "at the request of a party", it was proposed that the reference in the last sentence of draft article 9, paragraph 3, should be to article 8 and not only to article 8, paragraph 2. The proposal to delete the words, "paragraph 2" was adopted and, with that modification, the Committee adopted the substance of paragraph 3.

Draft article 10

45. It was noted that the principle in paragraph 3 that the appointing authority should appoint the entire arbitral tribunal when parties were unable to do so was an important principle, in particular in situations like the one that had given rise to the case *BKMI and Siemens v. Dutco*.[12] It was stated that the decision in the *Dutco* case had been based on the requirement that parties received equal treatment, which paragraph 3 addressed by shifting the appointment power to the appointing authority. In that light, a proposal was made to insert at the end of paragraph 3 the words "while respecting the equality of the parties".

46. The Committee agreed that party equality was one of the fundamental principles of arbitration to also be observed by the appointing authority. However, it was noted that the shifting of all appointing power to the appointing authority safeguarded the principle of equality of the parties. The Committee concluded that there was no need to add such language in the Rules.

47. After discussion, the Committee adopted the substance of draft article 10 without modification.

Disclosures by and Challenge of Arbitrators (draft articles 11-13)

Draft article 11

48. It was proposed to include language in draft article 11 that would relieve an arbitrator of his or her obligation to disclose circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence where those circumstances were already known to the parties. That proposal received little support. It was said that situation was already addressed by both draft article 12, paragraph 2, which gave a party the right to challenge the arbitrator appointed by it only for reasons of which it became aware after the appointment had been made, and draft article 13, paragraph 1, which included a time limit of 15 days for a party to challenge an arbitrator after the circumstances became known to it.

[12] *BKMI and Siemens v. Dutco*, French Court of Cassation, 7 January 1992 (see *Revue del'Arbitrage*, 1992, p. 470).

49. Another proposal was to qualify the standard of "circumstances likely to give rise to justifiable doubts" by including the words "in the view of an impartial third party" after the words "justifiable doubts". That proposal did not find support. After discussion, the Committee adopted the substance of draft article 11 without modification.

Draft article 12

50. The Committee adopted the substance of draft article 12 without modification.

Draft article 13

51. With a view to limiting frivolous challenges, a proposal was made to include at the end of paragraph 2 the following words: "and, as far as possible, the documents and the evidence on which the challenge is based". Another proposal was made to require the appointing authority to state the grounds on which its decision on challenge of arbitrator was made. A further proposal was made to include the words "within a reasonable time" at the end of paragraph 4 to avoid needless prolongation of the proceedings if the appointing authority was not sufficiently responsive. Those proposals did not find support.

52. It was noted that draft article 2 provided a general rule of interpretation, according to which periods of time stipulated in the Rules "begin to run on the day following the day when a notice, notification, communication or proposal is received". It was further noted that draft article 13, paragraph 4, however, referred to the "date of the notice of challenge" rather than the date of its receipt as the starting point for the calculation of the time period. The Committee confirmed that the starting date in draft article 13, paragraph 4, was correctly stated for the purposes of draft article 13, paragraph 4. The Committee adopted the substance of draft article 13 without modification.

Draft article 14: Replacement of an Arbitrator

53. The Committee adopted the substance of draft article 14 without modification.

Draft article 15: Repetition of Hearings in the Event of the Replacement of an Arbitrator

54. The Committee adopted the substance of draft article 15 without modification.

Draft article 16: Exclusion of Liability

55. The Committee considered draft article 16, which aimed at establishing immunity for the participants in the arbitration and sought to preserve exoneration in cases where the applicable law allowed contractual exoneration from liability, to the fullest extent permitted by such law, save for intentional wrongdoing.

56. The Committee recalled that the purpose of the provision was to ensure that arbitrators were protected from the threat of potentially large claims by parties dissatisfied with arbitral tribunals' rulings or awards who might claim that such rulings or awards arose from the negligence or fault of an arbitrator. It was also recalled that a waiver "to the fullest extent permitted under the applicable law" did not and should not extend to intentional wrongdoing.

57. It was stated that the existence of liability was regulated by the applicable law and not by the agreement between the parties. The Rules, it was further said, were an agreement between the parties. Therefore, the question was raised whether draft article 16 should be amended so as to avoid creating the impression that it regulated the existence of liability, and focus instead on the allocation of its consequences between the parties.

58. It was further said that draft article 16 might give rise to differing interpretations; in particular the proviso "save for intentional wrongdoing" might be interpreted differently in various jurisdictions. Also, the view was expressed that that proviso might create the impression that the Rules created liability even if there was no such liability under the applicable law.

59. The Committee noted that the Secretary-General of the PCA was mentioned as being among those against whom parties would waive liability under the revised Rules. However, according to the comments of the Court, it already enjoyed immunity against legal process under various agreements and international conventions. The Committee agreed to delete the words "the Secretary-General of the PCA" in draft article 16 for the reason that a specific waiver under the revised Rules was unnecessary for the Court. After discussion, the Committee adopted the substance of draft article 16 with necessary modifications.

Section III. Arbitral Proceedings

Draft article 17: General Provisions

Paragraph 1

60. It was noted that the Working Group had agreed to delete the word "full" that appeared before the word "opportunity" in article 15, paragraph 1, of the 1976 version of the Rules, in recognition of the fact that the phrase "a full opportunity" could be invoked to delay proceedings or otherwise misused and that it might be more appropriate simply to refer to "an opportunity".

61. Strong support was expressed for the inclusion of the word "reasonable" before the word "opportunity" on the ground that it corresponded to a commonly used and well-accepted standard.

62. After discussion, the Committee agreed to replace the word "an" appearing before the word "opportunity" in the first sentence of paragraph 1 with the words "a reasonable". The Committee adopted the substance of paragraph 1 with that modification.

Paragraph 2

63. It was noted that paragraph 2 provided for the power of the arbitral tribunal to change "any period of time". A suggestion was made to exempt from that power extension of the period of time for issuing an award, as certain domestic legislation prohibited any such extension. Accordingly, it was suggested to add at the end of paragraph 2 the words "provided that this does not include the power to alter the period of time for issuing the award". That suggestion did not receive support. It was explained that draft article 1, paragraph 3, of the Rules contained a general reservation stating that the Rules might not derogate from mandatory provisions of the law applicable to the arbitration, and that

provision appropriately addressed that concern. After discussion, the Committee adopted the substance of paragraph 2 without modification.

Paragraph 3

64. The Committee adopted the substance of paragraph 3 without modification.

Paragraph 4

65. A proposal was made to place the provision of paragraph 4, which dealt with all communications, as a new paragraph of draft article 2. It was further proposed to delete from draft articles 20, paragraph 1; 21, paragraph 1; 37, paragraph 1; and 38, paragraph 1, the notification requirement they contained since draft article 17, paragraph 4, it was said, already addressed the matter. Those proposals did not receive support.

66. The Committee considered paragraph 4 in the light of its decision to delete draft article 26, paragraph 9. In order to preserve the possibility for a party to apply to the arbitral tribunal for a preliminary order, it was proposed to modify draft article 17, paragraph 4, as follows:

> "All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties except if delayed communication to the other party is necessary so that the arbitral tribunal can consider, when it is otherwise authorized to do so, a party's request that it issue a preliminary order directing the other party not to frustrate the purpose of a requested interim measure while the tribunal considers that request."

67. It was pointed out that there were other instances where communications by a party could not be sent at the same time to the other parties. An example was the situation where arbitral institutions required that all communications be sent through them. With the aim of adopting a broader approach to possible exceptions to the requirement of simultaneous communication, a proposal was made to delete the words "at the same time" from paragraph 4. An alternative proposal was made to amend paragraph 4 as follows:

> "All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties, except as otherwise permitted by the arbitral tribunal."

68. The alternative proposal received support. It was proposed to add at the end of the alternative proposal the words "or by applicable law". That proposal received some support, as it was seen as a safeguard and a limit to the possibility for delayed communications.

69. In order to avoid any ambiguity as to the fact that the exception applied only to the timing of communication, it was suggested to divide the alternative proposal into two sentences along the lines of:
"All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Except as otherwise permitted by the arbitral tribunal, all such communications shall be made at the same time."

70. The Committee adopted the substance of paragraph 4.

Paragraph 5

71. The Committee considered paragraph 5, which allowed the arbitral tribunal to join a third party in the arbitration, under certain circumstances. It was pointed out that paragraph 5 provided that if a joinder would prejudice any of the parties, the provision gave the tribunal the possibility to deny it. It was said that joining a third person might deprive that person of its right to participate in the constitution of the arbitral tribunal. In that respect, it was clarified that the possible impact of the joinder on the validity or the enforceability of the award was a matter to be taken into account by the arbitral tribunal when assessing whether the joinder would cause prejudice to any of the parties. After discussion, the Committee adopted the substance of paragraph 5 without modification.

Draft article 18: Place of Arbitration

72. It was said that draft article 18, paragraph 1, of the Rules stated that "the award shall be deemed to have been made at the place of arbitration", and it was clarified that when the Rules were used by intergovernmental organizations, including the United Nations and its subsidiary organs, the reference to the place of arbitration should not be interpreted as a waiver of the organizations' privileges and immunities. It was said that the United Nations and its subsidiary organs were not subject to local laws, including procedural laws concerning the conduct of the arbitration proceedings.

73. The Committee confirmed the decision made by the Working Group to retain the phrase "place of arbitration", and adopted the substance of draft article 18 without modification.

Draft article 19: Language

74. The Committee adopted the substance of draft article 19 without modification.

Draft article 20: Statement of Claim

Paragraph 1

75. As a matter of drafting, it was proposed to add the words "referred to" in the second sentence of paragraph 1 before the words "in article 3". That proposal was adopted by the Committee and, with that modification, the Committee adopted the substance of paragraph 1.

Paragraphs 2 and 3

76. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Paragraph 4

77. A suggestion was made to complement paragraph 4 with a text providing that in case documents could not be submitted with the statement of claim, the statement of claim should provide explanation and an indication as to when the missing document could be made available. That suggestion did not receive support as it was considered over regulating the matter. The Committee adopted the substance of paragraph 4 without modification.

Draft article 21: Statement of Defence

Paragraph 1

78. As a matter of drafting, the Committee agreed to include the words "referred to" before the reference to "article 4" in the second sentence of draft article 21, paragraph 1. With that modification, the Committee adopted the substance of paragraph 1.

Paragraphs 2 and 3

79. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Paragraph 4

80. It was noted that paragraph 4 provided that draft article 20, paragraphs 2 and 4, applied to a counterclaim and a claim relied on for the purpose of a set-off. It was suggested that a reference to draft article 20, paragraph 3, be added to cater for the situation where a counterclaim or claim for the purpose of a set-off would be based on a contract or legal instrument different from the one submitted by the claimant in the statement of claim.

81. It was also proposed to include the phrase, "a claim under article 4, paragraph 2 (f)", after the words "a counterclaim", in order to address the situation in which a respondent would have formulated a claim against a party to the arbitration agreement other than the claimant.

82. Both proposals received broad support and the Committee adopted the substance of paragraph 4 with the necessary modifications.

