CONTENTS

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

Background

1. AALCO Secretariat has been in the practice of preparing reports to the Annual Session of the Organization that focus on the work of the UNCITRAL and other International Organizations in the field of international trade law. With the onset of the globalization process and the establishment of the World Trade Organization (WTO), the task of legislating new rules and harmonizing the existing laws relating to international trade has gained momentum.

2. Against this backdrop, this report by the Secretariat is intended to provide an overview of the work of the UNCITRAL and other International Organizations engaged in the international trade law, with particular emphasis on the works of UNCITRAL, namely:

(a) UNCITRAL (United Nations Commission on International Trade Law)

(b) UNCTAD (United Nations Conference on Trade and Development)

(c) UNIDROIT (International Institute for the Unification of Private Law)

(d) Hague Conference on Private International Law

1. REPORT ON THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) AT ITS THIRTY-NINETH SESSION

I. INTRODUCTION

1. The General Assembly of the United Nations, in the year 1966, by its Resolution 2205 (XXI) established the United Nations Commission on International Trade Law (hereinafter referred to as 'UNCITRAL' or 'Commission') as the primary organ of the United Nations system to harmonize and develop progressive rules in the area of international trade law. A substantial part of the Commission's work is carried out in meetings of the Working Groups, while the Commission meets annually to review and adopt recommendations towards guiding the progress of work on the various topics on its agenda. The Commission is also mandated to submit an annual report to the General Assembly, as to the tasks accomplished at its sessions.[1]

2. The thirty-ninth session of the UNCITRAL was held in New York from 19 June to 7 July 2006. The Commission had on its agenda, *inter alia*, the following topics for consideration:

(i) Finalization and adoption of the legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of Article II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;

(ii) Preliminary approval of a draft UNCITRAL legislative guide on secured transactions;

(iii) Public Procurement; and

(iv) Transport Law.

3. The main achievements of the Session were the approval in principle of the key objectives and major policies of a draft legislative guide on secured transactions and adoption of revised legislative provisions on interim measures of protection and the form of the arbitration agreement.[2] This brief report is primarily focused on examining the UNCITRAL's deliberations at its thirty-ninth session relating to the above topics.

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[1] Membership of UNCITRAL: The Commission is composed of 60 Member States elected by the United Nations General Assembly. Membership is structured so as to be representative of the world's geographic regions and its principal economic and legal systems. Members of the Commission are elected for six-year terms. Current members are: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Benin, Brazil, Cameroon, Canada, Chile, China, Colombia, Croatia, Czech Republic, Ecuador, Fiji, France, Gabon, Germany, Guatemala, India, Iran, Israel, Italy, Japan, Jordan, Kenya, Lebanon, Lithuania, Madagascar, Mexico, Mongolia, Morocco, Nigeria, Pakistan, Paraguay, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Serbia and Montenegro, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, United Kingdom, United States, Uruguay, Venezuela and Zimbabwe.

[2] UN Press Release, UNIS/L/102, 7 July 2006.

II. ARBITRATION

A. Background

4. The Commission, it may be recalled that, at its thirty-second session (1999), had a note entitled "Possible future work in the area of international commercial arbitration," which discussed the desirability and feasibility of further development of the law of international commercial arbitration. The Commission had entrusted this task to its Working Group II (Arbitration and Conciliation) and had decided that the priority items for the Working Group II should be requirement of written form of the arbitration agreement, enforcement of interim measures of protection and possible enforcement of an award that had been set-aside in the State of Origin. The Working Group II commenced its work at its thirty-third session in March 2000.

5. At its thirty-seventh session, in 2004, the Commission noted that the Working Group II had continued its discussions on a draft text for a revision of Article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") on the power of an arbitral tribunal to grant interim measures of protection, and on a draft provision on the recognition and enforcement of interim measures of protection issued by an arbitral tribunal (for insertion as a new article of the Model Law, tentatively numbered 17 bis), including on how to deal with *ex parte* interim measures in the Model Law. The Commission also noted that the Working Group II had yet to complete its work in relation to draft Article 17 ter dealing with interim measures issued by State courts in support of arbitration and in relation to the "writing requirement" contained in Article 7 (2) of the Model Law and Article II (2) of the New York Convention.

6. At its thirty-eighth session, in 2005, the Commission noted that the Working Group had continued its discussion on a draft text for a revision of Article 17 of the Model Law on International Commercial Arbitration on the power of an arbitral tribunal to grant interim measures; draft provisions on the recognition and enforcement of interim measures issued by an arbitral tribunal; and interim measures issued by State courts in support of arbitration. The Commission noted that the Working Group had yet to complete its work in relation to the "writing requirement" contained in Article 7 (2) of the Model Law and Article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"). As expected, the Working Group completed its work in respect of those issues and the Secretariat was requested to circulate the draft legislative provisions on interim measures and the form of arbitration agreement, and the draft declaration, to Governments for their comments, with a view to consideration and adoption of the draft legislative provisions and declaration by the Commission at its thirty-ninth session.

B. Considerations at the current Session of the Commission

7. At its thirty-ninth session, the Commission had before it the reports of the forty-third and forty-fourth sessions of the Working Group.[3] The Commission also had before it the following documents: (i) a note by the Secretariat containing the newly revised version of the draft model legislative provisions on interim measures and remarks on the draft provisions[4]; (ii) a note by the Secretariat containing the newly revised version of the draft model legislative provisions on the form of arbitration agreement and remarks

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[3] Vienna, 3-7 October 2005A/CN.9/589 and New York, 23-27 January 2006 A/CN.9/592, respectively.

[4] A/CN.9/605.

on the draft provisions[5]; (iii) a note by the Secretariat containing the newly revised version of the declaration on the interpretation of Articles II (2) and VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention and remarks on the declaration adopted by Working Group II (Arbitration and Conciliation) at its forty-fourth session;[6] and (iv) a compilation of comments relating to provisions on interim measures and the form of arbitration agreement, and to the declaration, by Governments and international organizations. The Commission was expected to finalize and adopt the draft articles which are discussed below.

C. Draft Legislative Provisions on Interim Measures and Preliminary Orders and Forms of Agreement considered by the Commission

Section 1. Interim measures[7]

8. One of the main features of the Model Law on International Commercial Arbitration is the ability to obtain measures of interim protection against a party to the arbitration in jurisdictions other than the place of arbitration. The interim measures may include- to maintain or restore the status quo; to prevent or require action to prevent imminent harm; to preserve assets out of which a subsequent award may be satisfied and/or to preserve evidence. However, while an arbitral 'award' is enforceable under the terms of the 1958 New York Convention, the extent to which interim or partial award, even when termed 'orders' is enforceable under the Convention is not settled. Because of this, the availability of the interim measures of protection largely depends on national law. Added to this is the fact that interim measures were increasingly being found in the practice of international commercial arbitration, and the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures.

9. General agreement was expressed as to the need for a harmonized and widely acceptable model legislative regime governing interim measures granted by arbitral tribunals and their enforcement as well as interim measures ordered by courts in support of arbitration. The Commission recalled that the draft legislative provisions on interim measures and preliminary orders were the result of extensive discussion in the Working Group. The Commission recalled as well that the Working Group, at its forty-second session, had agreed to include a compromise text of the provisions on preliminary orders, on the basis that those provisions would apply unless otherwise agreed by the parties; that it be made clear that preliminary orders had the nature of procedural orders and not of awards; and that no enforcement procedure would be provided for such orders in section 4.

Chapter IV bis. Interim measures and preliminary orders[8]

Section 1—Interim measures

Article 17—Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

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5 A/CN.9/606.

6 New York, 23-27 January 2006, A/CN.9/592

7 See Settlement of commercial disputes: Interim measures, Note by the Secretariat A/CN.9/605, 25 April 2006

8 The text of chapter IV bis on interim measures and preliminary orders, as adopted by the Working Group at its forty-fourth session.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

10. Paragraph 1 is in part a reproduction of the wording of Article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration. In the case of paragraph 2 of Article 17, there was an agreement in the Working Group that the phrase "whether in the form of an award or in another form", which was inspired from the UNCITRAL Arbitration Rules, was sufficiently neutral to reflect the intention of the Working Group not to create any preferred form in which an interim measure should be issued. It was said that it would be undesirable for the draft paragraph to be overly prescriptive in respect of the form that an interim measure should take. There was also an agreement to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph (2), the list could be expressed as an exhaustive one.

11. During deliberations in the Commission, it was questioned whether the words "or prejudice to the arbitral process itself", at the end of subparagraph (b), should be retained. It was noted that the purpose of those words was to clarify that an arbitral tribunal had the power to prevent obstruction or delay of the arbitral process, including by issuing anti-suit injunctions. The Commission noted that, at previous Sessions, the Working Group had expressed a preference for the inclusion of anti-suit injunctions in draft Article 17. It was also recalled that the words in question should not be understood as merely covering anti-suit injunctions but rather as more broadly covering injunctions against the large variety of actions that existed and were used in practice to obstruct the arbitral process.

Article 17 bis—Conditions for granting interim measures

(1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

12. A proposal to add the words "prima facie" to subparagraph (b) so that the arbitral tribunal would not be required to make a full determination on the question of possibility of success on the merits was not supported. In rejecting that proposal, the Commission noted that the term "prima facie" was susceptible to differing interpretations. It was recalled that the Working Group's intention in drafting that

subparagraph was to provide a neutral formulation of the standard of proof. Further, it was observed that the words "provided that" suggested that the second part of the sentence was a condition for the first part and therefore did not reflect the intention of the Working Group. In order to address that concern, a proposal was made to delete those words and split the subparagraph into two sentences. After discussion, it was agreed that subparagraph (b) should read as follows: "*There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination*".

