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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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CONTENTS

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

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

I. REPORT ON THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AT ITS THIRTY-SIXTH SESSION

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.

2. The thirty-sixth session of the UNCITRAL was held in Vienna from 30 June to 11 July 2003. The Commission had on its agenda, *inter alia*, the following eight topics for consideration:-

(i) Draft Model Legislative Provisions on Privately Financed Infrastructure Project;

(ii) Draft Legislative Guide on Insolvency Law;

(iii) Arbitration;

(iv) Transport Law;

(v) Electronic Commerce; and

(vi) Security Interests.

3. This brief report is primarily focused on examining the UNCITRAL's deliberations at its thirty-sixth session relating to the above topics.

1. UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

A. Background

4. The Commission, it may be recalled, at its thirty-third session (2000), had adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. At that session, the Commission took note of the proposal for formulating a model law on the subject dealing with specific issues. The Commission decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-fourth session in 2001.

5. The Commission at its thirty-fourth session (2001) agreed that a working group should be entrusted with the task of drafting core model legislative provisions and that the first session of the working group should identify the specific issues on which the model legislative provisions, possibly to become an addendum to the Legislative Guide, should be formulated.

6. The Working Group on Privately Financed Infrastructure Projects, set up by the Commission, decided to use the legislative recommendations contained in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects as a basis of its deliberations. The Working Group, in accordance with the suggestion made at the Colloquium, devoted its attention to specific phase of infrastructure projects, namely the selection of the concessionaire, with a view to formulating specific drafting proposals for legislative provisions.

7. The Commission at its thirty-fifth session (2002), requested the Working Group to review the draft model legislative provisions with a view to enabling their consideration for adoption by the Commission, as an addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, at its thirty-sixth session in 2003.

8. The Commission, at its current session, after consideration of the text of the draft Model Legislative Provisions on Privately Financed Infrastructure Projects as revised by the drafting group, adopted the Model Provisions at its 768th Meeting, on 7 July 2003. The Commission agreed that the future consolidated text should combine the model provisions as adopted by the Commission and the notes contained in the Legislative Guide and should reproduce, at the end, the full text of the legislative recommendations as originally adopted by the Commission in 2000.

9. The draft Model Legislative Provisions and legislative recommendations are intended to assist domestic legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. It consists of a set of core provisions dealing with matters that deserve attention in legislation specifically concerned with privately financed infrastructure projects.

10. The following pages seek to provide an overview of the Model Legislative Provisions, which have been divided in to five chapters and 51 Model legislative provisions.[1]

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[1] See A/CN.9/XXXVI/CRP.3; A/CN.9/XXXVI/CRP.3/Add.1; A/CN.9/XXXVI/CRP.3/Add.2

B. An Overview

(i) General provisions

Preamble (Model provision 1)

11. The Preamble lays down the general principles and objectives on which the Model Legislative Provisions on Privately Financed Infrastructure Projects are based on. The Commission adopted the preamble without any comment.

Definitions (Model provision 2)

12. Model legislative provisions, for purpose of the law, definitions:

(a) "infrastructure facility" means physical facilities and systems that directly or indirectly services to the general public

(b) "infrastructure project" means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(c) "Contracting authority" means the public authority that has the power to enter into a concession contract for the implementation of an infrastructure project.

(d) "Concessionaire" means the person who carries out an infrastructure project under a concession contract entered into a contracting authority.

(e) "Concession Contract" means the mutually binding agreement or agreements between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project.

(f) "Bidder" and "bidders", means persons, including groups thereof, that participates in selection proceedings concerning an infrastructure project.

(g) "Unsolicited proposal" means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(h) "Regulatory agency" means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.

13. All the definitions included in the model provisions were based upon the Legislative Guide. The Commission took note of a proposal to include a definition of the term "concession" which was necessary to establish which law should apply to a particular contractual relationship, irrespective of the name given to the relevant contract. However, the Commission viewed that the new definition described a legal concept that, while familiar in some legal system, might give rise to a number of questions in other legal systems where the notion of "concession" was not traditionally known. Preference was eventually given to the expression "concession contracts" as it was already in use in many legal systems. Further, it was felt that the existing definition, along with the notes contained in the Legislative Guide, would provide sufficient guidance as to the types of arrangements to which the draft model legislative provisions applied.

Authority to enter into concession contracts (Model provisions 3)

14. The enacting State shall list the relevant public authorities of the host country that may enter into concession contracts by way of an exhaustive or indicative list of public authorities.

15. This provision is intended to solve the difficulty to fix precisely in a concession law what assets or services might be subject to a concession and which organ might award the contract. In order to strike a balance between, on the one hand, the previously agreed distribution of power (in particular in local self-government) in the enacting State and on the other hand, the doubt as to which entity in the enacting State had the authority to award concession, the Model provision was drafted in a manner that was sufficiently flexible so as to be enacted in a manner that best suited the enacting State's constitutional and administrative system.

Eligible infrastructure sectors (Model provisions 4)

16. The enacting State shall indicate the infrastructure sectors eligible for concession contract by way of an exhaustive or indicative list.

17. It was suggested that rather than providing an indicative or exhaustive list of matters that might be the subject of concession contract, it would be preferable to refer generally to services and assets in respect of which a concession contract could be awarded pursuant to any applicable law. However, the Commission felt that like model provision 3, the enacting State should be given ample flexibility to implement the provision in a manner best suited to meet its constitutional and administrative needs.

(ii) Selection of the Concessionaire

Rules governing the selection procedures (Model provision 5)

18. The selection of the concessionaire shall be conducted in accordance with the Model provisions 6-27 and for matters not provided therein, the enacting State shall indicate the provisions of its law that provides for transparency and efficient competitive procedure for the award of government contracts.

Purpose and procedure of pre-selection (Model provision 6)

19. The main objective of the pre-selection proceedings is to identify bidders that are suitably qualified to implement the envisaged infrastructure projects. The invitation for participation shall be published according to the law of the enacting State. The invitation for participation shall include at least the following (6.3):

(a) a description of the infrastructure facility;
(b) an indication of other essential elements of the project such as services to be delivered and financial arrangements envisaged;
(c) summary of the main required terms of the concession contract to be entered into;
(d) the manner, place and deadline for the submission of applications; and
(e) the manner and place for solicitation of the pre-selection documents.

20. The pre-selection documents shall include (6.4):

(a) the pre-selection criteria in accordance with model provision 7;
(b) whether the contracting authority intends to waive the limitations on the participation of consortia set forth in model provision 8;
(c) whether the contracting authority intends to request only a limited number of pre-selected bidders to submit proposals; and
(d) whether the contracting authority intends to require the successful bidder to establish an independent legal entity.

21. It was suggested that the model provision 6.3 (a) is too narrow or restrictive in nature. The Commission noted that this provision was essentially concerned with a description of the physical infrastructure and agreed with the drafting group's recommendation to delete the words "to be built or renovated" after "a description of the infrastructure facility" to make it broader in scope.

Pre-selection criteria (Model provision 7)

22. In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria that the contracting authority considers appropriate. These criteria shall include at least the following:

- adequate professional and technical qualifications, human resources, equipment and other physical facilities;
- ability to manage the financial aspect and capacity to sustain its financing requirements; and
- appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

Participation of consortia (Model provision 8)

23. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information about the qualifications of the members of the bidding consortia, shall relate to the consortium as a whole as well as to its individual participants.

24. Each member of the consortium may participate, directly or indirectly, in only one consortium at the same time, and the violation of this rule shall cause the disqualification of the consortium and of the individual members. The rational for prohibition is to reduce the risk of leakage of information or collusion between competing consortia. When considering the qualifications of bidding consortia, the contracting authority shall consider whether the qualification of each member and the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

25. There was suggestion in favour of not presumptively barring a member of a losing bidding consortium from joining another bidding consortium, as long as such joining is disclosed to all parties. There was also agreement within the Commission that a bidder whose consortium abandoned or had to leave the selection procedure, but who desired instead to join another bidding group should be allowed to do so. To accommodate these

suggestions the Commission approved the addition of the words “at the same time” at the end of the first sentence of paragraph 2,

Decision on pre-selection (Model provision 9)

26. The contracting authority shall reach a decision with respect to the qualification of each bidder based only on the criteria that are set forth in the pre-selection documents. All pre-selected bidders shall be invited by the contracting authority to submit proposals in accordance with model provisions 10-17.