Draft article 22: Amendments to the Claim or Defence

83. The Committee adopted the substance of draft article 22 without modification.

Draft article 23: Pleas as to the Jurisdiction of the Arbitral Tribunal

Paragraph 1

84. It was noted that the phrase "shall have the power to rule" contained in article 21, paragraph 1, of the 1976 Rules had been replaced with the words "may rule" in draft article 23 of the revised Rules, which might be interpreted as weakening the power of the arbitral tribunal with respect to decisions on its own jurisdiction. It was explained that the modification had been made for the purpose of aligning the language of the Rules with that of the UNCITRAL Model Law on International Commercial Arbitration. While it was acknowledged that the words "may rule" were appropriate in the context of a legislative text, it was said that the wording of the 1976 version of the Rules should be retained as it better expressed the power granted to the arbitral tribunal under a text of a contractual nature such as the Rules. It was agreed to revert to the language in the 1976 version of the Rules and to replace in the first sentence of paragraph 1 the word "may" appearing before the word "rule" with the words "shall have the power to". With that modification, the Committee adopted the substance of paragraph 1.

Paragraphs 2 and 3

85. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Draft article 24: Further Written Statements

86. It was clarified that draft article 24, which dealt with further written statements that might be required from the parties, was meant to be a provision of a general nature and to include the possibility for the arbitral tribunal to require a response by the claimant to a counter claim or claim for the purpose of a set-off. The Committee adopted the substance of draft article 24 without modification.

Draft article 25: Periods of Time

87. It was said that the possibility for the arbitral tribunal to extend time limits provided for in the second sentence of draft article 25 if it considered that an extension was justified defeated the purpose of the first sentence of that provision, which was to determine a maximum time limit of 45 days for the communication of written statements. Therefore, it was proposed to also provide for a time limit with respect to extension of time limits that might be decided by the arbitral tribunal. That proposal did not receive support. The Committee adopted the substance of draft article 25 without modification.

Draft article 26: Interim measures

Paragraph 1
88. The Committee adopted the substance of paragraph 1 without modification.

Paragraph 2
89. As a matter of drafting, it was agreed to replace the words "to, including, without limitation:" appearing in the chapeau of paragraph 2 with the words, "for example and without limitation, to":

90. With respect to paragraph 2 (c), which allowed the arbitral tribunal to order a party to provide a means of preserving assets out of which a subsequent award might be satisfied, it was said that the property and assets of the United Nations were immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action pursuant to article II, section 3, of the Convention on the Privileges and Immunities of the United Nations. It was further said that such immunity was absolute and might not be disposed of by any court or tribunal. In that regard, it was clarified that paragraph 2 (c) was not intended to affect the regime of privileges and immunities of the United Nations.

91. With regard to state entities, a proposal was made to add to paragraph 2 (c) wording along the lines of: "nothing regarding that paragraph should be construed as derogating from the law on state immunity from execution". A proposal was made to include a general provision to the effect that nothing in the Rules should be implied as a waiver of state immunities. After discussion, the Committee agreed that such addition to paragraph 2 (c) was not appropriate in view of the generic nature of the Rules. It was also said to be unnecessary as nothing in the Rules was intended to affect the system of immunities and privileges of States and state entities. After discussion, the Committee adopted the substance of paragraph 2 with modification.

Paragraphs 3-8
92. The Committee adopted the substance of paragraphs 3-8 without modification.

Paragraph 9

93. The Committee recalled that, pursuant to chapter IV A of the Model Law on Arbitration with amendments as adopted in 2006, preliminary orders might be granted by an arbitral tribunal upon request by a party, without prior notice of the request to any other party, in the circumstances where it considered that prior disclosure of the request for the interim measure to the party against whom it was directed risked frustrating the purpose of the measure. The Committee further recalled the extensive discussions in the Working Group that had resulted in the adoption of paragraph 9. It was recalled that there were diverging views in the Working Group with respect to preliminary orders.

94. It was explained that the Working Group had agreed to the inclusion of paragraph 9 on the basis that it clarified that it would not be possible for an arbitral tribunal to grant preliminary orders in legal systems that did not allow them and that the power to grant preliminary orders had to be found outside these Rules. It was further explained that the text of draft paragraph 9 had been initially drafted for insertion in explanatory material accompanying the Rules. It was suggested to delete paragraph 9 on the basis that its drafting was unclear, did not provide a rule and was unnecessary.

95. In support of retaining paragraph 9, it was stated that paragraph 9 reflected existing practice and promoted a neutral approach to the question of preliminary orders. It was also pointed out that draft article 17, paragraph 4, which required that all communications to the arbitral tribunal by one party be at the same time communicated to all other parties, contained a reference to draft article 26, paragraph 9. It was stated that deletion of paragraph 9 would disassemble a carefully crafted compromise, which was seen as reconciling the diverging views expressed in the Working Group on the question of preliminary orders. After discussion, the Committee agreed to delete paragraph 9.

Paragraph 10

96. The Committee adopted the substance of paragraph 10 without modification.

Draft article 27: Evidence

97. In response to a suggestion to include in draft article 27 a provision regarding the possibility of cross-examining witnesses, it was clarified that there were no restrictions under draft article 27 as to the manner in which witnesses might be examined. That suggestion did not receive support. After discussion, the Committee adopted the substance of draft article 27 without modification.

Draft article 28: Hearings

Paragraphs 1-3

98. The Committee adopted the substance of paragraphs 1-3 without modification.

Paragraph 4

99. A suggestion was made to add language at the end of paragraph 4 to clarify that examination of witnesses or experts in a manner that would not require their physical presence should be justified by specific circumstances. In response to that suggestion, it was said that it might not be appropriate to provide for such a restriction in the light of technological developments in the field of communication. After discussion, the Committee adopted the substance of paragraph 4 without modification.

Draft article 29: Experts Appointed by the Arbitral Tribunal

100. The Committee adopted the substance of draft article 29 without modification.

Draft article 30: Default

101. In response to a question whether there could be any inconsistency between draft article 30, paragraph 1 (b), and draft article 32, it was explained that those two provisions dealt with different matters: draft article 30, paragraph 1 (b), addressed matters pertaining to the substance of the case, whereas draft article 32 related to matters of a procedural nature. The Committee adopted the substance of draft article 30 without modification.

Draft article 31: Closure of Hearings

102. In paragraph 1, a drafting suggestion was made to replace the word "or" appearing before the word "witnesses" with the word "including", as witnesses were a mode of proof. That proposal did not receive support. The Committee adopted the substance of draft article 31 without modification.

Draft article 32: Waiver of Right to Object

103. The Committee adopted the substance of draft article 32 without modification.

Section IV. The Award

Draft article 33: Decisions

104. It was suggested to modify draft article 33 to the effect that, in the absence of a majority, the award could be made by the presiding arbitrator alone. In response, the Committee recalled the extensive discussion in the Working Group that had led to the current text of the provision. Since the proposed change continued to provoke a division of opinion, it was not agreed to. After discussion, the Committee adopted the substance of draft article 33 without modification.

Draft article 34: Form and Effect of the Award

Paragraph 1
105. The Committee adopted the substance of paragraph 1 without modification.

Paragraph 2
106. The Committee considered paragraph 2 and noted that it was one of the provisions on which the Working Group did not reach agreement during the third reading of the draft revised Rules. The Committee adopted the substance of the first two sentences of paragraph 2. The discussion focused on the third sentence, which contained a waiver to recourse.

107. While some support was expressed for spelling out the recourses that were excluded from the scope of the waiver, it was also felt that the language proposed might create ambiguity regarding the scope of the waiver, in particular with regard to whether the waiver encompassed the ability to resist enforcement of an award. It was proposed to replace the third sentence of paragraph 2 with a formulation along the lines of rule 28,

paragraph 6, of the Rules of Arbitration of the International Chamber of Commerce (ICC) or rule 26.9 of the Arbitration Rules of the London Court of International Arbitration (LCIA), which provided in substance that the parties waived their rights insofar as such waiver could validly be made, without defining the specific recourses waived.

108. It was also said that it would not be possible to accurately list the exceptions to the waiver as proposed in paragraph 2, as such list would have to cover all forms of recourse that might not be waived in all legal systems. Following that approach, a proposal was made to amend the third sentence of paragraph 2 as follows: "In so far as they may validly do so by adopting these Rules, the parties waive their right to any form of appeal or review of an award to any court or other competent authority."

109. The concern was expressed that a general waiver without any qualifications might be ineffective and would not provide sufficient guidance to the parties. Parties might not be aware that certain forms of recourse could not be waived in most legal systems. In the few systems where a waiver was possible, various requirements had to be met for the waiver to be valid, depending on the applicable law. An alternative proposal was made to modify the third sentence of paragraph 2 as follows: "The parties waive their right to any form of appeal, review or recourse against an award to any court or other competent authority that may be waived under the applicable law, and the waiver of which does not require a specific agreement."

110. In view of the difficulties in properly defining the limits of the waiver, and on the basis that matter should be left to be addressed by applicable law, a proposal was made to delete the third sentence from paragraph 2 and to place its substance in an annex to the Rules, following the draft model arbitration clause for contracts. That proposal was adopted by the Committee with the waiver statement reading as follows: "The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law."

111. It was further proposed to include the waiver statement under the draft model arbitration clause for contracts, as an additional item that the parties should consider adding. In support of that approach, it was said that such a waiver provision in the model arbitration clause would be a useful reminder for the parties to explicitly waive recourses. However, it was said that the matters listed under the model arbitration clause related to basic procedural aspects, such as the number of arbitrators, place of arbitration and language. It was pointed out that the waiver statement was of a different nature, and it would be useful to provide some guidance to the parties on the effect of that statement and its interplay with applicable laws.

112. Therefore, it was proposed to place the waiver statement following the draft model arbitration clause with the heading "Possible waiver statement" and to add a note before the waiver statement along the lines of: "If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering however that the effectiveness and conditions of such an exclusion depend on the applicable law." Support was expressed for that proposal.

113. After discussion, the Committee agreed to delete the third sentence of paragraph 2 and to include the "possible waiver statement" following the draft model arbitration clause in the annex to the Rules.

Paragraphs 3-6

114. With respect to paragraph 5, which regulated conditions of publication of an award, it was said that as a means of ensuring the adequate protection of the privileges and immunities of the United Nations, including its subsidiary organs, the Organization generally provided that, when required by law, a third party was allowed to disclose certain information pertaining to the United Nations, subject to and without any waiver of the privileges and immunities of the United Nations. The Committee adopted the substance of paragraphs 3-6 without modification.

Draft article 35: Applicable Law, *amiable compositeur*

Paragraph 1

115. It was pointed out that the reference in the second sentence of paragraph 1 to "the law" that the arbitral tribunal determined to be appropriate in the absence of an express choice of the parties could be interpreted as excluding the arbitral tribunal's power to apply "rules of law". It was said that such an approach would differ from the solutions adopted by rules of other international arbitration institutions. It was suggested to amend the second sentence of draft article 35, paragraph 1, as follows: "Failing such designation by the parties, the arbitral tribunal shall apply the law or rules of law which it determines to be appropriate."

116. In response, it was explained that paragraph 1 was meant to increase the parties' and the arbitral tribunal's flexibility in determining the applicable law. It was noted that, while under the corresponding provision of the 1976 version of the UNCITRAL Arbitration Rules, the parties were expected to choose the "law" to be applied to the merits of the dispute, under the draft revised version they would be allowed to choose "rules of law", a phrase generally understood to mean any body of rules, not necessarily emanating from a State. It was further noted that, regarding the arbitral tribunal's choice of the applicable law in case the parties had not made a choice themselves, the 1976 version of the Rules instructed the tribunal to choose the governing law by applying conflict-of-laws rules that it considered applicable. It was explained that the draft revised version did not mention conflict-of-laws rules, thereby enhancing flexibility. It was also said that the decision of the Working Group not to give to the arbitral tribunal the discretion to designate "rules of law" where the parties had failed to make a decision regarding the applicable law was the result of careful consideration.