Section 2—Preliminary orders

13. In the legislative provisions, the term "preliminary order" is used, instead of "interim measure", to describe a measure issued on an *ex parte* basis. This term emphasizes the temporary and extraordinary nature of the order, as well as its distinct scope and purpose. At its forty-second session after extended discussion, the Working Group agreed to include a compromise text of the provisions on preliminary orders, on the basis of the principles that: those provisions would apply unless otherwise agreed by the parties; it be made clear that preliminary orders had the nature of procedural orders and not of awards; and no enforcement procedure would be provided for such orders in section 4.

> **Article 17 ter—Applications for preliminary orders and conditions for granting preliminary orders**
>
> (1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
>
> (2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
>
> (3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1)(a), is the harm likely to result from the order being granted or not.

14. Doubts were expressed as to whether or not the notion of "preliminary order" should be regarded as a subset of the broader notion of "interim measure". It was suggested that, if a preliminary order was understood to be a subset of an interim measure, then the distinction between them might be regarded as artificial and might lead to difficulties in implementation and practice. The Working Group noted that, although a preliminary order might be regarded as a subset of an interim measure, it should be distinguished from an interim measure in view of its narrower purpose, which was limited to preventing the frustration of the specific interim measure being applied for. Another distinctive feature of a preliminary order was that it was subject to strict time limits as set out in Article 17 quater. It was stated that a preliminary order was effectively to provide a "bridging device" until an inter parties hearing could take place in respect of the requested interim measure. Article 17 ter was adopted in substance by the Commission without modification.

> **Article 17 quater—Specific regime for preliminary orders**
>
> (1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of

the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

15. It was noted that the arbitral tribunal had an obligation to communicate documents and information to the party against whom the preliminary order was sought and it was suggested that it be clarified that that obligation applied whether the arbitral tribunal issued or refused to issue the order. The Commission noted that the Working Group agreed for clarification of that obligation to be included in any explanatory material accompanying Article 17 quater.

16. The Working Group and the Commission considered at length the issue as to whether an enforcement regime should be provided in respect of preliminary orders. The need for including such a regime was questioned given the temporary nature of a preliminary order and the fact that it could raise practical difficulties, such as whether notification to the other party of the preliminary order should be deferred until after a court had enforced the order. The Commission further noted that non-enforceability of preliminary orders was central to the compromise reached at the forty-second session of the Working Group. Article 17 quater was adopted in substance by the Commission without any modification.

Section 3—Provisions applicable to interim measures and preliminary orders

Article 17 quinquies—Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

17. Article 17 quinquies was adopted in substance by the Commission without any modification.

Article 17 sexies—Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

18. Article 17 sexies was adopted in substance by the Commission without any modification.

Article 17 septies—Disclosure

(1) The party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (1) of this article.

19. After considerable discussion, the Commission adopted the proposal to amend the paragraph 1 as: "*The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted*." The second sentence of paragraph 2 would then be amended as follows: "*Thereafter, paragraph 1 of this article shall apply*." It was also agreed that the explanatory material should clarify the scope of application of the disclosure obligation contained in Article 17 septies. Article 17 septies was adopted with these modifications.

Article 17 octies—Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

20. Article 17 octies was adopted in substance by the Commission without any modification.

Section 4—Recognition and enforcement of interim measures

Article 17 novies—Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 decies.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

21. Article 17 novies was adopted in substance by the Commission without any modification.

Article 17 decies—Grounds for refusing recognition or enforcement[*]

[*] The conditions set forth in Article 17 decies are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

(1) Recognition or enforcement of an interim measure may be refused only: (a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or (ii) The arbitral tribunal's decision with respect to the provision of

security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36, paragraphs (1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

22. Article 17 decies was adopted in substance by the Commission without any modification.

Section 5—Court-ordered interim measures

Article 17 undecies—Court-ordered interim measures

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

23. The purpose of Article 17 undecies was to preserve the power of courts to issue interim measures in support of arbitration, but should not be understood as expanding the powers of the court for interfering in the arbitral process. The Commission agreed that that matter should be clarified in any explanatory material to that provision. After discussion, the Commission agreed that Article 17 undecies would read as follows: "*A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration*".

D. Draft Legislative Provision on the Form of Arbitration Agreement

24. The Commission exchanged views on the draft legislative provision recalling that, in order to ensure a uniform interpretation of the form requirement that responded to the needs of international trade, it was desirable to prepare a modification of Article 7, paragraph 2, of the Arbitration Model Law, with an accompanying guide to enactment and to formulate a statement addressing the interpretation of Article II,

paragraph 2, of the New York Convention, that would reflect a broad and liberal understanding of the form requirement.

25. It was recalled that the Working Group's intention in revising Article 7 of the Arbitration Model Law was to update domestic laws on the question of the writing requirement for the arbitration agreement, while preserving enforceability of such agreements as foreseen in the New York Convention. The Commission had before it two texts for consideration, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft Article 7) and the other omitted the writing requirement altogether (the alternative proposal).[9] Views were expressed that both the alternative proposal and the revised draft Article 7 provided useful options to address concerns relating to the writing requirement. A suggestion was made and adopted by the Working Group at its forty-fourth session that both the revised draft Article 7, as amended by the Working Group, and the alternative proposal would be offered to States as alternative texts.

1. Revised draft Article 7 of the Arbitration Model Law

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(2) The arbitration agreement shall be in writing.
(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

26. It was recalled that paragraph 1 reproduced Article 7, paragraph 1, of the Arbitration Model Law. Paragraph 3 defined the writing requirement and sought to clarify how the writing requirement could be fulfilled. The Commission noted that the purpose of the writing requirement was to provide a record as to the consent of the parties to arbitrate or as to the content of the arbitration agreement. It was observed that what was to be recorded was the content of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the formation of the agreement. The Commission confirmed that paragraph 3 dealt with the definition of the form of the arbitration agreement and the question whether the parties actually reached an agreement to arbitrate was a substantive issue to be left to national

[9] The text of the draft legislative provisions considered by the Commission at the current session was as contained in document A/CN.9/606.

legislation. It was also pointed out that the question of proof of the content of the agreement and that of proof of the consent could not be dissociated from each other, and the writing could only prove existence of the arbitration agreement if at the same time it established the parties' agreement to arbitrate.

27. The Commission confirmed that a mere reference in an oral contract to a set of arbitration rules or to a law governing the arbitral procedure were cases that were not intended to be covered by paragraph 3 and that such a clarification should be included in any explanatory material accompanying that paragraph. The Commission agreed that further clarification as to the factual situations that were intended to be covered by paragraph 3 could be included in any explanatory material accompanying that provision.

2. Alternative proposal

> **Article 7. Definition of arbitration agreement**
>
> "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

28. The Commission noted that the alternative proposal omitted entirely the writing requirement and thereby recognized oral arbitration agreements as valid. A question was raised whether the alternative proposal should be retained. It was said that the revised draft Article 7 established the minimum requirements that should apply in respect of the form of arbitration agreement, whereas the alternative proposal went much further and did away with all form requirements in order, for example, to recognize the validity of oral arbitration agreements. While the alternative proposal met with considerable interest, the view was expressed that it might depart too radically from traditional legislation, including the New York Convention, to be readily acceptable in many countries. After discussion, the alternative proposal was adopted in substance by the Commission without modification.

E. Draft Declaration Regarding the Interpretation of Articles II (2) and VII (1) of the New York Convention

29. The text of the draft declaration regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the New York Convention, was considered and adopted by the Commission.[10] A question was raised as to whether it was appropriate for the Commission to issue a declaration on the interpretation of a multilateral treaty. The Commission recalled that it had a mandate, as defined in its founding General Assembly Resolution 2205 (XXI), inter alia, to promote "ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade". Therefore, issuing a recommendation that was persuasive rather than binding in nature, for the benefit of users of the treaty, including law-makers, arbitrators, judges and commercial parties, was within the mandate of the Commission. Such a recommendation was said to be appropriate and, in the circumstances, particularly desirable as it would encourage the development of rules favouring the validity of arbitration agreements in a wider variety of situations and encourage States to adopt the revised version of Article 7 of the Arbitration Model Law.

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[10] See A/CN.9/607

30. The Commission noted the discussions of the Working Group on the form of the document, including the question whether the document should take the form of a declaration or a recommendation. The Commission agreed that the purpose of the document, in line with the Commission's mandate, was to propose a harmonizing interpretation of certain provisions of the New York Convention, without interfering with the competence of the State parties to the New York Convention to issue binding declarations regarding the interpretation of that treaty. Against that background, the Commission agreed that the most appropriate form for such a document was that of a recommendation, instead of a declaration which could be misinterpreted as to its nature. The title of the document was amended accordingly. The Commission also agreed to bring forward the reference to its mandate in the opening paragraphs of the recommendation.

F. Adoption of Legislative Provisions and Recommendation

31. The Commission, after considering the text of the draft model legislative provisions relating to the definition and form of arbitration agreements and interim measures, and the text of the draft recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the New York Convention, adopted the decision at its 834th meeting on 7 July 2006.