27. The contracting authority may also reserve the right to request proposals upon completion of the pre-selection proceedings only to a limit the number of bidders that best meet the pre-selection criteria. For this purpose contracting authority shall rate the bidders and draw a list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings.

28. It was noted that this provision was deemed necessary to clarify the manner in which a decision on the qualifications of bidders is to be arrived at and was based on article 7, paragraph 5, of the UNCITRAL Model Procurement Law.

Single-stage and two-stage procedure for requesting proposals (Model provision 10)

29. The contracting authority shall provide each pre-selected bidder with a set of the request for proposal and related documents. However, the contracting authority may also use a two-stage procedure to request proposal, when it does not deem it to be feasible to describe in the request for proposals, the characteristics of the project such as project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

Content of the request for proposals (Model provision 11)

30. This provision provides for information that needs to be included in the request for proposals. The Commission adopted it without comment.

Bid securities (Model provision 12)

31. The request for proposals shall set forth the requirements with respect to the issuer, and the nature, form, amount and other principal terms and conditions of the required bid security. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:

(a) Withdrawal or modification of a proposal before or after the deadline for submission of proposals;
(b) Failure to enter into final negotiations with the contracting authority pursuant to model provision 17, para 1;
(c) Failure to submit its best and final offer within the time limit;
(d) Failure to sign the concession contract, if required by the contracting authorities to do so; and
(e) Failure to provide required security.

32. A view was expressed that this provision increased the recommended remedies of the contracting authority with regard to forfeiture of bid security. More particularly it was pointed out that paragraph 2 (b) merely authorized forfeiture of a bidder's security if the bidder failed to enter into final negotiation or, as provided in paragraph 2 (c), of the bidder failed to formulate a best and final offer.

33. Responding to this concern, the Commission agreed that this issues can be addressed by clarifying the relationship between draft model provisions 12 and 17 and in particular, by replacing the words "failure to formulate a best and final offer" in paragraph 2 (c) with the words "failure to submit its best and final offer". However, the Commission refused to replace the words "best and final offer" with simply words like "offer" or "final offer", stating that it was a term of art that was widely known in the international procurement practice.

Clarification and modifications (Model provision 13)

34. The contracting parties may, whether on its own initiative or as a result of a request for clarification by a bidder, review and as appropriate, revise any element of the request for proposals as set forth in model provision 11. The contracting authority shall justify any revision to the request for proposal and the same shall be communicated to the bidder.

35. A proposal was made that this provision should specify that there was no need for the contracting authority to inform the participants on the identity of the bidders. However, this proposal was opposed to in the interest of transparency and would be inconsistent with article 7 of the Model Procurement Law. As regards the issue whether clarification and modifications necessarily had to be made in writing and regarding the identity of the bidder that had asked the question, it was pointed out that those questions were left to the general procurement regime of the enacting State.

Evaluation Criteria (Model Provision 14)

36. The criteria for the evaluation and comparison of the technical proposals shall include at least Technical soundness; Compliance with environmental standards; operational feasibility; and Quality of services and measures to ensure their continuity.

37. The criteria for the evaluation and comparison of the financial and commercial proposals shall include, as appropriate:

- The present value of the proposed tolls, unit prices and other charges over the concession period;
- The present value of the proposed direct payment by the contracting authority;
- The cost of design and construction activities, annual operation and maintenance cost, present value of capital costs and operating and maintenance cost;
- The extent of financial support, if any, expected from a public authority;
- Soundness of the proposed financial arrangement;
- The extent of acceptance of the negotiable contractual terms proposed by contracting authority in the request for proposals; and
- The social and economic development potential offered by the proposals.

38. It was pointed out that the term “present value” used in the model provision refers to a calculation method whereby future anticipated revenue or expenditure were expressed in present currency exchange rates or inflation over the relevant period.

Comparison and evaluation of proposals (Model provision 15)

39. The contracting authority shall compare and evaluate each proposal in accordance with the evaluation criteria. For this purpose, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the selection procedure.

Further demonstration of fulfillment of qualification criteria (Model provision 16)

40. The contracting authority may further require any bidder to demonstrate again its qualifications in accordance with the same criteria used for pre-selection, and shall disqualify any bidder that fails to do so.

41. Responding to a question, the Commission clarified that the qualification requirements should be met not only by the consortium as a whole, but also by each of its individual members.

Final negotiations (Model provision 17)

42. All the responsive proposals shall be ranked on the basis of the evaluation criteria and shall invite the best-rated bidder for final negotiation of the concession contract. If the contracting authority feels that the negotiations with the bidder invited will not result in a concession contract, the contracting authority shall inform the bidder its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer. If the contracting authority does not find the proposal acceptable, it shall terminate the negotiations with the bidder concerned and invite for negotiation other bidders in the order of their ranking until it arrives at a concession contract or reject all remaining proposals.

43. The view was expressed that the second part of the model provision involved the risk that any demand of unilateral imposition by the authority could lead to termination of the negotiation. In response, it was stated that the model provision were meant to offer a structured procedure for final negotiation and is not intended to curb bad faith in negotiations.

44. A question was asked whether the contracting authority should be required to negotiate with all selected bidders or whether, upon reaching agreement with one of them, it could dismiss the bidders ranked lower even before negotiating with them. The Commission observed that the final negotiations contemplated in the model provision were clearly conceived as consecutive negotiations and not simultaneous negotiations and this is sufficiently clear from the language used in the model provision. In this context, the Commission further pointed out that allowing the contracting authority to reopen negotiations with a bidder with which negotiation has been terminated would amount to transforming the negotiations into simultaneous negotiations and would not be conducive to ensure the level of transparency recommended in the Legislative Guide.

Circumstances authorizing award without competitive procedures (Model provision 18)

45. The contracting authority may negotiate a concession contract without using the procedure set forth in model provisions 6-17 in the following cases:

(a) When there is urgent need for ensuring continuity in the provision of the service and engaging in procedure set forth in model provisions 6-17 would be impractical, provided that the circumstance giving rise to the urgency is neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

(b) Where the project is of short duration and the anticipated initial investment value does not exceed a monitory ceiling set forth by the enacting State;

(c) Where the project involves national defense or national security;

(d) Where there is only one source capable of providing the required service (e.g., intellectual property rights);

(e) In case of unsolicited proposals falling under model provision 23;

(f) When no application or proposals were submitted or all proposal fails to meet the evaluation criteria, and if, in the judgment of the contracting authority, issuing a new invitation would be unlikely to result in project award within a required time frame; and

(g) In cases where there is compelling reasons of public interest.

Procedures for negotiation of concession contract (Model provision 19)

46. In cases where the concession contracts is negotiated without using the procedure set forth in model provision 6-17, the contracting authorities, except of model provision 18 (c), shall (a) publish a notice of its intention to commence negotiations; (b) engage in negotiations with as many persons; and (c) establish evaluating criteria against which proposals shall be evaluated and ranked.

47. To enhance transparency under subparagraph (b), enacting State may establish qualification criteria to be met by persons invited to negotiations. An indication of possible qualification criteria is contained in model provision 7.

Admissibility of unsolicited proposals (Model provision 20)

48. As an exception to the model provisions 6-17, the contracting authority may also consider unsolicited proposals pursuant to the procedures set forth in model provisions 21-23, provided that such proposals do not relate to a project for which selection procedure have been initiated or announced.

Procedure for determining the admissibility of unsolicited proposals (Model provision 21)

49. The contracting authority after preliminary examination shall inform the proponent whether the project is considered to be potentially in the public interest. If the unsolicited proposal is in the public interest, the contracting authority shall invite the proponent to provide detailed information on the proposal. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

50. Public interest entails a considered judgment regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the infrastructure sector concerned.

51. The contracting authority, in considering the unsolicited proposal, shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. The Model provision provides separate selection procedure for unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights (Model provision 22) and unsolicited proposals involving intellectual property, trade secrets or other exclusive rights (Model provision 23).