117. It was also stated that, in any case, parties and the arbitral tribunal were not completely free to choose the applicable law. It was explained that the validity and enforceability of the award depended on the applicable law and on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention). For instance, under article V of the New York Convention, an award was invalid or unenforceable if a party to the arbitration agreement was under some incapacity under its law, if the award was on a matter that was not arbitrable under the law applied by the court or if it conflicted with the public policy of the forum. It was highlighted that relevant laws regarding legal capacity, arbitrability and public policy should be taken into

consideration. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraphs 2 and 3
118. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Draft article 36: Settlement or Other Grounds for Termination

119. The Committee adopted the substance of draft article 36 without modification.

Draft article 37: Interpretation of the Award

120. The Committee adopted the substance of draft article 37 without modification.

Draft article 38: Correction of the Award

121. The Committee adopted the substance of draft article 38 without modification.

Draft article 39: Additional Award

122. The Committee adopted the substance of draft article 39 without modification.

Draft article 40: Definition of Costs

123. It was noted that the definition of costs contained in draft article 40, paragraph 2 (f), referred to "any fees and expenses of the appointing authority", but only to "the expenses" of the Secretary-General of the PCA. It was suggested to add the word "fees" in the reference to the Secretary-General of the PCA in that paragraph. That suggestion received support and, with that modification, the Committee adopted the substance of draft article 40.

Draft article 41: Fees and Expenses of Arbitrators

124. The Committee considered draft article 41 and noted that paragraphs 3 and 4 had not been fully considered by the Working Group during the third reading of the draft revised Rules.

Paragraph 1
125. The Committee adopted the substance of paragraph 1 without modification.

Paragraph 2
126. It was observed that the words "has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority" appearing in paragraph 2 could be deleted as they were viewed as redundant. That proposal received support. It was further proposed to replace the word "an" appearing before the words "appointing authority" at the beginning of paragraph 2 with the word "the" for the sake of clarity. Concern was expressed that those proposals would not be consistent with the fact that an appointing authority would not necessarily be designated in each case. To accommodate that concern, it was proposed to begin paragraph 2 with the words "If there is an

appointing authority and it applies". That proposal received broad support. The Committee adopted the substance of paragraph 2 with the aforementioned modification.

Paragraph 3

127. The Committee adopted the substance of paragraph 3 without modification.

Paragraph 4

128. As a matter of principle, the question was raised whether the cost review mechanism designed under draft article 41 should be included in the Rules, as it might be seen as introducing complexities, and might give rise to abuse by losing parties that might seek review of fees to delay enforcement of an award. It was further said that the review mechanism would only address a situation rarely occurring in practice. In response, it was said that the review mechanism included in paragraph 4 would promote confidence in arbitration, that the risk of abuse was countered by the fact that the review did not affect any determination in the award, that paragraph 4 constituted the best compromise reached after extensive discussion in the Working Group and that the review mechanism would make the Rules attractive for users.

129. After discussion, the Committee agreed on the principle of including a cost review mechanism in the Rules and turned its attention to the drafting of paragraph 4 with a view to simplifying it.

130. After discussion, the Committee adopted the substance of paragraph 4 as follows:

> 4. (a) When informing the parties of the arbitrators' fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;
> b) Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;
> c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;
> d) Any such adjustments shall either be included by the tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.

Deposit for the payment of the fee review

131. Concern was expressed that draft article 41, paragraph 4, did not provide for the payment of the costs incurred by the appointing authority or the Secretary-General of the PCA for their review of the arbitrator's fees and expenses. In that regard, it was proposed to include an additional paragraph following paragraph 4 along the lines of:

> "A party referring for review, under paragraph 4, the arbitral tribunal's determination of fees and expenses shall at the time of such referral deposit with the reviewing authority a sum, to be determined by the reviewing authority to cover the estimated cost of such review. Any

excess amount shall be determined by the reviewing authority at the completion of the review."

132. Some support was expressed for the inclusion of such a provision on the ground that the payment of a deposit would deter parties from making frivolous requests for review.

133. After discussion and particularly in view of the agreed additions to paragraph 6, the Committee agreed that it was not necessary to include a provision on a deposit for the costs of the reviewing authorities.

Paragraph 5

134. The Committee adopted the substance of paragraph 5 without modification.

Paragraph 6

135. It was said that the cost review mechanism could delay the arbitral proceedings and might go beyond the scope of a review on the costs of the arbitrators only. To address the concern that the cost review might delay the recognition and enforcement of the award, it was proposed to include a second sentence in paragraph 6 along the lines of: "If an award containing the tribunal's determination of its fees and expenses is referred for review pursuant to paragraph 4, all provisions in the award other than those that relate to the determination of fees and expenses shall, to the maximum extent authorized by applicable law, be subject to immediate recognition and enforcement."

136. That proposal received support and, with a view to simplifying its drafting, the Committee agreed to add at the end of paragraph 6 the words, "nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses". With that modification, the Committee adopted the substance of paragraph 6.

Draft article 42: Allocation of Costs

137. The question was raised whether the words "any other award" appearing in paragraph 2 should be replaced with the words "any other decision", so as to align the wording of that paragraph with the term used in draft article 40, paragraph 1. In response, it was explained that draft article 42 dealt with the determination of amounts that a party might have to pay to another party as a result of the decision on allocation of costs, and that decision was to be found in an award. After discussion, the Committee adopted the substance of draft article 42 without modification.

Draft article 43: Deposit of Costs

138. The Committee adopted the substance of draft article 43 without modification.

3. Future Work in the Field of Settlement of Commercial Disputes

139. With respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session 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 current revision of the UNCITRAL

Arbitration Rules. The Commission entrusted its Working Group II (Arbitration and Conciliation) with the task of preparing a legal standard on that topic. The Commission was informed that, pursuant to the request received from the Commission at the forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in investor-State arbitration and that replies thereto would be made available to the Working Group.

140. Support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues which arose more generally in treaty-based investor-State arbitration and 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 was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.

B. Finalization and Adoption of a Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions with Security Rights in Intellectual Property

1. Background

141. It may be recalled that the Commission during the first part of its fortieth session,[13] decided to entrust Working Group on Security Interests (hereinafter 'Working Group or Working Group VI') with the preparation of an annex to the draft Guide on Secured Transactions with specific to security rights in intellectual property. At that session, the Commission had emphasized the need to complete that work within a reasonable period of time.

142. The Commission also recalled that, at its resumed fortieth session,[14] it had finalized and adopted the UNCITRAL Legislative Guide on Secured Transactions (the Legislative Guide) on the understanding that the annex to the Legislative Guide would be prepared as soon as possible thereafter so as to ensure the that comprehensive and consistent guidance would be provided to States in a timely manner.

2. Consideration at the Forty-Third Session (2010) of the Commission

143. At its current Session, the Commission had before it: (a) the draft supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property;[15] (b) the reports of the sixteenth and seventeenth sessions of Working Group VI (Security Interests);[16] (c) chapter V of the report of Working Group V (Insolvency Law) on the work of its thirty-eighth session[17]addressing the impact of

[13] Vienna, 25 June-12 July 2007.
[14] Vienna, 10-14 December 2007.
[15] A/CN.9/700 and Add.1-7
[16] Vienna, 2-6 November 2009, A/CN.9/685 and New York, 8-12 February 2010, A/CN.9/689 respectively.
[17] New York, 19-23 April 2010, A/CN.9/691.

insolvency of a licensor or licensee on a security right in that party's rights under a licence agreement; and (d) a note by the Secretariat transmitting comments of international Organizations on the draft supplement.[18]

3. Consideration of the Draft Supplement

144. With regard to the title of the supplement, the Commission agreed that it should be "UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property". It was also agreed that the notes to the Commission at the beginning of each chapter of the draft supplement, which provided information about the relevant discussion by Working Group VI, would not need to be reproduced in the final version of the supplement. The Commission gave the Secretariat the mandate to make the necessary editorial changes to ensure consistency among the various chapters of the draft supplement and between the draft supplement and the *Guide*.

Preface and Introduction[19]

145. The Commission with few changes adopted the substance of the preface and the introduction.

Chapter I: Scope of Application and Party Autonomy[20]

146. The Commission agreed that:

(a) In subparagraph (g) dealing with patents, the word "patent" should be replaced with the word "invention", as an inventor would invent the invention and not the patent;

(b) A subparagraph (h) should be added under patents in paragraph 11 to refer to "the transferability of patents and the right to grant a licence";

(c) At the end, text along the following lines should be added: "A State implementing the recommendations of the Guide may wish to address this question".

147. Subject to those changes, the Commission adopted the substance of chapter I.

Chapter II: Creation of a Security Right in Intellectual Property[21]

148. It was agreed that paragraph 32 should be revised to refer to cars or other devices that included a copy of copyrighted software or design rights. It was also agreed that the word "product" at the end of the paragraph should be replaced with the word "component". Subject to those changes, the Commission adopted the substance of chapter II. The Commission also adopted recommendation 243 unchanged.

[18] A/CN.9/701.
[19] A/CN.9/700.
[20] A/CN.9/700/Add.1.
[21] A/CN.9/700/Add.2 and recommendation 243.

Chapter III: Effectiveness of a Security Right in Intellectual Property against Third Parties[22]

149. It was agreed that the fourth sentence of paragraph 9 should be revised to read along the following lines: "… a security right in intellectual property is treated as another type of (outright or conditional) transfer …". Subject to those changes, the Commission adopted the substance of chapter III.

Chapter IV: The Registry System[23]

150. It was agreed that:

(a) In the fourth sentence of paragraph 13, the reference to "the Madrid Agreement concerning the International Registration of Marks (1891), the Madrid Protocol (1989)" should be deleted;

(b) After the words "For example" in the second sentence of paragraph 14, the phrase "the Madrid Agreement concerning the International Registration of Marks (1891) and the Protocol Relating to that Agreement (1989) provides for the possibility to record a restriction of the holder's right of disposal in an international application or registration should be inserted;

(c) Paragraph 29 should be revised to avoid unnecessarily emphasizing the fact that the general security rights registry provided less information and to clarify the advantages and disadvantages of such a general registry.

151. Subject to those changes, the Commission adopted the substance of chapter IV.

Chapter V: Priority of a Security Right in Intellectual Property[24]

152. The Commission agreed that the phrase in parenthesis at the end of paragraph 35 should be deleted. Subject to that change, the Commission adopted the substance of chapter V.

Chapter VI: Rights and Obligations of the Parties to a Security Agreement relating to Intellectual Property[25]

153. The Commission adopted the substance of chapter VI unchanged.

Chapter VII: Rights and Obligations of Third-party Obligors in Intellectual Property Financing Transactions[26]

154. The Commission adopted the substance of chapter VII unchanged.

Chapter VIII: Enforcement of a Security Right in Intellectual Property[27]

155. The Commission adopted the substance of chapter VIII unchanged.

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[22] A/CN.9/700/Add.3, paras. 1-9
[23] A/CN.9/700/Add.3, paras. 10-52, and recommendation 244
[24] A/CN.9/700/Add.4 and recommendation 245
[25] A/CN.9/700/Add.5, paras. 1-5, and recommendation 246
[26] A/CN.9/700/Add.5, paras. 6-7
[27] A/CN.9/700/Add.5, paras. 8-32.