32. The Commission adopted revised legislative provisions on interim measures of protection and the form of the arbitration agreement. The new provisions on arbitration reflect the need to align the UNCITRAL Model Law on International Commercial Arbitration, concluded in 1985 and adopted by some 50 States, with current practices in international trade, particularly with respect to the form in which arbitration agreements are concluded and the granting of interim measures of protection. These provisions, together with appropriate explanatory material, will significantly update the provisions of the Model Law and facilitate the use of arbitration as a method of settling disputes arising in the context of international commercial relations.

33. The Commission also adopted a recommendation regarding the interpretation of Articles II (2) and VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dealing with the form of the arbitration agreement, which will greatly promote the uniform interpretation and application of the Convention.

G. Future work on Arbitration

34. With respect to future work on arbitration, the Working Group suggested the following issues for possible future work of the Commission: possible revision of the UNCITRAL Arbitration Rules; arbitrability of intra-corporate disputes (and possibly other issues relating to arbitrability, for example, arbitrability in the fields of intellectual property rights, investment disputes, insolvency or unfair competition); online dispute resolution (ODR); and State immunity in light of the recently adopted United Nations Convention on Jurisdictional Immunities of States and Their Property. Other possible topics suggested were the revision of Article 27 of the Model Law or addressing the impact of anti-suit injunctions on international arbitration by appropriately amending the Model Law. It was also suggested that the Working Group could consider the impact of arbitration on third parties as well as multi-party arbitrations. The Commission gave priority to revision of the UNCITRAL Arbitration Rules and consideration of the arbitrability of intra-corporate disputes (and possibly other issues relating to arbitrability for example in the fields of intellectual property rights, investment disputes, insolvency or unfair competition).

III. SECURITY INTERESTS

35. The Commission, at its thirty-third session (2000), had considered a report of the Secretary-General on possible future work in the area of secured credit laws.[11] The proposal had argued that the modern secured credit laws could have significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties of the developed countries and developing countries, and in the share such parties had in the benefits of international trade.

36. Reflecting on the note of the Secretariat on security interests in its thirty-fourth session (2001),[12] the Commission felt that work should focus on security interests in goods involved in a commercial activity, including inventory. After discussion, the Commission decided to entrust a working group with the task of developing an efficient legal regime for security interests in goods involved in a commercial activity. The Working Group VI (Security Interests), which is preparing a draft legislative guide on secured transactions, has held until the thirty-ninth session of the Commission in 2006, ten one-week Sessions during which it considered draft chapters of the draft legislative guide prepared by the Secretariat.

A. Considerations at the current Session of the Commission

37. At its thirty-ninth session, the Commission had before it the reports of the eighth, ninth and tenth sessions of the Working Group.[13] The Commission also had before it draft recommendations.[14] After conclusion of its discussion of the recommendations of the draft guide, the Commission expressed its appreciation to the Working Group for the results achieved so far in the development of the draft guide and noted that the views expressed and the suggestions made would be taken into account in the next version of the draft guide. In addition, the Commission briefly considered the terminology of the draft guide, which was not part of the recommendations but was intended to facilitate their understanding. It was stated that a definition of the term "consumer goods" could be included in the terminology as several recommendations referred to consumer goods.

38. The Commission approved in principle the key objectives and major policies of a draft legislative guide on secured transactions, and, in particular, the scope of the draft legislative guide, the key objectives, the approaches to security, the creation of a security right, the effectiveness of a security right against third parties, the priority of a security right over the rights of competing claimants, the pre-default rights and obligations of the parties, the rights and obligations of third-party obligors, the enforcement of a security right, insolvency, acquisition financing devices, conflict-of-laws and transition.

39. It was also decided by the Commission that the Working Group VI would complete its work on the draft legislative guide during its next two Sessions to be held in 2006 and 2007 and present the draft legislative guide to the Commission for final discussion and adoption at its fortieth session in 2007.

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11 A/CN.9/475

12 A/CN.9/496

13 A/CN.9/588, A/CN.9/593 and A/CN.9/603, respectively.

14 A/CN.9/WG.VI/WP.24 and addenda 1, 2 and 5, A/CN.9/WG.VI/WP.26 and addenda 1 to 7, A/CN.9/WG.VI/WP.27 and A/CN.9/WG.VI/WP.28

B. Future work on Security Interests

40. With respect to future work in the field of secured financing law, the Commission noted that intellectual property rights were increasingly becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In that connection, it was stated that financing transactions with respect to equipment or inventory often included security rights in intellectual property rights as an essential and valuable component. It was also observed that significant financing transactions involving security rights in all the assets of a grantor would typically include intellectual property rights. In order to provide more guidance to States, the suggestion was made that the Secretariat should prepare, in cooperation with international organizations with expertise in the fields of security rights and intellectual property law and in particular the World Intellectual Property Organization (WIPO), a note for submission to the Commission at its fortieth session in 2007, discussing the possible scope of work that could be undertaken by the Commission as a supplement to the draft guide.

41. There was broad support in the Commission for those suggestions. It was stated that particular attention should be paid to the representation of all parts of the relevant industry and experts from various regions of the world. It was also observed that one issue of particular importance related to the enforcement of security rights in intellectual property rights, was jeopardized by their unauthorized use.

IV. PUBLIC PROCUREMENT

42. It may be recalled that the Commission, at its thirty-sixth and thirty-seventh sessions in 2003 and 2004, respectively, considered a possible revision of its 1994 Model Law on Procurement of Goods, Construction and Services, on the basis of the notes by the Secretariat.[15] 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 I (Procurement). The Working Group I 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.

43. **Considerations at the current Session of the Commission:** At its thirty-ninth session, the Commission had before it the reports of the eighth and ninth sessions of the Working Group on Procurement. The Working Group reported on its ongoing revision of the 1994 Model Law on Procurement of Goods, Construction and Services, to reflect new practices, in particular those that resulted from the use of electronic communications in public procurement. The Commission was informed that, at its eighth and ninth sessions, the Working Group continued the in-depth consideration of the topics related to the use of electronic communications and technologies in the procurement process. The Commission noted that, pursuant to the Working Group's decision at its seventh Session to accommodate the use of electronic communications and technologies (including electronic reverse auctions) in the Model Law, the Working Group, at its ninth Session, had come to preliminary agreement on the draft revisions to the Model Law and the Guide that would be necessary in that regard. The Commission

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[15] A/CN.9/539 and Add.1, and A/CN.9/553

also noted that the Working Group had decided that at its subsequent Sessions it would proceed with the in-depth consideration of the proposed revisions to the Model Law and the Guide addressing the remaining aspects of electronic reverse auctions and the investigation of abnormally low tenders, and would take up the topics of framework agreements and suppliers' lists.

44. The Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law.

V. TRANSPORT LAW

45. The Commission, at its twenty-ninth session (1996), had considered a proposal to include in its work programme a review of current practices and laws in the area of international carriage of goods by sea, with a view to establishing uniform rules where no such rules existed and achieving greater uniformity in laws. Since then work has been carried out by the UNCITRAL Secretariat with the cooperation of other international organizations representing various industries. The Commission at its thirty-fourth session (2001), decided to entrust the preparation of draft instrument on transport law to the Working Group III (Transport Law). As to the mandate of the work, the Commission decided that considerations should cover initially port-to-port transport operations (including liability issues). However, the Working Group III was given free hand to study the desirability and feasibility of dealing with door-to-door transport operations, or certain aspects of those operations.

46. At its thirty-seventh (2004) and thirty-eighth (2005) sessions, the Commission reaffirmed its appreciation of the magnitude and complexities of the project, and authorized the Working Group to hold its fourteenth, fifteenth, sixteenth and seventeenth sessions for two-week periods. At its thirty-eighth session, the Commission commended the Working Group for the progress it had made and, in revisiting the issue of establishing a deadline for completion of the project, agreed that 2007 would be a desirable goal.

47. **Considerations at the current Session of the Commission:** At the current Session, the Commission took note of the report of the sixteenth and seventeenth sessions of the Working Group on Transport Law.[16] The Working Group reported on its development of a new international transport Convention with multi-modal application, encompassing innovations such as electronic transport documents. The Commission was informed that, at its sixteenth and seventeenth sessions, the Working Group had proceeded with its second reading of the draft Convention and had made good progress regarding a number of difficult issues, including those regarding jurisdiction, arbitration obligations of the shipper, delivery of goods, including the period of responsibility of the carrier, the right of control, delivery to the consignee, scope of application and freedom of contract, and transport documents and electronic transport records. Also considered by the Working Group were the topics of transfer of rights and, more generally, the issue of whether any of the substantive topics currently included in the draft Convention should be deferred for consideration in a possible future instrument.

48. The Commission was informed that some concerns were expressed regarding the treatment of the issues of scope of application and freedom of contract in the draft Convention. The freedom given to the parties to volume contracts to derogate from

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[16] Vienna, 28 November-9 December 2005, A/CN.9/591 and Corr.1, and New York, 3-13 April 2006, A/CN.9/594, respectively.

provisions of the draft Convention was said to constitute a significant departure from the prevailing regime in transport law Conventions. It was argued that, in view of the broad definition of volume contracts in article 1 of the draft convention, freedom of contract might potentially cover almost all carriage of goods by shipping lines falling within the scope of the draft Convention. It was further argued that the conditions for valid derogation from the draft Convention did not require the express consent to the derogations by both parties, which was said to open up the possibility that standard contracts containing derogating clauses could be submitted to the shippers. It was also noted, in that connection, that freedom of contract was an important element in the overall balance of the draft Convention and that the current text reflected an agreement that had emerged in the Working Group after extensive discussions.