Miscellaneous Provisions

52. The Model legislative provisions also provide for provisions relating to Confidentiality (Model Provision 24); Notice of contract award (Model Provision 25); Record of selection and award proceedings (Model provision 26); and Review Procedure (Model provision 27).

(iii) Concession Contract

Contents of concession contract (Model provision 28)

53. The concession contract shall provide for such matters, as the parties deem appropriate, such as:

(a) The nature and scope of works to be performed and services to be provided;
(b) The condition for provision of those services and the extent of exclusivity of the concessionaire's right under the concession contract;
(c) The assistance that the contracting authority may provide for obtaining licenses and permits for the concessionaire;
(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with model provision 30;
(e) The ownership of the assets related to the project and the obligations of the parties;
(f) The remuneration of the concessionaire;
(g) Procedure for the review and approval of engineering designs, construction plan and specifications by the contracting authority and the procedure for testing and final inspection, approval and acceptance of the infrastructure facility;
(h) Extent of obligations of the concessionaire for the modification of the service;

(i) Right of the contracting authority or any other public authority to monitor the works, and the conditions and extent to which the contracting authority or any other public authority may order variations in respect of the works and conditions of service;
(j) Extent of concessionaire's obligation to provide reports and other information on its operations;
(k) Mechanism to deal with additional costs and other consequences that might result from any order issued by contracting authority;
(l) Rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire;
(m) Guarantee of performance to be provided and insurance policies to be maintained by the concessionaire;
(n) Remedies available in the event of default of either party;
(o) The extent to which each party may be exempt from liability for failure or delay;
(p) The duration of the concession contract and the right and obligations of the parties upon its expiry or termination;
(q) The manner of calculation of compensation;
(r) The governing law and the mechanism for the settlement of disputes; and
(s) The right and obligation of the parties with respect to confidential information.

54. The above list is indicative rather than exhaustive in nature. The parties are free to agree on the matters most appropriate for the particular needs and requirements of the specific infrastructure project.

55. It was suggested that the model provision should also refer either in the body or in the footnote: the available enforcement mechanism if any public user of the infrastructure facility did not pay for the service provided; the allocation of risk for undisclosed defects in facilities to be rehabilitated; and the allocation of risk for undisclosed environmental conditions for facilities to be operated or renovated by the concessionaire. However, the Commission, while acknowledging the relevance of those additional matters, declined to expand the list.

Governing law (Model provision 29)

56. Law of the enacting State shall be the governing law unless otherwise provided in the concession contract.

Organization of the concessionaire (Model provision 30)

57. The contracting authority may require that the successful bidder establish a legal entity incorporated under the law of the enacting State, provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate.

Ownership of the assets (Model provision 31)

58. The concession contract shall specify which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. In particular, the concession contract shall identify:

- Assets that the concessionaire is required to return or transfer;
- Assets that the contracting authority may purchase from the concessionaire;
- Assets that the concessionaire may retain or dispose of upon expiry or termination of the contract

59. This model provision is incorporated to deal with ownership of project-related assets. Clarity in this respect is important, as it will directly affect the concessionaire's ability to create security interests in project assets for the purpose of raising finance for the project. The classification done above is consistent with the flexible approach taken by various legal systems and the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows distinction between the assets.

Acquisition of rights related to the project site (Model provision 32)

60. The contracting authority shall make available or assist the concessionaire in obtaining rights relating to the project site, including the title thereto. Any compulsory acquisition of land for this purpose shall be carried out according to the law of the enacting State.

Easement (Model provision 33)

61. The contracting authority shall make available to the concessionaire the right to enter upon, transit through, do work or fix installation upon property of their parties as per the law of easement of the enacting State.

62. It was suggested that the model provision should more clearly provide that the easements should be compulsorily acquired by the contracting authority simultaneously with the project site. The Commission, to bring clarity in to the text, decided to provided two variants in its paragraph 1, for the possible source of easements (i.e. legislation itself or an act of the contracting authority or other public authority) and observance of the country's legislation on procedures for the creation of easement in paragraph 2

Financial arrangements (Model provision 34)

63. The concessionaire shall have the right to charge, receive or collect tariffs or fees for the use of the facility or its services in accordance with the concession contract. The contracting authority shall have the power to agree to make direct payment to the concessionaire as a substitute for methods and formula for the establishment and adjustment of those tariffs or fees.

64. Tolls, fees, prices, or other charges accruing to the concessionaire, which are referred to in the legislative Guide as 'tariffs', may be the main source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority. A view was expressed that the model provision should refer to the contracting authority's power to make direct payments to the concessionaire as a substitute for, or in addition to, tariff or fees for the use of the facility or its services. The Commission accepted this proposition and included a second paragraph in the model provision to this effect.

Security interests (Model provision 35)

65. Subject to the restriction that may be provided in the concession contract, the concessionaire has the right to create security interest over any of its assets, rights or interests, including, in particular:

- Security over movable and immovable property owned by the concessionaire or its interest in project assets;
- A pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the facility of the services it provides;

The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire. However, no security may be created over public property or other property, assets or rights needed for the provision of a public service, where law prohibits the creation of such security.

66. It was pointed out that in some countries a provision in the concession contract that limited the concessionaire's right to create security interest might not be sufficient to effectively prevent the creation of security interest in contravention of such a contractual provision, since the concession contract might not be effective *vis-a-vis* third parties. The Commission, aware of this practical implication, said that the model provision nevertheless reflected an important principle of law in several legal systems.

Assignment of the concession contract (Model provision 36)

67. Except as otherwise provided in model provision 35, the rights and obligation of the concessionaire may not be assigned to third parties without the consent of the contracting authority, who shall set forth the conditions for giving such consent.

68. In response to a question, it was clarified that the model provision would make it mandatory to spell out in the concession contract the conditions for authorizing an assignment of the concessionaire's rights and that, once such conditions were met, the contracting authority would be under an obligation to agree to an assignment.

(iv) Contents and Implementation of the Concession Contracts

Transfer of controlling interest in the concessionaire (Model provision 37)

69. Except otherwise provided in the concession contract, the controlling interest in the concessionaire may not be transferred to third parties without the consent of the contracting authority. The notion of "controlling interest' generally refers to the power to appoint the management of a cooperation and influence or determine its business.

Operation of infrastructure (Model provision 38)

70. This model provision provides that the extent of the concessionaire's obligations shall be set forth in the concession contract. The provision was adopted without comment.

Compensation for specific change in legislation (Model provision 39)

71. The concession contract shall specify the extent of the compensation for injury or loss caused to the concessionaire for any change in legislation or regulation specifically applicable to the infrastructure or the services it provide.

Revision of the concession contract (Model provision 40)

72. The concession contract shall set forth the extent to which the concessionaire is entitled to revision of the concession contract because of substantial increase in cost or diminish in value of the consignment receives, as a result of: change in economic or financial conditions; or change in legislation of regulation not specifically applicable to the infrastructure facility of the service it provides; or occur after the conclusion of the contract; are beyond the control of the concessionaire; and are of such nature that it is unforeseen at the time of negotiation of concession contract.

Takeover of an infrastructure project by the contracting authority (Model provision 41)

73. The contracting authority may temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire.

Substitution of the concessionaire (Model provision 42)

74. The contracting authority may agree with the entities extending the financing for the project for substitution of the concessionaire by a new entity or person, in case of serious breach by the concessionaire or any other event that could justify the termination of the concession contract.

75. The Commission agreed to a proposal that the model provision should be amended in order to provide that the concessionaire should be party to the agreement that set forth the terms and conditions of the concessionaire's substitution and added the words "and the concessionaire to provide for after the words "infrastructure projects".

(v) Duration and extension of the concession contract

Duration and extension of the concession contract (Model provision 43)

76. The duration of the concession shall be set forth in the concession contract. However, the duration may be extended in case of:

(a) Completion delay or interruption of operation due to circumstance, beyond the control of the either party;
(b) Project suspension brought about by contracting authority;
(c) Increase in cost not foreseen, the recovery of which could not be achieved without the extension; and
(d) Any other circumstance specified by the enacting State.