Chapter IX: Acquisition Financing in an Intellectual Property Context[28]

156. The Commission considered replacing the text in paragraphs 43-47 with a text that would clarify that a licensor or its secured creditor could obtain the benefits of an acquisition security right as it could register the licence or the security right in the relevant intellectual property registry before a secured creditor of the licensee. It was stated that that result would be achieved only if registration of security rights in future intellectual property was not permitted under the relevant specialized registration regime. It was also observed that, if such advance registration was permitted, the general financier of a licensee could obtain priority over an acquisition secured creditor of the licensor. After discussion, it was agreed that, while the proposed text contained an important element that could usefully be added to the text in paragraphs 43-47, it should not replace the text in those paragraphs. The Secretariat was authorized to make the necessary editorial amendments. Subject to that change, the Commission adopted the substance of chapter IX. The Commission also adopted recommendation 247 unchanged.

Chapter X: Law Applicable to a Security Right in Intellectual Property[29]

157. In addition to options A-D, the Commission considered the following options for recommendation 248:

"*Option E"*

> 248. The law should provide that, notwithstanding recommendations 208 and 218, in the case of a security right in intellectual property:
> a) The law applicable to property issues relating to whether a security right in the intellectual property may be created [, such as whether the intellectual property right exists, whether the grantor has an interest in it, and whether and to whom that interest is transferable,] is the law of the State in which the intellectual property is protected;
> b) Subject to paragraph (a), the law applicable to the creation of a security right in intellectual property is the law of the State in which the grantor is located;
> c) The law applicable to the effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected; however, if rights in the intellectual property may not be registered in an intellectual property registry in the State in which the intellectual property is protected, the law applicable to the effectiveness against third parties and priority of the security right in the intellectual property as against another secured creditor or the grantor's insolvency representative is the law of the State in which the grantor is located; and
> d) The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located, provided that, with respect to sale or other disposition of the intellectual property, the law applicable to property issues relevant to the rights in the intellectual property created by the sale or other disposition is the law of the State in which the intellectual property is protected.

"*Option F"*

> 248. The law should provide that, notwithstanding recommendations 208 and 218, in the case of a security right in intellectual property:
> a) The law applicable to property issues relating to whether a security right in the intellectual property may be created and the rights in the intellectual property created by enforcement of

[28] A/CN.9/700/Add.5, paras. 33-62, and recommendation 247
[29] A/CN.9/700/Add.6, paras. 1-54, and recommendation 248

the security right is the law of the State in which the intellectual property is protected; [such property issues include those that determine whether the intellectual property right exists, whether the grantor has an interest in it, the transferability of the intellectual property and the requirements for creating a property right in the transferee upon disposition;]
b) Subject to paragraph (a), the law applicable to the creation and enforcement of a security right in intellectual property is the law of the State in which the grantor is located; and
c) The law applicable to effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected; however, if rights in the intellectual property may not be registered in an intellectual property registry in the State in which the intellectual property is protected, the law applicable to effectiveness against third parties and priority of the security right in the intellectual property as against another secured creditor or the grantor's insolvency representative is the law of the State in which the grantor is located.

"*Option G"*

"The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in intellectual property is the law of the State in which the intellectual property is protected. The law should in addition provide that a security right in intellectual property may also be created under the law of the State in which the grantor is located and made effective under that law against third parties other than another secured creditor, a transferee or a licensee".

158. With respect to options E and F, which were substantially identical, it was stated that they were guided by the twin principles of accommodating the interests of secured creditors and intellectual property right holders, and of appropriately deferring to law relating to intellectual property. It was also observed that options E and F, the preparation of which was significantly aided by discussions at a meeting held in June by the European Max-Planck Group for Conflicts of Laws in Intellectual Property (CLIP), aimed at referring: (a) issues relating to the ownership and transferability of intellectual property to the law of the State in which the intellectual property was protected (*lex protectionis*); (b) the creation and enforcement of a security right in intellectual property to the law of the State in which the grantor was located; and (c) the third-party effectiveness and priority of a security right in intellectual property, with two narrowly defined exceptions, to the *lex protectionis*.

159. With respect to option E, subparagraph (d), concern was expressed that it might be unworkable to the extent that it appeared to separate enforcement issues into two different categories and refer them to two different laws. In response, it was stated that all enforcement issues were referred to the law of the State in which the grantor was located. It was also observed that, once an enforcement sale was concluded, issues relating to the transfer (and possibly the registration of the intellectual property) would normally be subject to the *lex protectionis*.

160. With respect to option G, it was stated that it was intended to reflect an approach based essentially on the *lex protectionis*, in the sense that it referred the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property to the *lex protectionis*. However, it was also observed that option G permitted the secured creditor to create and make effective against third parties a security right in intellectual property according to the law of the State in which the grantor was located. It was explained that, as a result, that option provided for the application of the law of the State in which the grantor was located to the effectiveness of a security right in the case of the

grantor's insolvency. In response to a question, it was explained that if a security right was effective as against an insolvency representative, its effectiveness had to be respected and thus no issue of priority arose.

161. While it was explained that enforcement in multiple jurisdictions was a common situation with respect to security rights in intellectual property, strong concern was expressed that referring enforcement issues in particular in the case of a security right in a portfolio of intellectual property assets protected under the law of multiple States to the laws of those jurisdictions would add complexity and cost to intellectual property financing transactions and would thus run counter to the overall objective of the *Guide* to facilitate access to secured credit at more affordable rates. The suggestion was thus made that enforcement should be referred to the law of the State in which the grantor was located. There was broad support for that suggestion.

162. After a preliminary discussion, the Commission agreed that, in view of the fact that options E-G had attracted some support and covered all the elements reflected in options B-D, the latter could be set aside. As a result, the Commission decided to focus on options A and E-G.

163. In support of option A, it was stated that it was consistent with various intellectual property conventions. In that regard, some doubt was expressed as to whether those conventions dealt with the law applicable to a security right in intellectual property. It was also observed that option A was consistent with the law in many States. In that connection, it was pointed out that option G was also an approach based on the *lex protectionis*, with the additional advantage that it allowed the secured creditor to obtain a security right that could be created and made effective against the grantor's insolvency representative and judgement creditors under the law of the State in which the grantor was located.

164. Broad support was expressed for option G, provided that it was revised to refer enforcement issues to the law of the grantor's location. To address that point, option G was revised to read as follows:

> "The law should provide that:
> "(a) The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected;
> "(b) A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee; and
> "(c) The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located."

165. General support was expressed for the revised version of option G on the understanding that it: (a) was essentially based on the *lex protectionis*; (b) allowed the secured creditor to obtain a security right that could also be created and made effective against the grantor's insolvency representative and judgment creditors under the law of the State in which the grantor was located; and (c) referred enforcement issues to the law of the State in which the grantor was located.

166. After discussion, the Commission adopted the revised option G as recommendation 248.

167. The Commission next turned to the commentary of chapter X. It was agreed that: (a) the analysis of possible approaches should be revised to reflect the Commission's adoption of revised option G and the reasons for that decision; (b) the commentary should emphasize the fact that the *Guide* did not affect the law applicable to ownership and transferability issues, drawing on the relevant text of options E and F; and (c) like any other recommendation of the *Guide* and the draft supplement, recommendation 248 was subject to recommendation 4, subparagraph (b). It was also agreed that a so-called "accommodation rule", under which a forum would equate a security right that was created and made effective under the law of the grantor's location to the closest equivalent of the security right under the *lex protectionis*, was not necessary as the text of recommendation 248 adopted gave appropriate recognition to the *lex protectionis*.

168. Subject to the changes agreed to be made in chapter X, the Commission adopted the substance of chapter X.

Chapter XI: Transition[30]

169. The Commission adopted the substance of chapter XI unchanged.

Chapter XII: The Impact of Insolvency of a Licensor or Licensee of Intellectual Property on a Security Right in that Party's Rights under a Licence Agreement[31]

170. The Commission noted that Working Group V (Insolvency Law), at its thirty-eighth session[32] had considered the text on automatic termination and acceleration clauses in intellectual property licence agreements referred to it by Working Group VI (Security Interests) at its sixteenth session.[33] The Commission further noted that Working Group V had approved that text subject to the addition of the following text possibly after paragraph 64:[34]

> "The commentary to the *Insolvency Guide* explains the perceived advantages and disadvantages of such clauses, the types of contracts that may be appropriate to be exempted and the inherent tension between promoting the debtor's survival, which may require the preservation of contracts, and introducing provisions which override contractual clauses. The possible application of such provisions to intellectual property is addressed in the commentary at part two, chapter II, paragraph 115, of the *Insolvency Guide*."

171. Subject to that change, the Commission adopted the substance of chapter XII.

C. Finalization and Adoption of Part Three of the UNCITRAL Legislative Guide on Insolvency Law on the Treatment of Enterprise Groups in Insolvency

1. Background

172. The Commission recalled that, at its thirty-ninth session, in 2006, it had referred the topic of the treatment of corporate groups in insolvency to Working Group V (Insolvency Law) for consideration. The term "corporate groups" was subsequently

[30] A/CN.9/700/Add.6, paras. 55-59
[31] A/CN.9/700/Add.6, paras. 60-82, and A/CN.9/691, paras. 94-98
[32] New York, 19-23 April 2010.
[33] A/CN.9/685, para. 95; the text currently reflected in A/CN.9/700/Add.6, paras. 64-66.
[34] A/CN.9/691, paras. 94-98.

replaced with the term "enterprise groups".[35] The Commission also recalled that, at its forty-second session, in 2009, it had taken note of the close connection between the work on the international treatment of enterprise groups and both the *UNCITRAL Model Law on Cross-Border Insolvency* and the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* and had emphasized the need to ensure consistency with those two texts. The Commission further recalled that, at that session, it had noted that the text resulting from the work on enterprise groups should form part three of the *UNCITRAL Legislative Guide on Insolvency Law* and adopt the same format, that is, recommendations and commentary.

173. The Commission noted that the Working Group had agreed at its thirty-seventh session[36] that the draft of part three[37] should be circulated to Governments with in sufficient time for comment and for compilation of those comments for the forty-third session of the Commission.[38]

2. Consideration at the Forty-Third Session (2010) of the Commission

174. The Commission had before it the revised draft of part three[39] in which the Working Group had approved at its thirty-eighth session[40] the comments by Governments and international organizations on draft part three[41] the reports of the thirty-seventh and thirty-eighth sessions of the Working Group[42] and a note by the Secretariat on the revision of draft part three as agreed by the Working Group at its thirty-eighth session.[43]

175. The Commission considered the domestic and international treatment of enterprise groups in insolvency as set forth in the documents and adopted the commentary and recommendations with the following modifications:

> (a) With respect to draft recommendations 242 and 248, the Commission agreed to include the words "to facilitate coordination of those proceedings" at the end of both draft recommendations;
> (b) With respect to draft recommendation 244, paragraph (c), the Commission agreed to delete the words "and claims" following the words "substantive rights", to align it with draft recommendation 243, paragraph (f).