49. With respect to a possible time frame for completion of the draft Convention, the Working Group completed its second reading of the draft Convention at the end of 2006 and the final reading would be completed at the end of 2007, with a view to presenting the draft Convention for finalization by the Commission in 2008. The Commission agreed that 2008 would be a desirable goal for completion of the project, but that it was not desirable to establish a firm deadline at the present stage. The Commission, noting the complexities and magnitude of the work involved in the preparation of the draft convention, authorized the Working Group to hold its Sessions on the basis of two-week Sessions.

VI. POSSIBLE FUTURE WORK IN ELECTRONIC COMMERCE

50. At its thirty-eighth session, in 2005, the Commission had requested the Secretariat to prepare a more detailed study on legal issues related to electronic commerce for consideration by the Commission at its thirty-ninth session in 2006, which should include proposals as to the form and nature of a comprehensive reference document, which the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world.

51. In the current Session, the Commission had before it a note prepared by the Secretariat in consultation with other organizations covering various areas related to electronic commerce, with proposals as to the form and nature of the reference document that would be envisaged. The note identified the following areas as possible components of a comprehensive reference document: (a) authentication and cross-border recognition of electronic signatures; (b) liability and standards of conduct for information-services providers; (c) electronic invoicing and legal issues related to supply chains in electronic commerce; (d) transfer of rights in tangible goods and other rights through electronic communications; (e) unfair competition and deceptive trade practices in electronic commerce; and (f) privacy and data protection in electronic commerce. The note also identified other issues which, although in a more summary fashion, could be included in such a document: (a) protection of intellectual property rights; (b) unsolicited electronic communications (spam); and (c) cyber crime.

52. The Commission reiterated its belief that the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures, and the Convention on Electronic Contracts, provided a good basis for States to facilitate electronic commerce, but only addressed a limited number of issues. Given the variety of issues involved, it was agreed that Member States might need more time, at least to consider the desirability and possible scope of future legislative work on those issues, and that the Commission should postpone a final decision on the topics to be covered until its fortieth session in 2007. The Commission further agreed that its final decision

on that matter might be facilitated if it could review a sample portion of the comprehensive reference document on a discrete topic. The Commission therefore requested the Secretariat to prepare a document dealing specifically with issues related to authentication and cross-border recognition of electronic signatures, for review at its fortieth session in 2007.

VII. POSSIBLE FUTURE WORK IN INSOLVENCY LAW

53. A number of proposals were made for future work to be undertaken by the Commission on the topic of insolvency law, including treatment of corporate groups in insolvency and the use of cross-border protocols in transnational insolvency cases. During the current Session, the Commission had before it notes by the Secretariat reporting on the colloquium held in Vienna from 14 to 16 November 2005, and discussing possible options for future work on insolvency law.[17] After deleberations, the Commission agreed that: a working group should consider the treatment of corporate groups in insolvency, including post-commencement finance, with work to promote practical experience on negotiating and using cross-border Protocols in transnational insolvency cases to be developed informally in consultation with judges and insolvency practitioners. The Commission noted that the topic of arbitrability of insolvency issues and the use of other alternative dispute resolution processes (such as mediation and facilitation) in the context of insolvency had been discussed as a possible topic for future work which would be undertaken by Working Group II (Arbitration and Conciliation), with input from Working Group V (Insolvency Law).

VIII. POSSIBLE FUTURE WORK IN COMMERCIAL FRAUD

54. The Commission considered this subject at its thirty-fifth to thirty-eighth sessions, in 2002 to 2005. At its thirty-seventh session, in 2004, the Commission agreed that it would be useful if, wherever appropriate, examples of commercial fraud were to be discussed in the particular contexts of projects worked on by the Commission so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations. In addition, the Commission agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud to the extent they would help them protect themselves and avoid becoming victims of fraudulent schemes.

55. At its thirty-eighth session, the Commission's attention was drawn to Resolution 2004/26 adopted by the Economic and Social Council (ECOSOC) on 21 July 2004, entitled "International cooperation in the prevention, investigation, prosecution and punishment of fraud, the criminal misuse and falsification of identity and related crimes". The Resolution envisaged an intergovernmental expert group, that would prepare a study on fraud and the criminal misuse and falsification of identity, and develop on the basis of such a study relevant practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL. The resolution also recommended the Secretary-General to designate the United Nations Office on Drugs and Crime (UNODC) to serve as secretariat for the intergovernmental expert group, in consultation with the secretariat of UNCITRAL. At that same Session, the Commission expressed its support for the assistance of the UNCITRAL secretariat in the UNODC project.

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[17] A/CN.9/596 and A/CN.9/597, respectively.

56. At its thirty-ninth session, the Commission heard a progress report of work by the Secretariat on materials listing common features present in typical fraudulent schemes, which had the following main purposes: (a) the formulation of materials that would identify patterns and characteristics of commercial fraud in a manner that would encourage the private sector to mobilize its resources to combat commercial fraud in an organized and systematic manner; (b) to assist governmental bodies in understanding how they might help the public and private sectors to address the problem of commercial fraud; and (c) to assist the criminal law sector in understanding how best to engage the private sector in the battle against commercial fraud.

57. Statements were made that commercial fraud deterred legitimate trade and undermined confidence in established contract practices and instruments. Against that background, it was said that the UNCITRAL transactional and private-law perspective and expertise were necessary for the full understanding of the problem of commercial fraud and were most useful in the formulation of measures to fight it. Statements were made that particular attention should be paid to the increased use by fraudsters of the Internet and to the use of business transactions for money-laundering. The Commission agreed with those statements and concluded that its Secretariat should continue its work in conjunction with experts and other interested organizations with respect to identifying common features of fraudulent schemes, with a view to presenting interim or final materials for the consideration of the Commission at a future Session, and that it should continue to cooperate with the United Nations Office on Drugs and Crime in its study on fraud, the criminal misuse and falsification of identity and related crimes, and that it should keep the Commission informed of the progress of that work.

IX. FORTIETH SESSION OF THE COMMISSION

58. The fortieth session of the Commission will be held in Vienna. The proposed dates are from 18 June to 13 July 2007.

X. AALCO SECRETARIAT'S COMMENTS AND OBSERVATIONS

59. It is indeed commendable that the Commission at its thirty-ninth session was able to finalize and adopt the revised legislative provisions on interim measures of protection and the form of the arbitration agreement. The Commission adopted for inclusion in the UNCITRAL Model Law on International Commercial Arbitration: a revision of Article 17 of the Model Law on the power of the arbitral tribunal to grant interim measures; and legislative provisions on the recognition and enforcement of interim measures issued by an arbitral tribunal, interim measures issued by State courts in support of arbitration and the form of the arbitration agreement. The Commission also adopted a recommendation regarding the interpretation of Articles II (2) and VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dealing with the form of the arbitration agreement, which will greatly promote the uniform interpretation and application of the Convention.

60. It is hoped that the new Articles on Arbitration will significantly update the provisions of the UNCITRAL Model Law on International Commercial Arbitration reflecting the current State practices in international trade and provide for an effective enforcement of the interim measures. As regards the future work on the subject, the Commision gave priority to revision of the UNCITRAL Arbitration Rules and consideration of the arbitrability of intra-corporate disputes (and possibly other issues relating to arbitrability for example in the fields of intellectual property rights, investment disputes, insolvency or unfair competition). The AALCO Secretariat hopes

that these amendments to the Model Law would be incorporated by the Member States to bring in uniformity and conistency.

61. The Commission was also able to approve in principle the key objectives and major policies of a draft legislative guide on secured transactions. The draft legislative guide was drafted to provide a legal framework that promotes access to low-cost secured credit. The recommendations approved by the Commission include: key objectives and scope of application, basic approaches to security, creation of the security right, effectiveness of the security right against third parties and registration, priority of the security right over the rights of competing claimants, pre-default rights and obligations of the parties, rights and obligations of third-party obligors, default and enforcement, insolvency, acquisition financing devices, conflict of laws and transitional arrangements.

62. It is also welcoming that all other Working Groups established by the Commission have made considerable progress. AALCO Secretariat hopes that the Member States would continue to support and actively participate in the work of the UNCITRAL and its Working Groups. The Secretariat also urges the Member States of AALCO to implement the instruments adopted by the UNCITRAL, in order to promote uniformity and consistency in the international trading system

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

1. The Trade and Development Board[18] of the UNCTAD had convened its fifty-third annual session from 27 September to 2 October 2006 and 10 October 2006. The Board had discussions on its substantive agenda items like (i) Review of Developments and Issues in the post-Doha Work Programme of Particular Concern To Developing Countries and (ii) Technical Cooperation Activities: Report on UNCTAD's Assistance to the Palestinian People.[19] This section of the report aims to highlight some of the activities carried out in the year 2006 by UNCTAD's three Commissions, which are of special interest to the Member States of AALCO.

A. TENTH SESSION OF THE COMMISSION ON TRADE IN GOODS AND SERVICES, AND COMMODITIES

2. The tenth session of the Commission on Trade in Goods and Services, and Commodities (DITC) was held from 6-10 February 2006. The Commission in the substantive issues adopted the agreed recommendations on Commodities and Development; Market Access, Market Entry and Competitiveness; Trade in Services and Development Implications; and Trade, Environment and Development. The excerpts from the Commission's report[20] are as follows:

3. The Commission examined the relationship between development and commodity production and trade, and envisioned that the commodities sector policies could be focused on projects and programmes that can enhance the capacity to trade in commodities contributing to poverty reduction through international cooperation under the aegis of the International Task Force on Commodities**.** Three major inconsistencies in relation to commodities were pointed out. Firstly, the share of commodities in world trade had declined from a third to a quarter, but most developing countries were just as dependent on commodity exports now as before. Secondly, developing countries were rich in commodity resources but had ceded control over these resources, failing to use them as a springboard for broad-based sustainable development. Thirdly, liberalization in developing countries had not released dynamic forces but had left an institutional vacuum instead; with the domestic private sector unable to replace government agencies, the field had been left open for uncompetitive practices and subsidized developed country exports.