77. The view was expressed that the model provision, in particular subparagraph (c), was too restrictive, as it does not provide for the possibility for the contracting authority and the concessionaire to agree on the extension of the term of the concession in the concession contract. After extensive deliberation the Commission agreed to insert the words “for the law” after the word “possibility” in the footnote which would be reread as: “the enacting State may wish to consider the possibility for the law of authorizing a consensual extension of the concession contract pursuant to its terms, for reasons of public interest, as justified in the record to be kept by the contracting authority”.

Termination of the concession contract by the contracting authority (Model provision 44)

78. The contracting authority may terminate the concession contract if it can no longer be reasonably expected that the concessionaire will be able to perform its obligation or for compelling reason of public interest or for other circumstance listed by the enacting State.

79. Responding to several questions concerning the meaning of the term “reasonably” in subparagraph (a), which was felt to be ambiguous, uncertain and involving subjective judgment, the Commission observed that the general agreed understanding was the, given the serious consequences of termination, it should under most circumstance be regarded as a measure of last resort. In this regard, the legislative Guide went further to state that the termination of the project agreement in most case should require a final finding by the dispute settlement body provided for in the agreement.

Termination of the concession contract by the concessionaire (Model provision 45)

80. A concessionaire may terminate the concession contract in the event of serious breach by the contracting authority; or failure to agree on the revision of the concession contract; or if there is increase in cost or decrease in value of the consignment receives and the parties have failed to agree on the revision of the concession contract.

81. A view was expressed that the model provision was excessively favorable to the concessionaire and potentially harmful to the public interest. In response it was pointed out that the rights of termination of the concessionaire were more limited than those of the contracting authority and that the grounds for termination by the concessionaire were usually limited to serious breach by the contracting authority and other exceptional situations and did not normally include a general right to terminate the project agreement at will.

82. Apart from this, either party shall have the right to terminate the concession contract if the performance of obligation is impossible by circumstance, beyond the reasonable control of either party’s (Model provision 46).

Compensation upon termination of the concession contract and Wind-up and transfer measures (Model provisions 47 and 48)

83. The concession contract shall also stipulate how compensation due to either party is calculated in the event of termination of the (Model provision 47). It shall also provide for mechanism and procedure for transfer of assets and the compensation for such transfer

of assets, transfer of technology, training for personals of contracting authority or a successor concessionaire and the provision for continuing support services and resources for a reasonable period after transfer (Model provision 48).

(vi) Settlement of Disputes

84. Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties (Model provision 49). For this purpose the enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of private financed infrastructure projects. In case of dispute involving consumers or users of the infrastructure facility, the concessionaire shall establish a simplified and efficient mechanism for handling claims (Model provision 50). For any other disputes between concessionaire and its shareholders, lenders, creditors, suppliers etc., are free to agree on any appropriate mechanism (Model provision 51).

2. DRAFT UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW

A. Background

85. The Commission, it may be recalled, had successfully completed the work on UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment, which was adopted by the Commission in 1997.

86. The Commission, at its thirty-second session (1999), considered a proposal from Australia on possible future work on the subject of insolvency law. The proposal urged that the Commission consider entrusting a working group with the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.

87. Subsequently, the Working Group on Insolvency Law (Working Group V) had held an exploratory session in Vienna from 6 to 17 December 1999 to consider the issues and the form of the future work on the topic.[2] In line with the recommendation made by the Working Group, the Commission at it thirty-third session (2000) approved and authorized the Working Group to prepare:

> "a comprehensive statement of key-objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring; a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefit and detriments of such approaches."

88. The Commission at its thirty-fourth session (2001), after deliberating on the report of the UNCITRAL – INSOL – IBA Global Insolvency Colloquium held at Vienna, from 4 to 6 December 2000, confirmed that the mandate given to the Working Group at the thirty-third session of the Commission should be widely interpreted to ensure an appropriately flexible work product, which would take the form of legislative guide. The Working Group on Insolvency Law commenced the preparation of a legislative guide to insolvency law at its twenty-fourth session (2001) and continued its work at its twenty-fifth session and twenty-sixth session.

89. The Commission at its thirty-fifth session (2002), appreciated the Working Group on the progress accomplished for developing a legislative guide and emphasized the need for a consistent approach by Working Group on Insolvency Law and Working Group on Security Interests.

B. Consideration by the Commission at its current Session

90. The Commission at its current session expressed its satisfaction with the progress of Working Group on Insolvency Law in developing the draft Legislative Guide, commending the level of consensus achieved in a very complex area of law and the comprehensive and balanced nature of the draft text. The Commission also expressed its appreciation for the level of cooperation and coordination with international organizations in the development of the draft Guide and stressed the need to maintain that coordination and cooperation, not only to finalize the text, but also to promote awareness and to facilitate use of the draft Guide.

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[2] For the report of the session, see A/CN.9/469.

91. The Commission noted that the World Bank was currently revising its *Principle and Guidelines for Effective Insolvency and Creditor Right System,* and so there should be cooperative approach to achieve convergence. To this end, it was proposed that issues of divergence be considered at the next session of the Working Group and that the World Bank make relevant documents available to facilitate that discussion.

92. The Commission endorsed the recommendation that had been made to it by the twenty-eighth session of Working group V (February 2003) and approved the scope of the wok undertaken by the Working Group. The Commission directed the Secretariat to make the current draft of the legislative guide available to all UN Member States and directed the Working Group V to complete its work and present it to the thirty-seventh session of the Commission in 2004 for approval and adoption.[3]

(i) Designing the structure and key objectives of an effective and effective insolvency regime (Part One)

Key objectives of an effective and effective insolvency regime (Chapter I.A)

93. There was wide support that the key objectives under Chapter I.A were well targeted and had reflected the components necessary for effective and effective insolvency regimes. However, some suggestions were made. It was suggested that firstly, paragraph 1 might be more balanced in its reference to the interests affected by an insolvency law, secondly, paragraph 24 might be expanded to include reference to the structure of an insolvency regime and to the possible use of out-of-court process and finally, the last sentence of key objectives 5 might be more flexible in its reference to application of the stay to secured creditors.

Reorganization (Chapter II.B)

94. Under this Chapter, concerns were expressed by some delegations with respect to the inclusion of material on informal reorganization process in a guide related principally to insolvency legislation and in particular, with respect to the level of detail of the treatment of those processes in the introductory chapter. The Commission, however, recognized that those types of process were increasingly being developed and is an useful addition to the tools available for addressing financial distress. Concerns were also expressed with respect to those processes described in part two, chapter V, and to their relevance to commercial insolvency regime.

(ii) Core Provisions of an effective and efficient insolvency regime (Part Two)

Assets to be affected (Chapter III.A)

95. As regard this chapter it was suggested that greater emphasis should be given to management of assets, as opposed to administration or disposition. With respect to the time of constitution of the estate in paragraph 65, it was suggested that the implications of the estate being constituted retrospectively to the date of application to address, for example, transactions entered into between application and commencement, should be discussed further.

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[3] A/CN.9/XXXVI/CRP.1/Add.8. It is expected that the Working Group V will complete its deliberations on the draft guide at its thirtieth session.

Treatment of contracts (Chapter III.D)

96. As regards this Chapter the Commission, while noting the importance of labour contracts and their treatment in insolvency law, acknowledged that those contracts raised complex and difficult issues of both national and international law that could not be comprehensively addressed in the draft legislative Guide. The Commission noted, however, that the reorganization processes discussed in the draft Guide were aimed specifically at facilitating business recovery and preserving employment.

Avoidance proceedings (Chapter III.E)

97. As regards this Chapter it was suggested that the draft Guide should discuss further the implications of the suspect period applying retrospectively from either application or commencement. More generally, the effect of application and commencement and their treatment in the draft Guide might need to be examined more closely to ensure consistency.

Creditors (Chapter IV.C)

98. The Commission took note of the concerns expressed with respect to the various mechanisms for creditor participation in insolvency proceedings and the need for greater clarity, in particular with respect to the relationship between the right of creditors individually and the mechanism for representation.

The reorganization plan (Chapter V.A)

99. In reorganization plan, it was proposed that the treatment of secured creditors in reorganization should be set forth clearly in the draft Guide and, in particular, in respect of the voting of secured creditors on the plan as a class or otherwise.

Treatment of creditor claims (Chapter VI.A)

100. In the treatment of creditor claims, a suggestion was made that the draft Guide should include further discussion of the complex question of subordination of claims.