176. With respect to paragraph 28 of document[44] on recording of the communication by courts as part of the record, it was suggested that the word "may" appearing in the second sentence should be replaced with the word "should", as the inclusion of the transcript in the record was seen as a mandatory consequence of the recording and the transcribing of the communication. In response, it was widely felt that the language should be kept as wide as possible, in order to maintain flexibility. The Commission agreed to retain the paragraph as drafted.

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[35] See A/CN.9/622, paras. 77-84, and A/CN.9/643
[36] Vienna, 9-13 November 2009
[37] As set forth in documents A/CN.9/WG.V/WP.90 and Add.1
[38] A/CN.9/686, para. 125
[39] A/CN.9/WG.V/WP.92 and Add.1
[40] New York, 19-23 April 2010.
[41] A/CN.9/699 and Add.1-4
[42] A/CN.9/686 and A/CN.9/691, respectively.
[43] A/CN.9/708
[44] A/CN.9/WG.V/WP.92/Add.1

D. Procurement: Progress Report of Working Group I

1. Background

177. It may be recalled that the Commission, at its thirty-sixth and thirty-seventh sessions, in 2003 and 2004, respectively, considered a possible updating of the UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Guide to enactment on the basis of the notes by the Secretariat.[45] At its thirty-seventh session (2004), the Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform. It decided to entrust the drafting of proposals for the revision of the Model Law to its Working Group on Procurement (hereinafter 'Working Group'). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations. At its thirty-eighth session, in 2005, the Commission reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law.

178. At its thirty-eighth and thirty-ninth sessions, in 2005 and 2006, respectively, the Commission took note of the reports of the sixth, seventh, eighth and ninth sessions of the Working Group.[46]

179. At its fortieth session (2007), the Commission had before it the reports of the tenth and eleventh sessions of the Working Group.[47] The Commission was informed that, at its tenth and eleventh sessions, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law and in this regard, it had considered the following topics: (i) the use of electronic means of communication in the procurement process; (ii) aspects of the publication of procurement-related information, including revisions to article 5 of the Model Law and the publication of forthcoming procurement opportunities; (iii) the procurement technique known as the electronic reverse auction; (iv) abnormally low tenders; and (v) the method of contracting known as the framework agreement. Further, the Commission recalled that, at its thirty-ninth session, it had recommended that the Working Group, in updating the Model Law and the Guide, should take into account the specific question of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide.

179. At the forty-first session (2008), the Commission took note of the reports of the twelfth and thirteenth sessions of the Working Group.[48] At its twelfth session, the Working Group adopted the timeline for its deliberations, later modified at its thirteenth session, and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its thirteenth session, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat[49] and agreed to combine the two approaches proposed in those documents, so that the Model Law, where appropriate, would address common features applicable to all types of framework agreement together, in order to avoid, *inter alia,* unnecessary

[45] A/CN.9/539 and Add.1, and A/CN.9/553.
[46] A/CN.9/568, A/CN.9/575, A/CN.9/590 and A/CN.9/595.
[47] Vienna, 25-29 September 2006, A/CN.9/615 and New York, 21-25 May 2007, A/CN.9/623.
[48] Vienna, 3-7 September 2007, A/CN.9/640 and New York, 7-11 April 2008, A/CN.9/648
[49] A/CN.9/WG.I/WP.52 and Add.1 and A/CN.9/WG.I/WP.56.

repetition, while addressing distinct features applicable to each type of framework agreement separately.

180. The Commission further recalled that, at its forty-second session, in 2009, it had taken note of the reports of the fourteenth to sixteenth sessions of the Working Group and established a Committee of the Whole to consider a draft revised model law, including the issues of defence sector procurement and the use of socio-economic factors in public procurement. At that session, the Commission had also taken note of the report of the Committee of the Whole, in which the Committee in particular had concluded that the revised model law was not ready for adoption at that session of the Commission, and had requested the Working Group to continue its work on the review of the 1994 Model Procurement Law.

2. Consideration at the Forty-Third Session (2010) of the Commission

181. At its current session, the Commission had before it the reports of the seventeenth and eighteenth sessions of the Working Group.[50] It was noted that the Working Group, at those sessions, had completed a second reading of all chapters of the draft revised model law and had begun a third reading of the text. It was also noted that the Working Group had settled many of the substantive issues and requested the Secretariat to redraft certain provisions to reflect its deliberations at the sessions. The Commission further noted that the Working Group, at its eighteenth session, agreed to address the remaining outstanding issues throughout the draft revised model law with a view to finalizing the text at its nineteenth session. The Commission also noted that the Working Group had agreed to undertake work on a draft revised guide to enactment. The Commission noted the Working Group's intention is to present the draft revised model law for adoption by the Commission at its forty-fourth session, in 2011.[51]

182. The Commission recalled that at its previous sessions, it had called for the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised model law within a reasonable time. Support was expressed for the suggestion that the Commission, at its current session, should ask the Working Group to complete its work so that a draft revised model law could be submitted to the Commission's next session, in 2011, and additionally instruct the Working Group not to reopen issues on which a decision had already been taken.

183. After discussion, the Commission requested the Working Group to complete its work on the revision of the 1994 Model Procurement Law during the next two sessions of the Working Group and present a draft revised model law for finalization and adoption by the Commission at its forty-fourth session, in 2011. The Commission instructed the Working Group to exercise restraint in revisiting issues on which decisions had already been taken.

[50] Vienna, 7-11 December 2009, A/CN.9/687 and New York, 12-16 April 2010, A/CN.9/690 respectively.
[51] A/CN.9/690, paras. 156-157.

E. Possible Future Work in the areas of Electronic Commerce and Online Dispute Resolution

1. Possible Future Work in the Area of Electronic Commerce

i. Background

184. The Commission recalled that the Working Group on Electronic Commerce (hereinafter 'Working Group'), after it had completed its work on the draft Convention on the Use of Electronic Communications in International Contracts, in 2004, requested the Secretariat to continue monitoring various issues related to electronic commerce, including issues related to cross-border recognition of electronic signatures, and to publish the results of its research with a view to making recommendations to the Commission as to whether future work in those areas would be possible.[52]

185. It was recalled that, at its fortieth session, in 2007, the Commission had requested the Secretariat to continue to follow closely legal developments in the area of electronic commerce, with a view to making appropriate suggestions in due course.

ii. Consideration at the Forty-Third Session (2010) of the Commission

186. At the current session, the Commission had before it a note by the Secretariat[53] containing an update on the progress of the work of the World Customs Organization (WCO)-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window on the implementation and operation of a single window facility. The note also provided information relating to electronic transferable records and an update on recent developments in the field of electronic commerce, with particular regard to identity management and electronic commerce conducted with mobile devices, including payments.

Electronic Single Window Facilities

187. The Commission recalled that, at its forty-first session, in 2008, it had requested the Secretariat to engage actively in cooperation with WCO and the United Nations Centre for Trade Facilitation and Electronic Business and, with the involvement of experts, in the study of the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on legal aspects of creating and managing a single window, and to report to the Commission on the progress of that work. That request had been reiterated by the Commission at its forty-second session, in 2009.

188. The Commission noted with appreciation the involvement of the Secretariat in the second meeting of the Joint Legal Task Force. The Commission took note of the decision of the Joint Legal Task Force to gather the necessary information on possible user models and cases from experts in customs procedures and to compile it for use as reference in legal analysis. With regard to the legal issues identified by the Joint Legal Task Force as suitable for further study, it was suggested that caution should be taken in dealing with

[52] A/CN.9/571, para. 12.
[53] A/CN.9/692.

issues related to enforcement as those generally fell into the realm of domestic regulatory matters.

189. After discussion, the Commission requested the Secretariat to continue its active participation in the work on single windows carried out by the Joint Legal Task Force and by other organizations, with a view to exchanging views and formulating recommendations on possible legislative work in that domain.

Electronic Transferable Records

190. It was recalled that, at its forty-second session, in 2009, the Commission had requested the Secretariat to prepare a study on electronic transferable records in the light of written proposals received at that session[54] and to organize a colloquium on that topic, resources permitting, with a view to reconsidering those matters at a future session. At the current session, the Commission was reminded that previous documents had already dealt in depth with the substantive aspects of that topic,[55] which had been before Working Group IV at its thirtieth and thirty-eighth sessions, respectively.

191. During the discussion, it was also suggested that work on electronic transferable records could embrace issues related to single window facilities and identity management and that it might be possible to address all those topics in a single project. However, it was also recalled that limited elements of commonality in the different records and rights transferred would not warrant immediate work at the working group level with respect to electronic transferable records.

Identity Management

192. The Commission took note of the information contained in the note by the Secretariat[56] regarding the notion of identity management system, its business model, processes and main actors as well as potential benefits. The Commission noted that identity management raised several relevant legal issues and that calls had been made for compiling a set of uniform legal rules to address such issues.

Use of Mobile Devices in Electronic Commerce

193. With respect to the use of mobile devices in electronic commerce, the Commission agreed that communication via mobile devices could be regarded as a subset of electronic communications as dealt with in relevant legislative standards adopted by UNCITRAL. The Commission further agreed that the predictability of the legal status of transactions conducted with mobile devices would be greatly enhanced by the adoption of appropriate legislation. In that connection, it was acknowledged that guidance on the adoption of appropriate legislative standards, with particular respect to the use of mobile devices, might be useful, in particular, in developing countries, where the broader use of mobile devices could make a significant contribution to widening access to electronic means of communication. It was also noted that payment services had been identified as an area of special importance for mobile technology and that mobile payments could support financial inclusion, especially in rural areas.

[54] A/CN.9/681 and Add.1 and A/CN.9/682
[55] A/CN.9/WG.IV/WP.69 and A/CN.9/WG.IV/WP.90.
[56] A/CN.9/692.

Decision by the Commission with respect to Future Work in the Area of Electronic Commerce

194. After discussion, the Commission requested the Secretariat to convene a colloquium and possibly other informal meetings to discuss all of the above-mentioned topics. The Secretariat was requested to report to the Commission at its next session on the results of the colloquium. The note to be prepared by the Secretariat should summarize the discussion and possibly identify a road map for future work by the Commission in the area of electronic commerce. It was agreed that that note, which would serve as a basis for discussion at the forty-fourth session of the Commission, in 2011, should provide sufficient information for the Commission to make an informed decision and to give a clearly defined mandate to a working group, if deemed appropriate.

2. Possible Future Work in the Area of Online Dispute Resolution in Cross-border Electronic Commerce Transactions

i. Background

195. It was recalled that, at its forty-second session, in 2009, the Commission had heard a recommendation that a study be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions, with a view to addressing the types of e-commerce dispute that might be solved by online dispute-resolution systems, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database of certified online dispute-resolution providers and the issue of enforcement of awards made through the online dispute-resolution process under the relevant international conventions.

196. The Commission had agreed on the importance of the proposals relating to future work in the field of online dispute resolution to promote e-commerce and requested the Secretariat to prepare a study on the basis of the proposals contained in document[57] and to hold a colloquium on the issue of online dispute resolution, if resources permit.

ii. Consideration at the Forty-Third Session (2010) of the Commission

197. At its current session, the Commission had before it a note by the Secretariat on the issue of online dispute resolution.[58] The note, in particular, summarized the discussion at the colloquium organized jointly by the Secretariat, the Pace Institute of International Commercial Law and the Penn State University Dickinson School of Law, under the title "A fresh look at online dispute resolution (ODR) and global e-commerce: towards a practical and fair redress system for the 21st century trader (consumer and merchant)". The Commission also had before it a note by the Secretariat[59] transmitting information provided by the Institute of International Commercial Law in support of possible future work by UNCITRAL in the field of online dispute resolution.