4. The Commission, on sub-topic "Strengthening Commodity Trade and Finance Institutions", observed that innovation in delivering financial services was a necessity if

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[18] The intergovernmental machinery of UNCTAD consists basically of (i) the Conference (ii) the Trade and Development Board, (iii) three Commissions, and (iv) expert meetings. The highest decision-making body of UNCTAD is the quadrennial conference, at which member States make assessments of current trade and development issues, discuss policy options and formulate global policy responses. The conference also sets the organization's mandate and work priorities. The UNCTAD Conference meets every four years, while the Trade and Development Board has one regular session and two or three executive sessions each year. In-between the quadrennial Conferences, the Trade and Development Board oversee the activities of the organization. It meets in Geneva in a regular session and up to three times a year in executive sessions to deal with urgent policy issues, as well as management and institutional matters. The Commissions meet once a year, and each Commission convene a number of expert meetings on specific topics.

[19] Action by the Trade and Development Board on Substantive items on its agenda are: review of progress in the implementation of the Programme of Action for the Least Developed Countries for the Decade 2001-2010, Economic Development in Africa, etc.

[20] The report of the Commission is available at http://www.unctad.org/en/docs/c1d80_en.pdf.

the opportunities offered by globalization were to be realized, including in Africa. Such innovation should focus on both traditional North-South finance flows and on returning some of the large amounts of capital kept offshore for financing commodity sector development. In addition to asset-backed securitization and structured finance, the development of alternative investment instruments was needed to provide new tools to overcome financing constraints.

5. The Commission while considering the agenda item "Market Access, Market Entry and Competitiveness" observed that non-tariff measures might act as important market entry barriers to developing country exports. The report highlighted the trends in trade and tariffs; market access issues in the Doha Round; salient issues relating to non-tariff barriers (NTBs); adjustment to trade liberalization and the concept of "aid for trade"; and determinants of competitive export performance. Special attention was given to dynamic and new sectors of world trade. High tariffs**,** tariff peaks and tariff escalation are important concerns of developing countries and hence, the UNCTAD was requested to strengthen its analytical work on these and other non-tariff barriers (NTBs). They reviewed the outcomes of specific sectors like the electronics sector, fish and fishery products, steel sector, etc., in developing countries.

6. During the discussions, participants reiterated that at the Hong Kong Ministerial Conference it was decided to ensure that there would be a comparably high level of ambition in market access for agriculture and Non-Agricultural Market Access (NAMA). This goal was to be achieved in a balanced and proportionate manner consistent with the principle of special and differential treatment. It was recognized that special attention should be given to full modalities for tariff-reduction that would allow better market access for exports from developing countries. Few participants also underscored that sector-by-sector negotiations were a useful instrument to reflect developing country market access interests. It was widely recognized that NTBs were serious export constraints for developing countries. The agreement at the Hong Kong Ministerial Conference on duty-free and quota-free market access for Least Developed Countries (LDCs) was considered as an important step towards the objective of achieving full duty-free and quota-free treatment of all exports from LDCs. Inputs from UNCTAD to assist developing countries to identify existing NTBs were strongly encouraged.

7. Under "Trade in Services and Development Implications" the Commission, recalled the major role played by the developing countries in international trade in services, as well as their experiences, challenges and opportunities in the ongoing negotiations on services. Most developing countries have embarked on reform processes, recognizing the positive effects that can accrue from progressive liberalization of trade in services in terms of generating jobs, technology and investment. It was noted that the liberalization of services trade had often resulted in market segmentation, where national service providers had retained the low-value market segment requiring small investments, with foreign ones concentrating in the higher income segments. To enhance domestic supply capacity, policy measures were necessary to encourage transfer of technology, promote utilization of local capacities, and enhance adherence to standards and quality. The participants concurred that liberalization did not automatically result in economic growth, unless appropriate preconditions were in place, including proper flanking policies, regulatory preparedness, the development of competition policies and laws, support for domestic supply capacity building, and policies to enhance transfer of technology. Discussions also took place on the services negotiations (under the General Agreement on Trade in Services (GATS)

and on the concerns of developing countries following the sixth WTO Ministerial Conference in Hong Kong. The Commission requested UNCTAD to strengthen its work on services assessment, as well as provide ongoing support to developing countries in the GATS negotiations.

8. The Commission addressed selected trade and environment issues that have received considerable attention in recent international debates, as well as in UNCTAD activities. It includes considerations in the field of environmental requirements and market access for developing countries, trade liberalization in environmental goods and services, the promotion of production and use of renewable energy, and the protection, preservation and sustainable use of traditional knowledge. A distinct area of consideration includes opportunities for promoting trade in products derived from the sustainable use of biodiversity, in particular through the BioTrade Initiative, as well as the BioFuels Initiative. The importance of 'Aid for Trade' programme addressed at the Hong Kong Ministerial Conference in order to facilitate developing countries to deal with different aspects of their trade capacity was stressed.

9. The representative of Pakistan, speaking on behalf of the **Group of 77 and China**, stated that ensuring policy space for developing countries to promote development oriented growth in agricultural, industrial and services sectors was of the utmost importance and the focus must be how and to what extent the intent of Doha negotiations had been accomplished and on the role of the UNCTAD in attaining the full realization of the ambition of Doha Development Agenda. On commodities, it was suggested that the Commission could identify and agree upon the methods to strengthen the nexus between trade, food security and industrialization from a commodity base. On the need to strengthen the institutional capacity to deal with the environmental requirements relating to trade, he welcomed the UNCTAD's Consultative Task Force on Environmental Requirements and Market Access for Developing Countries (CTF).

10. The representative of Sri Lanka, speaking on behalf of **Asian Group and China,** suggested that measures to be taken by the UNCTAD could include an emphasis on commodities in the aid for trade initiative; participation of UNCTAD in implementing the decision on commodities taken by the Sixth WTO Ministerial Conference; and financial support from donors for the International task Force on Commodities.

11. The representative of Zimbabwe speaking on behalf of **African Group,** reaffirmed the importance of the São Paulo Consensus as a guide for the UNCTAD's work and called for serious and constructive discussion on issues of concern to Africa, including achieving a more open, equitable, rule-based, predictable and non-discriminatory multilateral trading system.

12. The Commission shall convene three expert meetings in 2006 in furtherance to the requirement. The themes of these three expert meetings are: (i) Universal Access to Services, (ii) Participation of Developing Countries in New and Dynamic Sectors of World Trade: Review of the Energy Sector, and (iii) Enabling Small Commodity Producers and Processors of Developing Countries to Reach Global Markets. The eleventh Session of this Commission is scheduled on 19-23 March 2007.

B. TENTH SESSION OF THE COMMISSION ON ENTERPRISE, BUSINESS FACILITATION AND DEVELOPMENT

13. The tenth Session of the Commission on Enterprise, Business Facilitation and Development was held on 21-24 February 2006. The agenda items of the Commission[21] were (i) Improving the Competitiveness of SMEs through Enhancing Productive Capacity, (ii) Efficient Transport and Trade Facilitation to Improve Participation by Developing Countries in International Trade, and (iii) ICT (Information and Communication Technologies) and E-business for Development.

14. With respect to the item on "Improving the Competitiveness of SMEs through Enhancing Productive Capacity", the Commission recognizing the significance of SMEs in employment generation, poverty reduction and sustainable economic growth, requested the UNCTAD to continue exploring successful policies to promote enterprise development in developing countries, including the combination of export orientation and active policies oriented to the supply side of the economy to promote investment, technology transfer, entrepreneurship and the consolidation of productive chains, so as to build and maintain the ability to compete successfully in international markets and create new and dynamic capacities to facilitate internal linkages between export-led growth and the domestic economy. It was noted that Asia encompassed a great diversity of conditions but a number of regional developing countries had succeeded in boosting their economies under new international rules and transforming many domestic enterprises into global players.

15. During discussions, it was accentuated that for successful internationalization by firms from developing countries, an incremental approach to internationalization would be prudent. A sound corporate base with strong economic fundamentals was a necessary prerequisite before attempting expansion abroad. The use of risk mitigation mechanisms, facilitation of exchange of experiences, adoption of appropriate policy and institutional support are important for the same.

16. The Commission on "Efficient Transport and Trade Facilitation to Improve Participation by Developing Countries in International Trade" [22] item, recognized the need to assist developing countries, least developed countries, transit and landlocked developing countries to build capacities to design and implement trade and transport facilitation programmes based on the São Paulo Consensus, and requested UNCTAD to continue to:

- Monitor and analyse issues and developments relating to international transport and trade facilitation and their implications for developing countries, with a focus on the special situation of landlocked and transit developing countries and least developed countries, and the particular needs of their SMEs;
- Undertake comparisons of current practices in developing countries with international standards in international transport and trade facilitation; contribute to creating and strengthening institutional mechanisms in developing countries

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[21] The report of the Commission is available at http://www.unctad.org/en/docs/c3d76_en.pdf.