101. The Commission, while recognizing the importance of the issue of applicable law governing in insolvency proceedings, noted that the Working Group had not had the opportunity to consider this issue so far. The Commission further noted that those issues discussed in the current session would be taken into account in the future revision of the text and brought to the attention of Working Group V, at its next session which is to be held from 1 – 5 September 2003 in Vienna International Centre.

3. ARBITRATION

A. Background

102. 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 on Arbitration and Conciliation (Working Group II) and had decided that the priority items for the Working Group 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 on Arbitration commenced its work at its thirty-second session in March 2000.

103. The Commission at its thirty-fifth session (2002) considered the Working Group report on the requirement of the written form for the arbitration agreement and the issue of interim measures of protection. As regards the issue of interim measures of protection, the Commission took note that the Working Group had considered a draft text of a revision of article 17 of the Model law and the secretariat was requested to prepare a revised draft, based on the discussion in the Working Group, for consideration at the thirty-seventh session of the Working Group.

B. Consideration of the topic by the Commission at its present Session

104. The Commission at its current session took note with appreciation of the report of Working Group II on the work at its thirty-seventh and thirty-eighth sessions.[4] The Commission agreed that it was unlikely that all the topics could be finalized by the Working Group before the thirty-seventh session of the Commission in 2004. The Commission directed the Working Group to give a degree of priority to interim measures of protection and the commission noted the suggestion that the issue of *ex parte* interim measures, which the Commission agreed remained a point of controversy, should not delay the progress on the topic. The Commission's consideration at the present session was focused on the following four aspects.[5]

(i) Power of an arbitral tribunal to order interim measures of protection

105. On the issue of the power of an arbitral tribunal to order interim measures of protection, the Commission noted that, at its thirty-seventh session, the Working Group considered a revised draft text of article 17 of the UNCITRAL Model Law on International Commercial Arbitration. However, due to lack of time, the Working Group had not completed its deliberations.

(ii) Provision allowing for interim measures to be ordered *ex parte* by an arbitral tribunal

106. The issue whether to include a provision allowing for interim measures to be ordered *ex parte* by an arbitral tribunal was also discussed at the thirty-seventh session of the Working Group. It was recalled that a number of delegations had expressed the view that this power should be reserved for State courts. It was also noted that there were at least two situations to order an interim measures of protection on an *ex parte* basis,

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4 A/CN.9/523 and A/CN.9/524

5 The Working Group held its 39th Session from 10-14 November 2004 and in its 40th session is expected to continue its discussion on the issue of recognition and enforcement of interim measures ordered by an arbitral tribunal.

notwithstanding the fundamental principle of due process and equity of parties in arbitration. The first such situation was, when a party applying for interim measure in a case where it was urgently needed was prepared to provide notice to the other party but, for practical reasons, had not yet been able to give effective notice. The second, and more difficult circumstance was where a party seeking the interim measures of protection contended it was necessary to withhold notice in order to ensure that the interim measure would be effective or that the other party would not frustrate the measure.

107. In support of giving such power to the arbitral tribunal it was said that the ability to resolve disputes included the power to order interim measures generally, then it would necessarily follow that an arbitral tribunal should have the discretion to do so on an *ex parte* basis where circumstances so required. On the other hand, the argument against granting such power was the concern for the possible abuse of such a power.

(iii) Recognition and enforcement of interim measures of protection

108. With regard to the issue of recognition and enforcement of interim measures of protection, the Commission noted that the Working Group had briefly discussed this based on the Secretariat Note[6] at its thirty-seventh and thirty-eighth session. The Commission noted that the Secretariat has been requested to prepare a revised text setting out the various options discussed by the Working Group.

(iv) Provision expressing the power of the court to order interim measures

109. The Commission also noted that, at its thirty-eighth session, based on a note by the Secretariat[7], the Working Group had considered a possible draft provision expressing the power of the court to order interim measures of protection in support of arbitration, irrespective of the country where the arbitration took place. General support was expressed in favour of such a provision. As to the criteria and standards for the issuing of such measures, different views were expressed. One view was that the court should apply its own rules of procedures and standards. Another view favoured the criteria and standards set forth in article 17. It was generally recognized that any reference to existing standards would have to provide flexibility for the court to adapt to the specific features of international arbitration. A revised provision on the basis of the discussion in the Working group shall be prepared by the Secretariat for future discussion.

110. The Commission recognizing that it was unlikely that all topics could be finalized by its thirty-seventh session, agreed that interim measures of protection should be given a level of priority. The Commission also noted that suggestion that the issue of *ex parte* interim measures, which remained a point of controversy, should not delay progress on that topic.

C. Future work of the Commission

111. The Commission took note that arbitrability, a topic that had been accorded low priority, could be reassessed when considering future work. Further, the UNCITRAL Arbitration Rules (1976), and the UNCITRAL Notes on Organized Arbitration Proceedings (1996) could be considered for inclusion in future work, once the existing topic being considered by the Working Group had been completed.

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6 A/CN.9.WG.II/WP.119

7 A/CN.9.WG.II/WP.119, paras. 77 and 78

4. TRANSPORT LAW

A. Background

112. 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.

113. The Commission at its thirty-fourth session (2001), decided to entrust the preparation of draft instrument on transport law to the Working Group on Transport Law (Working Group III). 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 was given free hand to study the desirability and feasibility of dealing with door-to-door transport operations, or certain aspects of those operations. Depending on the result of the studies, the Working Group could recommend to the Commission an appropriate extension of its mandate. The mandate thus concerns the revision of maritime law and is limited to port-to-port operation.

114. The Commission at its thirty-fifty session (2002) had before it the report of the ninth session of the Working Group on Transport Law, where the Working Group undertook a preliminary review of the provisions of the draft instrument on transport law. The Commission, after discussion, approved the working assumption that the draft instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.

B. Preparation of the Draft Instrument on Transport Law

115. The Working Group at its tenth and eleventh sessions continued to review the provisions of the draft instruments on transport law. At its tenth session the Working Group took proceeded to consider the draft articles 6, 4, 9.4 and 9.5 of the draft instrument. Due to insufficient time, the Working Group deferred its consideration of draft article 4 and the remaining provisions of the draft instrument.

116. At the eleventh session, the Working Group completed its first reading of the draft instrument contained in the annex to the note by the Secretariat[8], with the exception of those provisions of the draft instrument dealing with the use of electronic commerce techniques in transport documentation, which were left for consideration at a later stage. The Secretariat was requested to prepare a revised version of the draft instrument to reflect the decisions made by the Working Group. Where no such decision had been made, the Secretariat was requested to conduct its work bearing in mind the various views and concerns expressed in the course of the deliberations of the Working Group. The Working Group encouraged the Secretariat to exercise broad discretion in restructuring the draft instrument and redrafting its individual provisions to facilitate continuation of

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[8] A/CN.9/WG.III/WP.21

the discussion at a future session on the basis of options reflecting the spectrum of opinions that had been expressed at the ninth, tenth and eleventh sessions of the Working Group.

C. Considerations at the current session of the Commission

117. At its current session, the Commission had before it the report of the tenth and eleventh sessions of the Working Group on Transport Law. The Commission, taking note of the fact that the Working Group has reached a particularly difficult phase of its work and that any further progress would require a delicate balance being struck between the various conflicting interests at stake, decided on an exceptional basis, to hold the Working Groups twelfth and thirteenth session on the basis of two-week sessions. The Commission further invited the Working Group to make every effort to complete its work expeditiously and, for that purpose, to use every possibility of holding inter-sessional consultations, possibly through electronic mail.

5. SECURITY INTERESTS

A. Background

118. 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 law.[9] 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 a 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.

119. Reflecting on the note of the Secretariat on security interests in its thirty-fourth session (2001),[10] 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. In order to obtain the view and benefits from the relevant industry, a colloquium was conducted in Vienna from 20 to 22 March 2002.[11] The Working Group on Security Interests (Working Group IV) held its first meeting in New York from 20 to 24 May 2002. The Working Group considered chapters I to V and X of the first preliminary draft guide on secured transactions, prepared by the Secretariat.[12]

120. The Commission at its 35th Session (2002) took note of the work done by the Working Group and confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide. The Working Group, at its second session (Vienna December 2002) considered chapter VI, VII and IX of the first preliminary draft guide on secured transactions, prepared by the Secretariat. The Working Group considered chapters VIII, XI and XII of the first version of the draft Guide and Chapter II and paragraphs 1 to 33 of Chapter III of the second version of the draft guide at its third session (New York, March 2003).