198. The Commission noted that, during the colloquium, it had been said that proposals for regional online dispute-resolution systems were in the process of being developed and it might therefore be timely to deal with the matter internationally from the outset in order

[57] A/CN.9/681/Add.2
[58] A/CN.9/706.
[59] A/CN.9/710.

to avoid development of inconsistent mechanisms. It was further noted that the goal of any work undertaken by UNCITRAL in that field should be to design generic rules, which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce), could apply in both business-to-business and business-to consumer environments.

199. The Commission was informed that the commonly shared view expressed during the colloquium was that traditional judicial mechanisms for legal recourse did not offer an adequate solution for cross-border e-commerce disputes, and that the solution - providing a quick resolution and enforcement of disputes across borders - might reside in a global online dispute-resolution system for small-value, high-volume business-to-business and business-to-consumer disputes. E-commerce cross-border disputes required tailored mechanisms that did not impose costs, delays and burdens that were disproportionate to the economic value at stake. Those views were generally supported in the Commission. The Commission also noted that work on the topic should recognize the digital divide and that more efforts should be made to hear the views of developing States.

200. The Commission was generally of the view that topics identified at the colloquium required attention and that work by the Commission in the field of online dispute resolution would be timely. However, some concerns were expressed with regard to the scope of work to be undertaken. It was suggested that such scope should be limited, at an initial stage, to business-to-business transactions. It was pointed out that issues related to consumer protection were difficult to harmonize, since consumer protection laws and policies varied significantly from State to State. It was also stated that work in that area should be conducted with extreme caution to avoid undue interference with consumer protection legislation.

201. In response, the view was expressed that, in the present electronic environment, consumer transactions constituted a significant portion of electronic and mobile commercial transactions and were often cross-border in nature. It was also argued that it was 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. It was concluded that work by a working group should be carefully designed not to affect the rights of consumers. Although it was generally felt that it would be feasible to develop a generic set of rules applicable to both kinds of transactions, it was also agreed that the Working Group should have the discretion to suggest different approaches, if necessary.

202. After discussion, the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business to- consumer transactions. It was also agreed that the form of the legal standard to be prepared should be decided by the working group after further discussion of the topic.

G. Possible Future Work in the Area of Insolvency Law

1. Background

203. The Commission recalled that, at its thirty-ninth session, in 2006, it had agreed that: (a) the topic of the treatment of corporate groups in insolvency was sufficiently

developed for referral to Working Group of Insolvency Law (hereinafter 'Working Group') for consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems that the Working Group would identify under that topic; and (b) post-commencement finance should initially be considered as a component of work to be undertaken on insolvency of corporate groups, with the Working Group being given sufficient flexibility to consider any proposals for work on additional aspects of the topic.

204. At the forty-first session, the Commission had before it a progress report made on the work of compiling practical experience with negotiating and using cross border insolvency agreements. It was decided that the compilation should be presented as a working paper to Working Group at its thirty-fifth session for an initial discussion. The Working Group could then decide to continue discussing the compilation at its thirty-sixth session in April and May of 2009 and make its recommendations to the forty-second session of the Commission, in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in searching for solutions in the international treatment of enterprise groups in insolvency.

2. Consideration at the Forty-Third Session (2010) of the Commission

205. The Commission had before it a series of notes[60] setting forth a number of proposals for future work on insolvency law. The proposals contained in those documents were discussed at the thirty-eighth session of Working Group V (Insolvency Law).[61] An additional document[62] was submitted after that session of Working Group V, which set forth material additional to the proposal of Switzerland contained in document.[63]

206. After discussion, the Commission endorsed the recommendation by Working Group V contained in document,[64] 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. Those topics were:

> (a) The United States' proposal as described in paragraph 8 of document[65] to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Insolvency Law relating to centre of main interests 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;
>
> (b) The proposals of the United Kingdom,[66] International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)[67] and the

[60] A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6.
[61] A/CN.9/691, paras. 99-107.
[62] A/CN.9/709.
[63] A/CN.9/WG.V/WP.93/Add.5.
[64] A/CN.9/691, paragraph 104.
[65] A/CN.9/WG.V/WP.93/Add.1
[66] See A/CN.9/WG.V/WP.93/Add.4.

International Insolvency Institute[68] concerning the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases. 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 criminal law issues were outside the scope of the mandate.

207. With respect to the proposal by Switzerland, the Commission agreed that the study[69] should be undertaken by the Secretariat as resources permitted. It was noted in that regard that reports on work being undertaken by a number of other organizations on the same topic were expected by the end of 2010 and that those reports should be factored into the Secretariat's work. It was anticipated that coordination would be sought between the Secretariat and other interested international organizations.

208. The Commission heard a proposal by the Secretariat, which noted that participants in the judicial colloquiums that had been held by UNCITRAL in cooperation with INSOL and the World Bank (the Ninth Colloquium is scheduled for 2011) had indicated a desire for information and guidance for judges on cross-border-related issues and in particular on the UNCITRAL Model Insolvency Law. To that end, the Commission was informed that the Secretariat had been working on the preparation of a draft text that provided a judicial perspective on the use and interpretation of the UNCITRAL Model Insolvency Law. The Commission agreed that the Secretariat should be mandated to develop that text in the same flexible manner, resources permitting, as was achieved with respect to the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*. That would involve consultation, principally with judges, but also with insolvency practitioners and professionals; consideration, at an appropriate stage, by Working Group V; and finalization and adoption by the Commission, possibly in 2011.

G. Possible Future Work in Security Interests

1. Background

209. The Commission recalled that, during the first part of its fortieth session,[70] it had decided to entrust Working Group on Security Interests (hereinafter 'Working Group') with the preparation of an annex to the draft Guide on Secured Transactions specific to security rights in intellectual property. At that session, the Commission had emphasized the need to complete that work within a reasonable period of time.

210. The Commission also recalled that, at its resumed fortieth session,[71] it had finalized and adopted the UNCITRAL Legislative Guide on Secured Transactions (the Legislative Guide) on the understanding that the annex to the Legislative Guide would be prepared as soon as possible thereafter so as to ensure the that comprehensive and consistent guidance would be provided to States in a timely manner.

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[67] A/CN.9/WG.V/WP.93/Add.3
[68] A/CN.9/582/Add.6
[69] See A/CN.9/709, para. 7.
[70] Vienna, 25 June-12 July 2007.
[71] Vienna, 10-14 December 2007.

2. Consideration at the Forty-Third Session (2010) of the Commission

211. At its current session, the Commission had before it a note by the Secretariat on possible future work in the area of security interests.[72]

212. In addition, the Commission noted that Working Group, at its seventeenth session had engaged in a preliminary discussion of its future work programme.[73] The Commission also noted that, at that session, some support had been expressed for work on registration of security rights and a model law on secured transactions based on the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions*, while any work on security rights in securities would have to be limited to non-intermediated securities and any work on intellectual property licensing would need to be closely coordinated with WIPO.[74]

213. The Commission agreed that four issues related to secured transactions law listed in document,[75] paragraph 2 (a)-(d), were interesting (non-intermediated securities, registration of security rights, a model law and a contractual guide on secured transactions) and should be retained on its future work agenda. At the same time, in view of the limited resources available to it, the Commission agreed that it could not undertake work on all four issues at the same time and that, as a result, it should set priorities. In that regard, there was general agreement that priority should be given to work on registration of security rights in movable assets.

214. With respect to work on security rights in non-intermediated securities, differing views were expressed. One view was that work should be undertaken to provide guidance to States with respect to security rights in a very important type of asset. It was stated that non-intermediated securities were used as security for credit in commercial financing transactions and yet they were generally excluded from the scope of the *Guide* and the UNIDROIT Convention on Substantive Rules for Intermediated Securities (2009). Another view was that there was no reason why the recommendations of the *Guide* should not apply to security rights in non-intermediated securities, a result that could be achieved by a change in the scope provisions of the *Guide*. It was stated that the Secretariat could study that matter and report to the Commission at a future session. Yet another view was that any work on security rights in non-intermediated securities should be postponed until the International Institute for the Unification of Private Law (UNIDROIT) had a chance to complete its work on a commentary and an accession kit to the Geneva Securities Convention, as well as to consider its future work in the area of financial markets.

215. After discussion, the Commission decided that Working Group VI should be entrusted with the preparation of a text on registration of security rights in movable assets as a matter of priority.

216. The Commission next considered the topic of intellectual property licensing, a topic at the intersection of intellectual property and contract law. It was widely felt that the Commission did not have sufficient information to make a decision as to the desirability and feasibility of any work on that topic. The Commission, therefore, considered whether to request the Secretariat to prepare a desirability and feasibility study that would identify

[72] A/CN.9/702 and Add.1.
[73] New York, 8-12 February 2010, A/CN.9/689, paras. 59-61.
[74] A/CN.9/689, para. 61.
[75] A/CN.9/702.

any particular needs and suggest specific ways in which those needs could be addressed by a legal text to be prepared by the Commission with a view to removing any legal obstacles to intellectual property licensing practices hindering the development of international trade.

217. Differing views were expressed as to whether the topic of intellectual property licensing fell within the mandate of the Commission and, as a result, whether the Commission could undertake any work on that topic. One view was that, to the extent that intellectual property licensing involved contract issues and formed an important part of international trade, it was within the mandate of the Commission. Another view was that intellectual property licensing was more properly viewed as an intellectual property law topic that fell within the scope of work of other organizations, such as WIPO. After discussion, the Commission agreed that intellectual property licensing was a topic at the intersection of intellectual property and commercial law and thus, while it fell within the mandate of the Commission, and work by the Commission should be undertaken in cooperation with other organizations, such as WIPO.

218. Another view was that the study should examine a narrow topic related to secured transactions, such as, for example, whether licensee rights could be used as security for credit and, if so, in which rights exactly and under which conditions. It was stated that, in the absence of any specific indication of a particular need, no work was warranted of a broader scope.

219. After discussion, the Commission requested the Secretariat to prepare a study, within existing resources, that would identify specific topics and discuss the desirability and feasibility of the Commission preparing a legal text with a view to removing specific obstacles to international trade in the context of intellectual property licensing practices.

H. Possible Future Work in the Area of Microfinance

1. Background

220. The Commission recalled that, at its forty-second session, in 2009, it had received a suggestion that it would be timely for UNCITRAL to carry out a study on microfinance with the purpose of identifying the need for a legal and regulatory framework aimed at protecting and developing the microfinance sector so as to allow its continuous development, consistent with the purpose of microfinance, which was to build inclusive financial sectors for development. It was further recalled that, after discussion at that session, the Commission had requested the Secretariat, subject to the availability of resources, to prepare a detailed study on the legal and regulatory issues of microfinance as well as proposals as to the form and nature of a reference document that the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world in establishing a favourable legal framework for microfinance. The Commission had also requested the Secretariat to work in conjunction with experts and to seek possible cooperation with other interested organizations for the preparation of such a study, as appropriate.

2. Consideration at the Forty-Third Session (2010) of the Commission

221. At its current session, the Commission had before it a note by the Secretariat containing a study and proposals as requested.[76] The note, it was explained, sought to examine and provide an overview of the issues relating to the regulatory and legal framework of microfinance.