[22] For the consideration of this item, the Commission had before it the following documentation: (i) "Efficient transport and trade facilitation to improve participation by developing countries in international trade" (TD/B/COM.3/72); (ii) "Report of the Expert Meeting on Trade Facilitation as an Engine for Development" (TD/B/COM.3/EM.24/3); and (iii) "Trade Facilitation as an Engine for Development" (TD/B/COM.3/EM.24/2).

designed to integrate transport and trade facilitation into the development process;

- Undertake research and provide assistance to developing countries to participate in the trade facilitation and transport and logistics services negotiating processes, including in the context of the Doha Development Agenda;
- Provide technical assistance and capacity-building activities in the area of transport and trade facilitation, including on the use of automated systems such as Automated System for Customs Data (ASYCUDA), to improve international trade and transport management; special attention should be paid to the improvement of transit arrangements for the landlocked and transit developing countries; and
- Cooperate with other international, intergovernmental and non-governmental organizations and other cooperative mechanisms in carrying out the work programme of the UNCTAD in the areas of international transport and trade facilitation.

17. On the agenda item "ICT and E-business for Development",[23] the Commission while considering the important contribution that the wider adoption and use of ICTs and e-business in developing countries can make to internationally agreed development goals, including those adopted at the Millennium Summit, mandated the UNCTAD to:

- Carry out research and policy-oriented analytical work on the implications for economic development of the different aspects of ICT and e-business;
- Continue work in the field of ICT measurement, in cooperation with relevant statistical capacity-building bodies and programmes, and contribute to the partnership on measuring ICT for development to enable developing countries to measure the access, use and impact of ICTs, particularly in the area of e-business and development;
- Continue to provide a forum for international discussion and exchange of experiences on ICTs, e-business, their applications to promote trade and development and policies aimed at creating an enabling environment, at the national and international levels, for the information economy.
- In cooperation with other international organizations, and where appropriate non-governmental entities, contribute to capacity-building in the area of technology and ICTs for development in sectors of particular interest to developing countries;
- Further explore the potential benefit of free and open source software for developing countries, with particular attention to the needs of SMEs;
- Within the UN system-wide processes, take operational steps to play its part in support of the implementation and follow up of World Summit on the Information Society (WSIS), giving priority to issues of greatest developmental impact; and

[23] For the consideration of this item, the Commission had before it the following documentation: "ICT and E-Business: Selected Trends and Issues on the ICT for Development Agenda" (TD/B/COM.3/74); "Report of the Expert Meeting on ICT and Tourism for Development" (TD/B/COM.3/EM.25/3); "ICT and Tourism for Development" (TD/B/COM.3/EM.25/2).

- Ensure the development perspective of the *Information Economy Report* and include it as an integral part of the Commission's agenda for due consideration with the objective of facilitating consensus building.

18. The representative of Pakistan speaking on behalf of **Group of 77 and China** stated the ultimate objective of the trade liberalization was to raise the standards of the people and hence, it should be linked to industrialization. In the context of WTO negotiations on trade facilitation, it was observed that developing and least developed countries would require significant additional support for the implementation of commitments in trade facilitation measures. Also, it was essential for countries to integrate ICT into their development process, as they were crosscutting tools that could support their efforts to achieve the Millennium Development Goals.

19. The representative of Zimbabwe speaking on behalf of the **African Group** noted that Africa's share in world trade had fallen over the years due to its dependence on primary exports. To overcome its shrinking share of global trade, it needed to overcome obstacles to its connectivity to the global economy and the international trading system, such as high transport and transit costs, as well as problems of poor infrastructure and network systems, particularly in landlocked countries. It was highlighted that many African countries faced serious constraints in enterprise internationalization and only a few of them were able to adopt outward foreign direct investment policies.

20. The representative of Sri Lanka speaking on behalf of the **Asian Group** stressed that one of the priorities of Asia was to promote SMEs to combat poverty. On ICT and e-business for development, the experiences of several Asian developing countries revealed that national ICT policies and strategies could have a significant impact on the access to, and use of, ICT. Hence, there was a need to adopt policies that could encourage the deployment of ICT infrastructure, raise awareness on ICT, promote the adoption of e-business, promote free and open-source software as a means to lower access costs, develop e-government services, enhance ICT skills in the workforce and remove regulatory barriers.

21. The agreed expert group meeting topics for 2006 are: (i) Best practices and policy options in the promotion of SME-TNC business linkages, (ii) ICT Solutions to facilitate trade at border crossings and ports, and (iii) In support of the implementation and follow-up of WSIS: ICTs as an enabler for growth and development. The eleventh session of this Commission would be held on 19–23 February 2007.

22. The fifty-fourth annual session of the trade and development board is scheduled to be held from 1 to 11 October 2007.

C. TENTH SESSION OF THE COMMISSION ON INVESTMENT, TECHNOLOGY AND RELATED FINANCIAL ISSUES

23. The tenth Session of the Commission on Investment, Technology and Related Financial Issues (DITE) was held from 6-10 March 2006. The Commission[24] adopted the agreed recommendations at that level and appreciated the contributions of UNCTAD in research and policy analysis, technical assistance, and capacity and consensus building. The agenda items for the Session were (i) Policy Issues related to Investment

[24] The report of this Commission is available at http://www.unctad.org/en/docs/c2d71_en.pdf.

and Development, (ii) Issues related to Investment Arrangements, (iii) Investment Policy Reviews: Exchange of National Experiences, and (iv) Adoption of the Reports of the Subsidiary Bodies of the Commission.

24. The Commission recommended that UNCTAD should continue its statistical and analytical work on trends, development impact on developing countries and countries with economies in transition, and policy options, including Outward Foreign Direct Investment (OFDI) from developing countries, internationalization of Small and Medium Enterprises (SMEs) and Foreign Direct Investment (FDI) in natural resources. In this area of work, particular consideration was given to the needs of LDCs. The role of transnational corporations (TNCs) in the era of globalization process was highlighted, leading to the fact that investment has influenced the allocation of productive resources. The Commission had for its consideration a number of trend in this regard. First, the current upswing in FDI flows was fuelled by an increase in the number of mergers and acquisitions, which more than before also involved firms from developing countries. Second, increased FDI from developing countries provided important opportunities for South–South economic activity, and there was a need to consider ways of leveraging this process for development. Third, the scope of activities affected by the globalization process was expanding, involving increasingly varied service functions – from call centres to research and development. Fourth, rising commodity prices had contributed to record inflows of FDI into countries rich in natural resources, thus raising questions about how policies could help ensure long-term benefits for the recipient countries. There has been an important global policy trends in recent years in terms of increasing number of International Investment Agreements (IIAs), investor–State disputes, etc. Hence, it was stressed that there is a need to address these issues from a development dimension in IIAs, reflecting a proper balance of rights and obligations between States and investors.

25. The Commission, in the case of "Policy Issues related to Investment and Development'[25] asked the UNCTAD to enhance its research work on FDI, from the angle of productivity, to contribute to the enhancement of the economy and to long-term development, by alleviating resource constraints, and helping to avoid further indebtedness, create jobs, acquire new technologies, build linkages with the rest of the economy, crowd in domestic investment, stimulate new export opportunities, and reduce poverty.

26. The Commission, in the case of "Issues Related to Investment Arrangements"[26] emphasized the paradigm shift in the investment trends, for example, international investment rule-making, most notably the proliferation of IIAs at the bilateral, regional and interregional levels; the increasing formulation of investment rules in agreements encompassing a broader range of issues, including trade in goods and services; the growing number of South–South IIAs; the increasing sophistication and scope of

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[25] For the consideration of this item, the Commission had before it the following documentation: (i) *World Investment Report 2005: Transnational Corporations and the Internationalization of R&D* (UNCTAD/WIR/2005 and overview); (ii) "Report of the Expert Meeting on Positive Corporate Contributions to the Economic and Social Development of Host Developing Countries" (TD/B/COM.2/EM.17/3); and (iii) "Report of the Expert Meeting on Capacity Building in the Area of FDI: Data Compilation and Policy Formulation in Developing Countries" (TD/B/COM.2/EM.18/3).

[26] For the consideration of this item, the Commission had before it the following documentation: (i) "International investment rule setting: Trends, emerging issues and implications" (TD/B/COM.2/68); and (ii) "IIA evaluation report" (UNCTAD/ITE/IIT/2005/6).

international investment rules; and the increase in the number of investor–State disputes. Thereby requiring countries and companies to operate within an increasingly intricate framework of multi-layered and multifaceted investment rules that were often overlapping and even inconsistent in terms of obligations.

27. The discussions on this item lead to an understanding among the participants that there is a new generation/development in international investment law like need to sophisticated reformulations of treaty provisions dealing with fair and equitable treatment and indirect expropriation. As a result, it becomes necessary for developing countries to update these changes.

28. On the agenda item "Investment Policy Reviews: Exchange of National Experiences"[27], the Commission recalled that various countries have given their investment policy reviews (IPRs) stating how they have taken general measures like taxation, labour matters, arbitration issues, entry of foreign workers and follow-up of technical assistance concentrated on legal regime, business regulations, investment strategy, institutional improvement and investment promotion plans. The example of expanding one's bilateral investment treaties (BITs) and double taxation treaties (DTTs) to create a legal certainty for the investors as adopted by Columbia was cited as a good model, which could be followed by other developing countries too.

29. The Commission urged the UNCTAD to ensure a timely response to requests of interested countries, as well as expanded technical assistance to developing countries in the follow-up policy advice and capacity-building projects.