B. Consideration at the current session of the Commission

121. At its current Session (2003), the Commission considered the reports of the second and third sessions of the Working Group.[13]

122. With respect to the scope of work, it was suggested that Working Group VI should consider covering, in addition to goods, including inventory, certain types of intangible assets, such as trade receivables, letters of credit, deposit accounts and intellectual and industrial property rights, in view of their economic importance for modern financing practices. With respect to the importance of intellectual and industrial property rights, reference was made to equipment financing transactions in which security was also often taken in the trademark relating to such equipment and to transactions in

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9 A/CN.9/475
10 A/CN.9/496
11 For the report of the colloquium, see A/CN.9/WG.VI/WP.3
12 A/CN.9/WG.VI/Wp.2 AND Add 1-5 and 10.
13 A/CN.9/531 and A/CN.9/532

which security was taken over the entirety of a debtor's assets. In view of the complexity of the matter and the expertise of international organizations such as the World Intellectual property Organization, it was suggested that increased efforts of coordination and further studies were called for. There was broad support in the Commission for both suggestions. The Commission noted with satisfaction that the Secretariat planned to prepare a working paper on those matters in consultation with all interested organizations.

123. As to the substance of the draft legislative guide, it was stated that, while the guide could discuss the various workable approaches to the relevant issues, it should also include clear legislative recommendations. It was also observed that, with respect to issues in which alternative recommendations were formulated, the relative merits of each approach, in particular for developing countries and countries with economies in transition, needed to be discussed in detail.[14]

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[14] At the fourth session (8-12 September 2003), the Working Group considered Chapter IV (Creation), IX (Insolvency), I (Introduction), II (Key Objectives) and paragraphs 1 to 41 of Chapter VII (Priority) and requested the Secretariat to prepare revised versions of those chapter (see A/CN.9/543). The fifth Session of the Working Group will be held at the UN Headquarters from 22 to 25 March 2004.

6. BRIEF REPORT ON OTHER TOPICS

A. Electronic Commerce

124. On the subject of Electronic Commerce, it may be recalled that the Commission, at its thirtieth session (1997), entrusted the Working Group on Electronic Commerce with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. Since then the Commission at its successive sessions considered the progress on this work within the Working Group. The Commission at its thirty-fourth session (2001) adopted the UNCITRAL Model Law in Electronic Signatures, together with a Guide to Enactment of the Model Law. In that session, the Commission also endorsed a set of recommendations for future work by the Working Group on Electronic Commerce at its thirty-eighth session, which included the preparation of an international instrument dealing with selected issues on electronic contracting and consideration of three other topics namely:

(a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instrument
(b) a study of the issues related to transfer of rights, in particular rights in tangible goods by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interest in goods; and
(c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration.

125. At its 35th session, the Commission took note with appreciation the report of the Working Group on the work done at its thirty-ninth session,[15] regarding the possible international instrument dealing with selected issues on electronic contracting. The Commission, took note of the different view that were expressed within the Working Group concerning the form and scope of its instrument, including proposals that the Working Group's, consideration should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. While reiterating the importance of the project, the Commission requested the Working Group to devote most of its time at its fortieth session, in October 2002, to a substantive discussion of various issues relating to legal barriers to electronic commerce that has been raised in the Secretariat's initial survey.[16]

126. At its current session, the Commission took note of the reports of the Working Group on the work of its fortieth session[17] held in Vienna (October 2002) and its forty-first session[18] held in New York (May, 2003), and focused its consideration on the following two aspects:

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15 A/CN.9/509
16 A/CN.9/WG.IV/WP.94
17 A/CN.9/527
18 A/CN.9/528

a. Legal barriers to the development of electronic commerce in international instruments relating to international trade

127. It may be recalled that the Commission at its 35th Session (2002) requested the Working Group to devote most of its time at its fortieth session, to a substantive discussion of various issues that had been raised in the Secretariat's initial survey.[19]

128. Accordingly, the Working Group at its fortieth session continued its review of the Secretariat's survey. The Working Group was informed that, as a starting point, the Secretariat had limited its survey of possible barriers to electronic commerce in existing trade-related conventions to international conventions and agreements that were deposited with the UN Secretary-General. Following further deliberations, the Working Group agreed to recommend that the Secretariat take up the suggestions for expanding the scope of the survey to additional instruments proposed for survey by other organizations.

129. The Commission at its current session endorsed this recommendation and called on Member States to assist the Secretariat in that task by inviting appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.

b. Electronic contracting: provisions for a draft convention

130. It may be noted that the Working Group had, at its thirty-ninth session (March 2002), begun its deliberation on the preliminary draft convention.[20] The deliberations were based on a note prepared by the Secretariat discussing selected issues on electronic contracting, which contained in its annex I an initial draft tentatively entitled "Preliminary draft Convention on (International) contracts concluded or Evidenced by Data Messages"[21] Consideration of the preliminary draft convention was continued during the fortieth [22] and forty-first[23] sessions of the Working Group.

131. At its current session, the Commission was informed that the Working Group had undertaken a review of articles 1 to 11 of the revised text of the preliminary draft conventions. It was observed that the form of an international convention had been used by the Working Group thus far as a working assumption, but that did not preclude the choice of another form for the instrument at a later stage of the Working Group's deliberations

132. The Commission noted that the Working Group had held a preliminary discussion on the question of whether intellectual property rights (IPRs) should be excluded from the draft convention. In this regard, the question before the Working Group was whether and to what extent the solutions for electronic contracting being considered in the context of the preliminary draft convention could also apply to transactions involving licensing of IPRs and similar arrangements. The Secretariat was requested to seek the views of other

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19 A/CN.9/WG.IV/WP.94

20 See Report of the Working Group on Electronic Commerce on the work of its thirty-ninth session A/CN.9/509

21 A/CN.9/WG.IV/WP.95

22 A/CN.9/527

23 A/CN.9/528

international organizations, and the World Intellectual Property Organization (WIPO) in particular.

B. Public Procurement

133. The deliberations in the Commission on this topic were based on a note prepared by the UNCITRAL Secretariat.[24] The note besides reviewing the implementation of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services, set out current activities of other organizations in the area of public procurement.

134. Strong support was expressed for the inclusion of procurement law in the work programme of the Commission. An appropriate framework for public procurement was said to be essential for the efficient and transparent expenditure of public funds. Despite the widely recognized value of the UNCITRAL Model Procurement law, novel issues and practices had arisen since its adoption, which might justify an effort to adjust its text. It was also observed that alternative procurement methods, such as "reverse auction" and "off-the-shelf" purchases, should be taken into account, as those methods were believed to help in curbing collusion among bidders and to offer potential price savings, compared with traditional procurement methods such as tendering.

135. The Commission agreed to request the Secretariat to prepare detailed studies on the issues identified in the note of the Secretariat as a starting point and to formulate proposals on how to address them. This was mandated with a view to enable the consideration of the Secretariat's studies by a working group that might be convened in the third quarter of 2004, subject to the conformation by the Commission at its 37th Session.

136. It was suggested that the Secretariat's studies and proposals should take into account the fact that in some countries public procurement was not a matter for legislation, but for internal directives of ministries and government agencies. The Commission's work, it was further suggested, could also extend to the advice, in addition or as an alternative to legislative guidance. It was expected that the work would be carried out in close cooperation with organizations having experience and expertise in the area, such as the World Bank.

C. Commercial Fraud

137. It may be recalled that at its 35th session (2002), the Commission considered a proposal that its Secretariat prepare a study of fraudulent financial and trade practices in various areas of trade and finance for consideration at a future session of the Commission. At that session the Commission requested the Secretariat to carry out a study on this topic, but did not set a time limit for the completion of the study, nor did it commit itself to taking action on the basis of it.