222. It was recognized that, in facilitating access to financial services to the many poor who were not currently served by the formal financial system, microfinance could play an important role as a tool for the alleviation of poverty and achievement of the Millennium Development Goals. It was also noted that an appropriate regulatory environment contributed to the development of the microfinance sector.

223. A number of delegates cautioned against UNCITRAL straying too far into the field of domestic banking and financial regulation, one delegation noting that this had proved to be a subject of acrimonious debate when raised in other international forums. The question was raised as to whether microfinance was an appropriate field of work for UNCITRAL, given that its mandate related to international trade. It was also stated that many aspects of microfinance seemed to be largely domestic issues and that the supranational aspect of any work in the area should be made clear.

224. After discussion, the Commission agreed that the Secretariat should convene a colloquium, with the possible participation of experts from other organizations working actively in that field, to explore the legal and regulatory issues surrounding microfinance that fell within the mandate of UNCITRAL. The colloquium should result in a report to the Commission at its next session, outlining the issues at stake and containing recommendations on work that UNCITRAL might usefully undertake in the field.

I. Forty-Fourth Session of the Commission

225. The forty-fourth session of the Commission will be held in Vienna from 27 June to 15 July 2011.

[76] A/CN.9/698.

III. REPORT ON THE WORK OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

226. The other major international organization that deals with trade related matters is UNCTAD. This part of the Secretariat's report takes note of a major development of the United Nations Conference on Trade and Development (UNCTAD), namely; the fifty-seventh annual session of the Trade and Development Board held in Palais des Nations, Geneva from 15 to 28 September 2010.

A. Fifty-Seventh Annual Session of Trade and Development Board (15-28 September 2010, Palais des Nations, Geneva)

227. The fifty-seventh annual session of the Trade and Development Board[77] focused at their high-level segment on the global economic crisis and the necessary policy response. The other areas that were of importance to the countries from Asian and African regions were: (i) Economic development in Africa: South–South cooperation: Africa and the new forms of development partnerships, (ii) Evolution of the international trading system and of international trade from a development perspective: The impact of the crisis-mitigation measures and prospects for recovery, (iii) Development strategies in a globalized world: Globalization, employment and development; and (iv) Investment for development: Emerging challenges.

228. The previous year's main focus of UNCTAD's activities was on addressing the global financial crisis. The high-level segment focussed 'towards sustainable recovery'. It dealt with reviewing national and global experiences of the economic and financial crisis, and the effectiveness of the policies that were put in place to help support demand and ward off complete financial collapse. There was broad agreement that the current trends of economic recovery were still fragile and uneven, and that the longer-term scenario was uncertain. Many long-term issues and imbalances had still not been adequately addressed, and the crisis had aggravated persistent development challenges. Unemployment was at unprecedented levels. Numerous countries faced a new debt crisis and had limited fiscal space for counter-cyclical policies, provoking worsened levels of poverty and inequality, and undermining longer-term prospects for growth and recovery. Various measures taken by governments and also their strategies to overcome the after-effects of financial crisis was discussed and deliberated.

229. In that segment, the delegates noted that the world was suffering not from an "ordinary recession" but rather from "balance sheet recession", where liabilities exceeded the market value of the underlying assets. It meant that the money borrowed at inflated prices for assets now needed to be repaid, using the limited cash flows that were still available to firms and households. Such situation was leaving households and firms virtually bankrupt, with little if any fresh investment or consumption, causing the economy to shrink still further. In such a situation, even zero interest rates were not sufficient to boost the economy, and it was felt that governments should step in to provide for the lack of demand from the private sector and to mitigate the high rate of savings from the private sector. That supportive role of government needed to continue until the private sector balance sheet was repaired, when liabilities were smaller or equal to assets.

[77] See Report of the Fifty-seventh session of the Trade and Development Board of the United Nations Conference on Trade and Development held at the Palais des Nations, Geneva, from 15 to 28 September 2010, document no. TD/B/57/8.

230. During the high-level segment, emphasis was made on the need for a completely new economic model, calling for new, stronger and more stable development pathways – "new software" to redress fundamental imbalances in the world economy. Any new development models needed to address fundamental issues relating to

(a) speculation and price volatility in commodity and agricultural markets;
(b) regulation of the financial and monetary system, including early warning systems;
(c) illicit financial flows;
(d) the development impact of migration;
(e) access to credit;
(f) the transparency and effectiveness of ODA;
(g) inequality and poverty;
(h) a universal, rules-based and equitable multilateral trading system with meaningful trade liberalization; and
(i) environmental sustainability.

231. Need for new global energy model in relation to challenges of climate change and greater participation and voice of developing countries in the Bretton Woods institutions was reiterated. Further, it was states that the United Nations, in particular the General Assembly, should strengthen its role in global governance. With regard to the role of UNCTAD, it was said that it should participate prominently in the process to reform the global economic architecture, to support the cause of the world's underdeveloped countries. Within the G-20 framework, UNCTAD was requested to work closely with ILO and OECD on questions related to trade liberalization and its effect on employment.

232. On Economic development of Africa, it was pointed out that the 2015 target date for the Millennium Development Goals (MDGs) was fast approaching and that UNCTAD should help African countries articulate their post-2015 strategies. On evolution of international trading system and of international trade from development perspective, it was stated that the recovery in the world economy from the global economic crisis driven especially by dynamic demand growth in emerging economies in Asia, and a resurgence of international trade. Crisis-mitigation efforts by governments to stimulate demand played an important role in reducing the slowdown in output and trade, and new financial regulations and reform in economic governance were being pursued to address the root causes of the financial and economic crisis. The pace of recovery, however, remained fragile and uneven among countries. The scourge of the crisis remained deep and wide, as evident in persistently high unemployment, poverty, growing global imbalances, ongoing fiscal consolidation, and uncertainty in financial regulations. In developing countries, the crisis had aggravated persistent development challenges, especially in Africa and LDCs.

233. Upholding the significant role of emerging developing countries in revival and the recovery in developed countries, it was signalled at their growing economic role and deepened interdependence among countries. However, since the level of global trade still remained below the pre-crisis level, there was no place for complacency. In this regard, it was noted that the rise of intensive protectionism had been contained and some countries had taken trade liberalizing measures, increasing unemployment. Cooperative efforts, WTO disciplines, self-restraint and enhanced monitoring – such as by WTO, UNCTAD and the Organization for Economic Cooperation and Development (OECD) – had been essential, and should be continued.

IV. REPORT ON THE WORK OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

234. The General Council at its 89th session held in Rome from 10 to 12 May 2010, adopted the following Work Programme for the 2009-2011 triennium on legislative activities: (i) finalisation of the additional chapters of the UNIDROIT Principles of International Commercial Contracts; (ii) finalisation of the Space Protocol to the Cape Town Convention; (iii) work on an instrument on netting in financial services, a legislative guide on principles and rules capable of enhancing trading in securities in emerging markets and, resources permitting and possibly included in that guide, rules facilitating convergence of national investor classification systems. However, importance was attached to finalisation of the works already undertaken by the UNIDROIT Secretariat. Hence, the following four areas are considered.

A. Principles of International Commercial Contracts

235. The Working Group for the preparation of a third edition of the UNIDROIT Principles of International Commercial Contracts at its fifth session in Rome, from 24 to 26 May 2010, seized of the revised draft Chapters on: Draft rules on restitution, Revised comments to Article 1.4, Draft [Chapter] [section] on illegality, Draft Chapter on Plurality of Obligors and/or Obligees; Draft Chapter on Conditions.[78] The Working Group was requested to submit the revised and final version at the earliest considering that they must be edited and submitted for approval of the Governing Council in its 2011 session and the volume would be distributed by June 2011.[79]

236. The draft Rules on Restitution[80] comprise of three articles dealing with restitution in case of avoidance (Article 3.18) and with restitution in case of termination (Articles 7.3.6 and 7.3.7). Other provisions on restitution are Article 2 of the draft Chapter on Illegality[81] and Article 5 of the draft Chapter on Conditions[82].

B. Progress made on the Model Law on Leasing

237. The Model Law on Leasing was finalised and adopted at the Joint Session of the UNIDROIT General Assembly and the UNIDROIT Committee of Governmental Experts held in Rome, November 2008. The Secretariat was mandated to prepare Official Commentary to the Model Law and place it during the 89th session of the Governing Council held in Rome from 10 to 12 May 2010. In this regard, two sets of draft official commentaries (March and May 2010)[83] inclusive of Historical Background, Preamble and Article 1 - 24, have been prepared and placed by the UNIDROIT Secretariat at the recent Governing Council Meeting.

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[78] See Report of the Working Group for the preparation of Principles of International Commercial Contracts (3rd) Fifth session held at Rome, 24 – 28 May 2010, document no. UNIDROIT 2010 - Study L – Doc. 114 to UNIDROIT 2010 - Study L – Doc. 119.

[79] See http://www.unidroit.org/english/documents/2010/study50/s-50-misc30-e.pdf for Summary Report of the Fifth Session.

[80] See UNIDROIT 2010 - Study L – Doc. 114.

[81] See UNIDROIT 2010 - Study L – Doc. 116.

[82] See UNIDROIT 2010 - Study L – Doc. 118.

[83] See Official Commentary as prepared by the UNIDROIT Secretariat on Model Law on Leasing, document no. UNIDROIT 2010 – Study LIXA – Doc. 23 and UNIDROIT 2010 – Study LIXA – Doc. 24.

C. International Interests in Mobile Equipment

238. The work in progress in relation to legislative activity of the UNIDROIT are the following:

(i) Preliminary Draft Space Protocol.
(ii) a future Protocol to the Cape Town Convention on agricultural, construction and mining equipment was proposed, which the Council recommended for inclusion in the Work Programme for the Triennium 2011-2013.; and
(iii) Promotion of the work relating to international interests in mobile equipment.

239. The Committee of Governmental Experts for the preparation of a Draft Protocol to the Cape Town Convention on Matters specific to Space Assets and authorised the convening by the Secretariat of a fifth session of that Committee to resolve the outstanding issues. The Council would expect to be able to authorise the holding of a Diplomatic Conference for adoption of the resultant draft Protocol, at its 90th session, in 2011.[84] At its 89th session, the UNIDROIT Governing Council authorised the Secretariat to convene a fifth session of the Committee of Governmental Eexperts, which was held in Rome from 21 to 25 February 2011.[85] In line with the statements made in the concluding part of the fourth session regarding future work, the Secretariat, moreover, organised meetings of both the Informal Working Group of the Committee of Governmental Experts on limitations on remedies and the Informal Working Group of the Committee of Governmental Experts on default remedies in relation to components, as well as consultations with representatives of the international commercial space, financial and insurance communities, in Rome from 18 to 21 October 2010. The text of the revised Preliminary Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets was amended by the UNIDROIT Committee of Governmental Experts during its fourth session, held in Rome from 3 to 7 May 2010.

240. With regard to Cape Town Convention, it is decided that informal consultations with relevant sectors, including industry sectors would be conducted so as further to develop an understanding of the potential scope and advantages of the project.

D. Transactions on International and Connected Capital Markets

241. The UNIDROIT Convention on Substantive Rules regarding Intermediated Securities was adopted by the Diplomatic Conference and the draft official commentary on that Convention is under progress. One of the important achievements of the UNIDROIT was the adoption of the Convention on Substantive Rules regarding Intermediated Securities at the final session of the Diplomatic Conference held in Geneva from 5 to 9 October 2009. The draft was prepared by four sessions of a Committee of Governmental Experts of the UNIDROIT and a first session of the Diplomatic Conference held in Geneva in September 2008. Promotion of the work on capital markets remains.