30. On the agenda item on the "Report of the Subsidiary Groups",[28] the Commission noted with appreciation the guidance on corporate governance disclosure prepared by the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting, and recommended its wide dissemination since it is a useful voluntary tool to improve corporate governance disclosures in order to facilitate investment and enhance the transparency and stability of the investment environment.

31. The representative of Pakistan, speaking on behalf of **Group of 77 and China,** regarding IIAs observed that the there is a need for a policy coherence and that the new generation of IIAs included interrelated and complex issues that touched upon a whole range of domestic concerns. The major concerns of the developing countries highlighted in relation to IIAs were to strike a proper balance creating a favourable environment for foreign investment while retaining sufficient regulatory power and discretion for host country governments and to advance development objectives by emphasizing on the responsibilities of foreign investors in host country.

32. The representative of Sri Lanka, speaking on behalf of the **Asian Group and China,** stressed that the debates on investment issues has been placed at the right time since most of the Asian countries are actively concluding not only IIA but also regional economic agreements containing specific investment provisions. While pointing out the developments in investment issues like increasing investor-to-state disputes, it was

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[27] For consideration of this item, the Commission had before it the following documentation: (i) *Investment Policy Review of Colombia* (UNCTAD/ITE/IPC/MISC/2005/11); and (ii) "Summary of deliberations of the Science and Technology and Innovation Policy Review of the Islamic Republic of Iran" (TD/B/COM.2/69).

[28] For its consideration of this agenda item, the Commission had before it the document - "Report of the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting on its Twenty-second Session" (TD/B/COM.2/ISAR/31).

observed that UNCTAD should become the focal point in collecting the information related to international investment rule making.

33. The representative of Zimbabwe speaking on behalf of **African Group** said that UNCTAD could play a pivotal role in assisting the African countries, which lacked technical capacity and expertise to participate effectively in investment negotiations in the light of increasing BITs and regional cooperation arrangements being signed.

34. Three topics have been proposed for Expert Meetings for 2006 by the Commission, which includes FDI in natural resources, Building productive capacities, and Ad Hoc Expert Meeting on Advocacy for Investment Policies with particular reference to the Development Dimension. The eleventh session of this Commission would be held on 8-14 March 2007 at Geneva.

3. REPORT ON THE WORK OF INTERNATIONAL INSTITUTE FOR THE UNIFICTION OF PRIVATE LAW (UNIDROIT)

1. The triennium work programme for the year 2006-2008 of the UNIDROIT[29] as drawn up by Governing Council at its 84th session (18-20 April 2005) and subsequently approved by General Assembly at its 59th Session are as follows: (i) Principles of International Commercial Contracts, (ii) Model Law on Leasing, (iii) International Interests in mobile equipment, and (iv) Transactions on Transnational and Connected Capital Markets.

A. PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

2. The Third Edition of the Working Group (WG) for the preparation of the UNIDROIT Principles of International Commercial Contracts held its first Session from 29 May-1 June 2006 in Rome. At that Session, the first agenda item was on the exchange of views concerning promotion of the Principles of International Commercial Contracts and monitoring and implementing them in practice. The WG had an in-depth discussion on the position paper prepared by the Secretariat[30] titled "Principles of International Commercial Contracts: I: Promoting and Monitoring Use in Practice; II: Preparation of a Third Edition" wherein five topics were suggested for the inclusion in the new edition of the principles. These topics are (i) unwinding of failed contracts, (ii) illegally (iii) plurality of debtors and of creditors, (iv) conditions and (v) termination of long-term contracts for cause. The WG had appointed Rapporteurs for the study of those topics and the preliminary drafts rules along with explanatory notes would be submitted to the WG for discussion during the next plenary session. The second session of the WG is scheduled to be held on 4-8 June 2007 in Rome.

B. PREPARATION OF MODEL LAW ON LEASING

3. The State Parties to the UNIDROIT Convention on International Financial Leasing, 1988, majority being developing countries and countries in transition raised a special need for the development of leasing legislation. As a result, there was a consultation with potential key economic stakeholders in the project and it was decided to prepare a "Preliminary Draft Model Law on Leasing"[31]. The Advisory Board which was entrusted with the task of preparing this model law were required to reflect upon the legal and economic systems that were intended to be the essential beneficiaries of the project.

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[29] The Working method of the Institute is as follows: Once a subject has been entered on UNIDROIT Work Programme, the Secretariat will draw up a preliminary "Comparative law report" designed to ascertain the desirability and feasibility of Law reform. If the Governing Council is satisfied that the preliminary report has made out a case for taking action, it will ask the Secretariat to convene a study Group or the preparation of a preliminary draft convention or model laws, legal guides, etc. Typically, in the case of a preliminary draft Convention, these will consist in its asking the Secretariat to convene a *committee of governmental experts* for the finalization of a draft convention capable of submission for adoption to a diplomatic conference. In the case of one of the alternatives to a preliminary draft Convention not suitable by virtue of its nature for transmission to a committee of governmental experts, the Council will be called upon to authorize its publication and dissemination by UNIDROIT in the circles for which it has been prepared.

[30] UNIDROIT 2006 – Study L-Doc.99 available at its official website - http://www.unidroit.org/english/publications/proceedings/2006/study/50/s-50-099-e.pdf.

[31] UNIDROIT 2006 – Study LIX-A-Doc.11 available at its official website - http://www.unidroit.org/english/publications/proceedings/2006/study/59a/s-59a-11-e.pdf

4. The Reporter to the Advisory Board after various discussions [32] prepared a second version of the preliminary draft model law. The basic structure of the preliminary draft encompasses to:

(i) cover both financial leases and operating leases, keeping in mind the present day needs of developing countries, transition economies and the changing market trends;

(ii) provide uniform rules governing the effects of leasing agreement,[33] the performance of the leasing agreement,[34] etc; and

(iii) default remedies like definition of default, need to give notice, measure of damages, liquidated damages, termination etc.

5. The text of the preliminary draft model law consisting of twenty-four articles was submitted to the Governing Council at its 85th Session held on 8-10 May 2006 in Rome for follow-up action. The 86th Session of the Governing Council of UNIDROIT will be held on 16-18 April 2007 in Rome.

C. INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

6. The Convention on International Interests in Mobile Equipment came into force on 1 April 2004. Resolution No.2 of the Conference invited the International Civil Aviation Organization (ICAO) to accept the functions of Supervisory Conference of the International Registry Task Force. On 15 June 2005, the ICAO Council decided to confirm its acceptance of State functions and assumed the role. The gamut of "Mobile Equipment" regime consists of -

(a) Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment (Aircraft Protocol);
(b) Draft Protocol to the Cape Town Convention on Matters Specific to Railway Rolling Stock (Railway Rolling Stock Protocol);
(c) Preliminary Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets (Space Assets Protocol); and
(d) Future Protocol to Cape Town Convention on Agricultural Construction and Mining Equipment.

7. The primary objective of the Convention is to increase the efficiency of financing high value "mobile equipment" like say aircraft objects, space objects, railway rolling stock, etc. The reasons being such equipment moves from jurisdiction to jurisdiction and the creditor's rights need to be protected and made certain. The first Protocol under the Convention, Aircraft Protocol, provides for the application of the Convention in relation to aircraft objects and modifies the operation of the Convention to particular requirements of aircraft financing transactions. The work of the other two

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[32] The Advisory Board met in Rome on three occasions, 17 October 2005, 6-7 February 2006 and 3-5 April 2006.

[33] Uniform rules governing the effects of leasing agreement includes enforceability, the running of the supplier's duties to the lessee, priority in relation to liens and liability for death, personal injury or property damage to third parties.

[34] The performance of the leasing agreement includes irrevocability of the lessee's duties as from the time when the leasing agreement is entered into, the risk of loss under a lease, the lessee's rights in the event of damage to the leased asset, the conditions for, and consequences of the lessee's acceptance and rejection of the leased asset, the extent of the right of the parties to the leasing agreement to transfer their rights and duties there under, the extent of the warranties of the parties to a leasing agreement, the extent of the lessee's duty to maintain and return the leased asset.

protocols is under progress. The Railway Rolling Stock Protocol has been finalized by an inter-governmental negotiation process and may be adopted at the Diplomatic Conference scheduled from 12-23 February 2007 in Luxembourg.[35] The Space Assets Protocol is under consideration of an inter-governmental negotiation process, which includes the representation of private sector financiers and space industry. The Future Protocol on Agricultural Construction and Mining Equipment is subject to the confirmation in a preliminary study, which shall examine the possibility of including industrial and civil works equipment within the scope of the project.

D. TRANSACTIONS ON TRANSNATIONAL AND CONNECTED CAPITAL MARKETS

8. The future Convention on Harmonised Substantive Rules regarding Securities Held with an Intermediary[36] was intended to bring about a legal framework that deal with modern system of holding through intermediaries practice in many countries. It was particularly intended to fill the legal uncertainty that occurred due to the fact that securities are increasingly held and transferred across borders. A study group was constituted to address this issue, which held its first meeting in September 2002. A preliminary draft Convention was submitted in 2004 and it was complemented by a set of explanatory notes too. The preliminary Draft Convention served as a basis for an International negotiation process to the first Session of Committee of Governmental Experts (CGE) held in May 2005. The second Session of CGE was held in March 2006.

9. In 2005, the CGE, based on the negotiations on the draft Convention on Harmonised Rules regarding Intermediated Securities recommended the General Assembly to authorize another item which is on the preparation of 'the Principles and rules capable of enhancing trading in securities on emerging markets'. The need of the hour was to have a basic commercial law rules applicable to trading in securities. The UNIDROIT Secretariat has also framed the probable list of areas of proposed study.