138. Based on a meeting of experts convened in Vienna (December 2002), the Secretariat presented a note on possible future work relating to commercial fraud to the Commission at this current session.[25]

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[24] A/CN.9/539

[25] A/CN.9/540

139. The Commission was informed that the advent and spread of technologies and use of the Internet had markedly affected the growth and incidence of commercial fraud, in particular given its transnational component. The Under Secretary-General, the Legal Counsel, who also acted as Chairman of the Legal Advisers of the United Nations System, mentioned in that context that the Legal Advisers had discussed the absence of an international legal regime for the Internet. Pursuant to those discussions, the Legal Advisers had agreed on the following points, to be conveyed by them to Member States as appropriate:

(a) The Internet was of fundamental importance as a vehicle of communication, commerce, political and cultural expression, education and scientific cooperation;
(b) Because of the international nature and effects of the Internet, individual national laws and court systems were not able to provide an adequate legal framework for much of the activity that occurred on the Internet;
(c) It was urgent to develop a legal structure and institutions at the international level that favoured the further development of activity on the Internet in an environment of legal certainty and respect for the rule of law and for the international character of activity on the internet.

140. The Commission was informed that at the advent and spread of technologies, notwithstanding the strong criminal law component of attempts to combat commercial fraud, a key role for private law in the field could serve a useful tool and in this regard UNCITRAL had a role to play on the internet.

141. It was decided that an international colloquium and studies on the terms of commercial fraud could be undertaken in cooperation with the Commission on Crime Prevention and Criminal Justice. It was also clarified that there was no expectation of establishing an inter-governmental working group on commercial fraud.

D. Date and Place of the thirty-seventh session of the Commission

142. The Commission approved holding its thirty-seventh session in New York from 14 June to 2 July 2004.

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

1. This report aims at highlighting some of the activities carried out within the three Commissions (i.e, in Expert Meetings within the Commissions) of UNCTAD in the year 2003 that may be of interest to the AALCO Member States.[26]

1. COMMISSION ON TRADE IN GOODS AND SERVICES AND COMMODITIES

A. Expert Meeting on Market Entry Conditions Affecting Competitiveness and Exports of Goods and Services of Developing Countries: Large Distribution Networks, Taking into Account the Special Needs of LDCs

2. In the Expert Meeting on Market Entry Conditions Affecting Competitiveness and Exports of Goods and Services of Developing Countries held Geneva 26–28 November 2003, individual experts and specially invited resource persons put forward their views on how developing country producers could obtain market entry, particularly in developed country markets, taking into account the growing importance of large distribution networks.

3. Large distribution networks are geographically diversified networks with many components that handle large volumes of products and that are, usually, vertically integrated. Experts agreed that it was important for developing country producers to engage with these networks since they have become the core of the logistic chain both of domestic commerce and international trade and therefore offer the potential for producers of reaching wider markets. The experts noted that the large distribution networks pose particular market entry conditions. These conditions may be defined as the parameters that exporting firms in developing countries have to meet in order to enter such distribution networks for goods and services in the markets of developed countries. The parameters in question may relate to product characteristics, the nature of the production process (e.g with respect to worker health and safety, or to environmental impact), prices and speed of delivery. Compliance with such market entry conditions is a prerequisite for participation in entry modes such as direct exportation, joint ventures, partnerships, franchising, licensing or trade fairs, and for the use of a sales representative, distributor or consolidator.

4. On the topic of Competition issues in large distribution networks, the Meeting focused on four main themes: (i) how market entry conditions and requirements positively or negatively affect the competitiveness of developing countries in their premier markets; (ii) how the anti-competitive practices of large distribution networks within developing countries and in their premier markets positively or negatively affect

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[26] The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 to promote international cooperation in trade and development and the economic development of developing countries. It is composed of 187 member States. Its institutional set-up comprises the Conference, the Trade and Development Board (TDB) and a number of subsidiary bodies serviced by a permanent Secretariat. It may be noted that the analytical work of the UNCTAD is largely carried out within the following three subsidiary bodies, Commission on Trade in Goods, Services, and Commodities; Commission on Investment, Technology and Related Financial Issues; and Commission on Enterprise, Business Facilitation and Development.

the competitiveness of developing countries' producers and exporters; (iii) how the playing field of trading rules is tilted or not against developing countries in the context of both market entry and market access barriers; and (iv) how subsidies given by developed countries to their enterprises and producers in the agricultural sector, for example, alter the competitive field.

5. The experts devoted part of their discussion to the impact of large supermarket chains on developing countries' agro-food exports. It was pointed out that the there are number of problems and restrains in the development of this sector. The main questions are how and under what conditions can producers and exporters in developing countries participate in global food chains, and what policy measures can contribute to capable and equal participation in these global food chains. The Expert Meeting noted that the complexity of food safety and environmental requirements of supermarkets requires a strategic and proactive response by developing countries, rather than a piecemeal, reactive and short-term approach. The elements of such a strategic, proactive approach may include:

- Development of national and regional strategies in response to some very important general or multi-sectoral requirements.
- Establishing information clearing houses, at the national, subregional or international level on environmental and product safety requirements and related early warning and quick response systems.
- Creating or improving systems of adequate national environmental regulations and standards as well as, where appropriate, specific standards for exports that are similar to environmental requirements in key target markets.
- Improving or creating national or subregional eco-labelling systems.
- Actively pursuing avenues of harmonization, technical equivalence and mutual recognition of regulations and standards.
- Better co-ordination of technical assistance and capacity-building activities of foreign donors (including importers in accordance with Art. 11 of the TBT Agreement) to implement the elements above.

6. The Expert Meeting also suggested that there is a need to focus more assistance at the subsector level, particularly for small firms that are often overlooked by the large technical assistance schemes of many aid agencies. There is also the need to strengthen international cooperation. This can include the following measures:

- Actively harnessing provisions on Special and Differential Treatment (S&D) in the TBT and SPS Agreements.
- Creating international or subregional clearing houses on environmental requirements from Governments and the private sector.
- Exploring the creation of regional or subregional standards and certification systems.
- Far more active use by the developing countries of discussions in the TBT and SPS Committees of WTO to preserve or improve export competitiveness. Developing countries should also use the WTO Committee on Trade and Environment more effectively to raise concerns on environmental and food safety measures related to market access; to operationalized S&D measures; and to

support proactive adjustment strategies and active involvement in stakeholder consultations in standard setting.

- UNCTAD's initiative on creating an International Consultative Task Force on Environmental Requirements and International Trade, as a project-based activity that would assist developing countries in improving information management on environmental and health requirements in key export markets.

B. Expert Meeting on Market Access Issues in Mode 4 (Movement of Natural Persons to Supply Services) and Effective Implementation of Article IV on Increasing Participation of Developing Countries

7. The Expert Meeting on Market Access Issues in Mode 4 (Movement of Natural Persons to Supply Services) and Effective Implementation of Article IV on Increasing Participation of Developing Countries was held on 29–31 July 2003 at Geneva. Individual experts put forward their views on how Governments of developed and developing countries could play an active role at the national level and in multilateral negotiations in order to promote trade in services through mode 4.

8. The Expert Meeting recognized that liberalization of mode 4 could be a win-win welfare situation for developed and developing countries given the right policy and regulatory framework at the national and international levels. Movement of natural persons supplying services under the GATS exceeds its pure economic, trade and competitiveness benefits for developing countries. It is an effective tool in addressing primary development needs, including alleviation of poverty and gender mainstreaming into services industries. There is therefore a strong political and economic case in favour of more comprehensive and commercially meaningful market access commitments in mode 4. GATS negotiations on mode 4 provide a unique opportunity to redeem the reputation of globalization and trade in the interest of developing and least developed countries. This is an important development benchmark for the Doha Work Programme from developing countries' perspective and would make the international trading system more equitable and balanced from that same perspective.

9. Despite being recognized as the key area of importance for developing countries, mode 4, under which benefits go directly to people in developing countries, has not featured prominently in the Doha Agenda. Effective market access in mode 4 would depend on how it will be addressed in the context of discussions on domestic regulation under the Article VI and the recognition of qualifications and equivalent experience, and on multilateral progress in making visa and permit systems less restrictive for trade.