242. The triennial work programme for the year 2009 - 2011 of the UNIDROIT as traced by the Governing Council at its Eighty-Eighth Session held in Rome, from 20 to 23

84 See report of the UNIDROIT Committee of Governmental Experts for the preparation of a Draft Protocol to the Convention on International Interests in Mobile equipment on matters specific to Space Assets, Fourth Session, Rome, 3 - 7 May 2010, document no. UNIDROIT 2010 - C.G.E./Space Pr./4/W.P. 3 rev.
85 See Report: UNIDROIT 2011 - C.G.E. Space Pr./5/Report.

April 2009 are as follows: (i) Proposal for a Convention on the Netting of Financial Instruments; (ii) Study for an International Legislative Project on (Contractual) Counterparty Classification, (iii) Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets, (iv) Possible Future Work on Civil Liability for Satellite-based Services; (v) Proposal for a Model Law on the Protection of Cultural Property; and (vi) Possible Future Work in the Area of Private Law and Development. However, the Governing Council at its 89th session held in Rome from 10 to 12 May 2010, examined various topics proposed for inclusion in the UNIDROIT's Work Programme but recommended the General Assembly of the UNIDROIT to give priority to finalising the three outstanding legislative topics and defer any discussion of other items to its sixty-sixth session to be held in 2010.

243. UNIDROIT Study Group on Principles and Rules on the Netting of Financial Instruments held its first meeting from 18 to 21 April 2011. Prior to this, at its 67th session, in December 2010, the General Assembly of UNIDROIT approved the work programme for the triennium 2011-2013 and endorsed the recommendation of the Governing Council concerning the development of an international instrument on netting and assigned the highest level of priority to this subject. It had commissioned a study assessing the extent of legal risk arising out of situations involving cross-jurisdictional netting and identifying the causes of legal obstacles to the proper operation of netting agreements. Additionally, the study explores possible solutions and appropriate steps to take, if any. Further, a Preliminary draft Report on the need for an international instrument on the enforceability of close-out netting in general and in the context of bank resolution is being discussed.

V. REPORT ON THE WORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH)

244. The Council on General Affairs and Policy met from 5 to 7 April 2011 reviewed the work progress of the Hague Conference. The Permanent Bureau of the Conference emphasised that the Conference should venture into drafting new instruments in order to maintain its global leadership in the field of private international law.[86] In future works, the Permanent Bureau would discuss on the following issues: Choice of law in international contracts, Treatment of foreign law, Protocol to the 1980 Child Abduction Convention, Protocol to the 2007 Child Support Convention regarding international recovery of maintenance of vulnerable persons; and legal issues relating to economic migrants. The present report would highlight the developments in the following two areas, (i) Inter-country adoption, and (ii) Choice of Law in International Contracts.

A. Intercountry Adoption

245. From 17 to 25 June 2010, a Special Commission meeting was held in The Hague, wherein the objective of the Commission was to review the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption and to achieve consensus on the main elements of a Guide to Good Practice on Accreditation and Adoption. The conclusions and recommendations adopted by the Commission contains specifications regarding:

(i) Abduction, Sale and Traffic in Children and their Illicit Procurement in the context of Intercountry Adoption;
(ii) Draft Guide to Good Practices on Accreditation; and
(iii) Review of Practical Operations Convention; that dealt with Guide to Good Practice No 1, Mutual support and assistance in applying the safeguards of the Convention, Selection, counselling and preparation of the prospective adoptive parents, Certificate of conformity under Article 23, Recognition and effects of adoption (Arts 23 and 24), Private and independent adoptions, International surrogacy and intercountry adoption.

246. The Special Commission reiterated the value of the 1996 Convention on the International Protection of Children in the context of cross-border placement of children as well as other international child protection situations. Also that the Special Commission stressed the usefulness of linking the application of the Hague Adoption Convention of 1993 to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (the Apostille Convention). In the light of the high number of public documents included in a typical adoption procedure, the Special Commission recommended that States Parties to the Adoption Convention but not to the Apostille Convention consider the possibility of becoming a party to the latter.

B. Choice of Law in International Contracts

247. The Council on General Affairs 2011 welcomed the progress made by the Working Group, notably the adoption of draft articles, and encouraged the continuation of the work. Upon completion of the draft articles by the Working Group, the Permanent Bureau is invited to report back to the Council and present a succinct document prepared by the

[86] See Annual Report 2010 of the Hague Conference on Private International Law.

Working Group highlighting the substance of the draft articles and indicating the policy choices involved. The Council decided that the draft articles and the commentary prepared by the Working Group should be reviewed by a Special Commission at a later stage.

248. Regarding future work of the Working Group, these topics would be discussed, (i) Accessing the content of foreign law and the need for the development of a global instrument in this area, Desirability and feasibility of a protocol to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Continuation of the Judgments Project, The application of certain private international law techniques to aspects of international migration, Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements, Property law aspects of moveable assets, and so on.

VI. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

249. The UNCITRAL during its forty-third session has adopted a number of important texts. The first major one was the adoption of the revised UNCITRAL Arbitration Rules, 2010 which were originally adopted in 1976. The revision was necessitated in order to keep pace with the necessary changes and needs of the present day international trade system and arbitral trade practice. It is certainly hoped that the revised UNCITRAL Arbitration Rules will significantly enhance the efficiency of arbitration under the revised Rules. The 2010 UNCITRAL Arbitration Rules are considered to be a welcoming development in the arena of international commercial arbitration. The revised rules would include, more provisions dealing with, amongst others, multiple parties arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal. A number of innovative features contained in the Rules whose aim is to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness on costs and a review mechanism regarding the costs of arbitration. These revisions will ensure that the UNCITRAL Arbitration Rules will continue to be relevant, despite changing circumstances, and will be the preferred rules for international commercial arbitration for many years to come.

250. It is welcoming that the Kuala Lumpur Regional Arbitration Centre (KLRCA) which is established under the auspices of the Asian-African Legal Consultative Organization (AALCO) is the first Arbitration Centre to adopt the revised UNCITRAL Arbitration Rules on 15 August 2010.[87]

251. Further, the UNCITRAL also adopted 'the UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property'. In this regard, AALCO Secretariat hopes that while dealing with Security Rights in intellectual property, the Supplement would help States in assessing the economic efficiency of their secured transaction regimes as well as their intellectual property regimes and in revising or adapting legislation relevant to secured transaction and intellectual property. Further, the overall objective of this Guide is to promote low-cost credit by enhancing the availability of secured credit. In line with this objective, the draft Supplement is intended to make cheaper and more accessible credit available to intellectual property owners and other intellectual property rights stakeholders, thus enhancing the value of intellectual property

[87] See UN Press Release, Arbitration Centre Adopts UNCITRAL Arbitration Rules (as revised in 2010), UNIS/L/145 dated 20 August 2010.

rights. The draft Supplement, however, seeks to achieve this objective without interfering with fundamental policies of law relating to intellectual property.

252. As regards the adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law, dealing with the treatment of enterprise groups in insolvency, the Commission noted that the business of corporations is increasingly conducted, both domestically and internationally, through enterprise groups, which are therefore an important feature of the global economy and significant to international trade and commerce. Notwithstanding that significance and the importance of knowing how a group will be treated in insolvency if its business fails, as well as the need for fast and efficient resolution of its financial difficulties, the States recognized enterprise groups as distinct legal entities or had a comprehensive regime for their treatment in insolvency. Therefore, in order to provide timely guidance to States on how to develop and improve the administration of the insolvency of enterprise groups, both domestically and in the cross-border context, the part three of the UNCITRAL Legislative Guide on Insolvency Law was adopted by the Commission.

253. With regard to the progress made by Working Group I (Procurement) which is also engaged with the work of updating UNCITRAL Model Law on Procurement of Goods, Construction of Services, adopted in 1994, with a view to reflect in it new practices, in particular those resulting from the use of electronic communications in public procurement, and to incorporate the experience gained in the use of the 1994 Model Law, the AALCO Secretariat is confident that the Working Group would be able to complete its work during its next two sessions, so that the draft revised model law may be adopted by the Commission at its next session in 2011.

254. It is also important to mention that all other Working Groups established by the Commission have made considerable progress in the forty-third session. AALCO Secretariat hopes that the Member States would continue to support and actively participate in the work of the UNCITRAL and its Working Groups. Further, the AALCO Secretariat encourages the Member States to implement the instruments adopted by the UNCITRAL, in order to promote uniformity and consistency in the international trading system.

255. The fifty-seventh session of the UNCTAD's Trade and Development Board mainly focused among other things on towards sustainable recovery after the global economic and financial crisis. The discussion during the sessions witnessed the concerns on how Member States have dealt with the crisis and witnessed warnings as to effective monetary regulatory mechanism to be put in place in developing countries, failing which there could be severe implications on the employment sector. The regulatory bodies of countries must take note that though immediate stability may have happened but larger and new economic model is required for strengthening the economic base of a country. Hence, it is essential to share experiences among Member States of AALCO and also consider the platform of AALCO to strengthen and exchange information, strategies and regulatory mechanisms that would be useful for nations as well for dealing with such financial crises in future.

256. UNIDROIT's current legislative activities relate to the need of the hour in terms of strengthening financial sector, which is evident from emphasis on netting of financial instruments. Various Model laws and principles have been adopted at the Diplomatic Conferences especially on leasing which currently focuses on official commentary to

facilitate member countries to build upon their domestic legislation. In this regard, the Member States of AALCO needs to actively participate in order to facilitate functional and efficient model laws and principles that the Organization is preparing. Alongside this, the research works carried out by the Hague Conference on Private International Law (HCCH) also should be closely monitored and efficiently participate to address the issues faced by AALCO Member States which would add strength to furnishing consolidated view from the Asian-African perspective. The role played by HCCH is significant in the field of private international law. The convergence of private and public international law, cross-border influences of private laws is witnessed which marks the varied interests of member countries in linking international law matters with domestic law.

VII. ANNEX

SECRETARIAT'S DRAFT
AALCO/RES/50/SD 12
1 JULY 2011

REPORT ON THE WORK OF THE UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW
(*Deliberated)*

The Asian-African Legal Consultative Organization at its Fiftieth Session,

Considering the Secretariat Document No. AALCO/50/COLOMBO/2011/SD 12,

Noting with appreciation the introductory statement of the Deputy Secretary-General;

Being aware of the revised version of the UNCITRAL Arbitration Rules, 2010; the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property; and Part Three of the UNCITRAL Legislative Guide on Insolvency Law on the Treatment of Enterprise Groups in Insolvency at its forty-third session;

Welcoming the decision of the UNCITRAL to take up new topics in the areas of settlement of commercial disputes, security interests and insolvency law and undertake work in the area of online dispute resolution;

Taking note of the adoption of UNIDROIT Model Law on Leasing and also the on going work on its official commentary;

.

1. **Expresses** its satisfaction for AALCO's continued cooperation with the various international organizations competent in the field of international trade law and hopes that this cooperation will be further enhanced in the future;

2. **Urges** Member States to consider adopting, ratifying or acceding to the instruments prepared by the UNCITRAL; and

3 **Decides** to place this item on the provisional agenda of the Fifty-First Session.