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[35] The information on this aspect is available at its official website http://www.unidroit.org/english/conventions/mobile-equipment/conference2007/conferencedocuments/main.htm.

[36] Preliminary Draft Convention on Substantive Rules Regarding Intermediated Securities (as adopted by the Committee of Governmental Experts at its second session, held in Rome, 06-14 March 2006) and consists of 27 articles.

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

1. This part of the report seeks to provide an overview of the major activities of the Hague Conference on Private International Law during the year 2006.[37]

A. SPECIAL COMMISSION ON MAINTENANCE OBLIGATIONS

2. The Working Group on the Law Applicable to Maintenance Obligations (WGAL) established by the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance of May 2003 proceeded with its task in accordance with the mandate received from the Special Commission in June 2004. During the first meeting, held in The Hague on 15 June 2004, the WGAL developed a first sketch of provisions relating to applicable law, and outlined the elaboration of a Questionnaire relating to the law applicable to maintenance obligations. That Questionnaire was then developed by means of an electronic mailing list, with assistance from the Permanent Bureau of the Hague Conference. It was sent to all Member States of the Hague Conference, States Party to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, other States invited to attend the Special Commission meeting in June 2004, and to the relevant governmental and non-governmental international organization's in early September 2004.

3. The assignment conferred on the WGAL by the Special Commission of April 2005 was to continue with its work in order to develop general rules, to be included in the text of the Convention, and a working draft of an optional instrument on applicable law. The WGAL met twice in The Hague in July 2005 and March 2006, the proceedings were conducted by means of an electronic discussion list. During its first meeting in July 2005, the WG reached agreement on some general rules of conflict of laws, intended for inclusion in the mandatory part of the Convention. At its meetings in July 2005 and March 2006, the WG then concentrated on the development of a draft optional instrument on the law applicable to maintenance obligations.

4. Working Draft on Applicable Law contains ten articles and mainly deals with provisions of remedies for finding the jurisdiction in order to fix the liability on maintenance issues. The underlying factors for such determination are three connecting factors like the maintenance creditor's habitual residence is the main criterion,

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[37] The principal method used to achieve the purpose of the Conference consists in the negotiation and drafting of multilateral treaties or Conventions in the different fields of private international law. After preparatory research has been done by the secretariat, preliminary drafts of the Conventions are drawn up by the Special Commissions constituted of governmental experts. The drafts are then discussed and adopted at a Plenary Session of the Hague Conference, which is a diplomatic conference. The work in progress of the Hague Conference during 2006 includes issues relating to: Child Abduction, Cooperation with UNCITRAL on Insolvency, E-commerce, General Affairs, Inter country Adoption and Maintenance Obligations. On the topic *Child Abduction*, the Permanent Bureau of the Hague Conference has drawn up a document titled 'Regional Developments', wherein they have drawn up the facts stating that both the membership and the Contracting Parties of the Convention has substantially increased to 65 Member States and 59 non-Member States. The regional developments include the following regions- (i) the Americas, (ii) Southern and Eastern Africa, (iii) non-Hague Convention States from the Islamic World and (iv) Asia-Pacific.

supplemented by two subsidiary criteria, like law of the forum and the common nationality of the parties. The main aim is to favour the maintenance creditor in such a way that the rules of conflict of laws do not deprive him or her of their maintenance claim.

5. The Special Commission after its fifth meeting held on 30 October-9 November 2006 gave some recommendations, specifically emphasizing on 'aid on ensuring the safe return of children'.[38] By virtue of use of protective measures, criminal proceedings to be initiated against child abductors the Special Commission also reaffirming the need for a possible Protocol concerning protective measures in terms of the 1980 Convention. On the implementation of 1996 Convention, the Special Commission invited the Permanent Bureau[39] to begin work on preparation of a practical guide to the 1996 Convention.

B. INTER COUNTRY ADOPTION

6. The Hague Convention on Protection of Children and Co-operation in respect of Inter country Adoption of 29 May 1993 is considered to be one of the most successful international treaties drawn up by the Hague Conference on Private International Law. Upon accession of Mali to this Convention on 2 May 2006, its list of signatories has increased to 69 State parties. The second meeting of the Special Commission on the practical operation of The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter country Adoption was held on 17-23 September 2005.

7. In its recommendations, the Special Commission gave its general endorsement to the draft Guide to Good Practice dealing with Implementation of the 1993 Convention prepared by the Permanent Bureau. Under the guide to good practice and certain general principles were discussed and were grouped under four headings like the protection of the child's best interests, the safeguards for the child against abduction, sale or trafficking, the establishment of a framework of co-operation between authorities and the establishment of a framework for authorization of competent authorities to approve inter country adoptions.[40] In order for such approval by the competent authorities (central authority) there are certain mandatory rules to be fulfilled like establishing that a child is adoptable, reporting on the child and the prospective adoptive parents, preparing the prospective adoptive parents (like proper counseling) preserving the information and search of origins. Few legal issues surrounding the implementation which was considered relevant were (i) Existence of Bilateral Agreement (ii) Placing Units on Inter Country Adoption by Countries of Origin (iii) Nationality Issues of the Adopted Child (wherein States of origin argued that receiving States should give their nationality at the time of adoption so that complications of the child's statelessness is avoided) (iv) Habitual Residence of the Prospective Adoptive Parents, (v) Private Adoptions, and (vi) Adoptions by same Sex Couples.

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[38] Part VIII of the report on 'Securing the Safe Return of the Child' available at http://www.hcch.net/upload/wop/maint_pd22e.pdf.

[39] The Permanent Bureau in consultation with Member States of the Hague Conference and Contracting States to the 1980 and 1996 Conventions shall begin the work on the preparation of a practical guide to the 1996 Convention which would provide advice on the factors to be considered in the process of implementing the Convention into national law and assist in explaining the practical application of the Convention. The conclusions and recommendations of the Special commission on the fifth committee is available at http://www.hcch.net/upload/concl28sc5_e.pdf

[40] The report on the inter-country adoption by the special commission is available at http://www.hcch.net/upload/wop/adop2005_rpt-e.pdf

8. The Permanent Bureau has a 'Proposal for a Pilot Implementation Assistance Programme for the implementation of the Inter country Adoption Convention'. The pilot programme, presently at Phase II of the development of the implementation assistance programme for the Inter country Adoption Convention, is designed to put into practical effect the strategies set out in the Guide to Good Practice, currently under development at the Permanent Bureau.

C. REPORT ON THE SECRETARY-GENERAL'S MEETING WITH DR. HANS VAN LOON, SECRETARY-GENERAL OF HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH)

9. The Secretary-General of AALCO had a meeting with the Secretary General of the Hague Conference on Private International law (HCCH), Dr. Hans van Loon and Deputy Secretary-General, Dr. William Duncan, on 4 December 2006, at the AALCO Secretariat. Deputy Secretaries-General of AALCO, Mr. Motokatsu Watanabe, Dr. Xu Jie, and Legal Staff of AALCO participated in the meeting. The meeting was to formalize and concretize AALCO's relation with the HCCH.

10. The Secretary-General of AALCO explained that most of the AALCO work programme deal with public international law. However he noted that in the Secretariat brief on Report on the Work of UNCITRAL and Other International Organizations in the Field of International Trade Law, the activities of UNIDROIT and The Hague Conference was reported. He also pointed out that of the 48 AALCO Member States, 10 were Member of the HCCH.

12. The Secretary General of the HCCH recalled the previous Meeting he had with the then Secretary General of AALCO, Mr. B. Sen in 1982. He recalled that Mr. B. Sen had clarified to him in that Meeting that inviting Asian African States at that point of time to become parties to multilateral agreements on private international law could be a difficult exercise. He noted that there was a forty percent increase in the Membership of the Hague Conference, which presently stands at 65, and four countries would be joining in the immediate future. East European countries are readily joining the Conference. Moreover, the European Union was likely to join the Conference.

13. He explained that Mr. Duncan had just visited 18 African States and met Judges and government officials and they showed tremendous interest in these matters. He also stated that as part of their regional programmes a Meeting was scheduled to be held in Egypt, in January 2007. He explained that Hague Conference makes rules precisely for the direct application by the Judges. When a country adopts a Convention it brings immediate obligation on the part of the country to implement it, which many countries does not want.

14. Secretary General of the Hague Conference expressed the desire to have closer cooperation with the AALCO and could plan activities with the financial support from external agencies like the European Union/World Bank. He explained that there are several public international law instruments dealing with private interests. He also expressed his desire to attend the forthcoming Annual Session of AALCO. Dr. Duncan explained that the conventions on private international law, particularly relating to child protection address problems that are of common concern and these problems are of universal nature.

15. Secretary-General of AALCO explained that AALCO has a brief on Transnational Organized crime wherein protection of women and children are dealt with. He suggested that the Hague Conference could make aware the importance of

private international law to its Member States in the Annual Session and proposed that the priority could be given to child protection and family matters which affect human beings directly. The Secretary-General also offered cooperation from AALCO in making awareness in the Asian –African countries. He further proposed that cooperation between the two Organizations could take place at three levels. First, Hague Conference's participation at the forthcoming Annual Session of AALCO, second, signing of Memorandum of Understanding (MoU), and third, organizing seminar/training programme for jurists from Member States of AALCO. The Secretary General of HCCH tentatively expressed the desire for Hague Conference participation in the forthcoming AALCO Annual Session with a view to following up the long-term action plan of MoU and training Programme. The publications of both the Organizations were also exchanged.