10. Experts recognized the contribution made by the Expert Meeting on Mode 4 and underlined the leading role that UNCTAD should play in clarifying the way ahead and in undertaking concrete further steps towards deepening the debate on MNP in a perspective of continuity among the most relevant stakeholders. Such work could include identification of domestic policy frameworks, formulas, mechanisms, disciplines and institutional arrangements to approach trade issues in a manner facilitating mode 4 movement, treatment of which is technically feasible within the GATS framework, as a means of mainstreaming a symmetrical treatment of MNP in relation to the other modes of delivery of services, ensuring trade and development gains, and obtaining a balance of rights and obligations and full implementation of Articles IV and XIX of the GATS.

Experts felt that such an endeavor should be achieved in a reasonable timeframe, before the end of the Doha Work Programme.

11. Further, UNCTAD was invited to continue working in the trade-related areas of Movement of Natural Persons (MNP) and explore possible areas of work. In particular it should:

- Continue the dialogue on conceptual, policy, legal, institutional and administrative frameworks facilitating movement of natural persons to supply services;
- Explore possible approaches and mechanisms for granting GATS visas and for expediting associated administrative procedures;
- Contribute to strengthening capacities of Governments in managing the trade agenda surrounding the issues of mode 4, including sequencing of the implementation of domestic policy reforms, innovative employment policies and training programmes aimed at capitalizing on export opportunities; and support the creation of institutional capacities to allow recognition of qualifications at all levels in those services with export potential through this mode;
- Drawing upon existing work and information available, analyse national and existing regional experiences in the treatment and liberalization of mode 4 in schemes relating to integration, free trade areas and bilateral agreements in order to draw lessons for the treatment of MNP at the multilateral level;
- Undertake studies and organize ad hoc expert meetings to discuss specific issues such as recognition of qualifications and MRAs, transparency, economic needs tests, safeguards and national experiences with regard to administrative procedures.

12. In this respect, it was suggested that UNCTAD should continue working together with other relevant organizations, including WTO, ILO, UNESCO, OECD, IOM, regional organizations, and UN regional commissions.

C. Expert Meeting on Definitions and Dimensions of Environmental Goods and Services in Trade and Development

13. The Expert Meeting on Definitions and Dimensions of Environmental Goods and Services in Trade and Development was held on 9–11 July 2003 in Geneva. Discussions focused on two key issues arising from the negotiating mandate in paragraph 31 (iii) of the Doha Ministerial Declaration: uncertainty about definitions and classifications of Environmental Goods and Services (EGS), and the need to ensure that the liberalization of trade in EGS works for all WTO Members, developing and developed alike.

14. Experts saw a need for practical approaches to defining environmental goods and negotiating modalities and for convergence on the classification of environmental services. A great deal of discussion was devoted to identifying environmental goods of export interest to developing countries, including certain categories of environmentally preferable products, and considering the practical and systemic implications of bringing these within the scope of the negotiations. Developing countries expressed strong interest in using the negotiations to improve access to cleaner technologies.

15. Experts discussed environmental infrastructure services as well as environmental commercial and support services. These require different approaches in the negotiations,

as well as on the domestic front. Water and waste-water management have taken centre stage in discussions on environmental infrastructure services, but essentially as a development rather than a trade issue, to be seen in a broader context of sustainable development. Strengthening regulatory frameworks is essential. For commercial and related environmental services, identifying and capturing export opportunities for developing countries was considered more important.

16. Discussions among experts led to a number of recommendations, to be pursued at appropriate levels are set out below. Several recommendations made at the Meeting referred to possible actions at the national level are:

- Development of a list of environmental goods that reflects a country's sustainable development and trade interests;
- Implementation of policies and measures that translate environmental, human health and resource management needs into demand for EGS;
- Coordination among all relevant policy contexts to ensure an integrated approach to the development of the various EGS sectors and trade liberalization;
- Promotion of policy dialogues involving trade negotiators, policy makers, regulators, providers of environmental services and other stakeholders;
- Sequencing of regulatory consolidation and liberalization.

17. Several issues raised at the Expert Meeting would require action by the international Community are:

- There needs to be more work on developing consensus on the classification of environmental services.
- Greater importance should be attached to developing practical approaches to compiling a list of environmental goods and related criteria for the purposes of negotiations.
- It is important to choose the right forums for advancing the various segments of the EGS agenda.
- Greater policy coherence is required between provisions on EGS in bilateral and regional trade agreements and the multilateral trading system, as well as with policies of international financial institutions and development assistance bodies on EGS.
- Greater coherence will also be required between the various areas of ongoing WTO negotiations and discussions, notably the areas of non-agricultural and agricultural products, services, technical barriers to trade, subsidies and countervailing measures, TRIPS, TRIMs and government procurement.
- There is a need to promote coherence with instruments of relevant MEAs.
- More in-depth discussion is required on the relationship between transfer of ESTs and trade liberalization of EGS.

2. COMMISSION ON INVESTMENT, TECHNOLOGY AND RELATED FINANCIAL ISSUES AND RELATED EXPERT MEETINGS

A. Expert Meeting on FDI and Development

18. The Expert meeting of Foreign Direct Investment (FDI) and Development was held in Geneva from 29 to 31 October 2003. In accordance with the agenda of the meeting, the discussions focused on the role of FDI in the development of services industries and related policy challenges. The first day's debate revolved around general issues concerning services, FDI and competitiveness, and the growth of export-oriented FDI in services. The remaining two days concentrated on the role and impact of FDI in the context of privatization of services.

19. The meeting took note of the growing importance of services and noted that services often represent the largest sector of the economy, and they are also central in FDI, now accounting for the majority of the stock of inward FDI in both developed and developing countries. Through privatization, FDI can also help restructure ailing state-owned enterprises, bring in necessary capital and know-how, and increase governmental budget revenues. But these benefits are not automatic, and there may also be costs. There are concerns that FDI may (as, for example, in the retail sector) crowd out local companies and have adverse socio-cultural effects. Some forms of FDI may be footloose. Moreover, lack of investment in local skills development and formation of linkages overseas rather than locally may reduce positive spillovers. The risk of negative balance-of-payments effects from FDI in non-tradable services was also referred to. In terms of privatization, some concern was voiced regarding employment effects and the risk of formerly public monopolies being converted into private foreign monopolies.

20. There was some discussion regarding the WTO General Agreement on Trade in Services (GATS). Some experts noted that developing countries had not made many commitments in the GATS and suggested that this might hamper the ability of these countries to benefit fully from FDI in services. Other experts argued that GATS commitments were not a good proxy for a country's openness to FDI in services, as many countries had chosen to liberalize services unilaterally without binding such liberalization under the GATS, perhaps in part owing to its inadequacy regarding an emergency safeguard mechanism.

B. Intergovernmental Group of Experts on Competition Law and Policy

21. The fifth Session of the Intergovernmental Group of Experts on Competition Law and Policy (IGE) was held in Geneva from 2–4 July 2003. A key agenda item of the fifth session of the IGE will be consultations among Governments on two issues: (1) the interface between competition policy and industrial policy; and (2) the optimal design and implementation of competition law in developing countries, including the desirability of a phased approach.[27]

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[27] The IGE is responsible for overseeing the implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, a set of recommendations relevant to competition policy adopted by the UN General Assembly in 1980. It provides expert advice to help guide the work of UNCTAD in this field, which focuses on institutional capacity-building; competition advocacy and educating the public; studies on

22. In two lively panels**,** the IGE discussed (a) the interface between industrial and competition policy; and (b) the optimal design and implementation of competition law in developing countries, including the desirability of a phased approach.

23. At its closing session the IGE adopted Agreed Conclusions, which pointed to the importance of the role of competition law and policy for sound economic development, and recommended to UNCTAD XI Conference, the strengthening of UNCTAD´s work programme on competition law and policy "which proceeds with the active support and participation of member countries". Calling on UNCTAD to continue its close cooperation with the WTO, OECD and other organizations active in this field, it took note with appreciation of relevant work by UNCTAD and particularly of the Final Consolidated Report on UNCTAD´s regional meetings on the Post-Doha mandate held in 2002 and 2003 in accordance with paragraph 24 of the Doha Declaration.

24. The next session of the IGE**,** which will also act as a preparatory meeting for the Fifth UN Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principle and Rules for the Control of Restrictive Business Practices, convened by the General Assembly of the United Nations to take place in 2005, will consider a preliminary assessment by the UNCTAD secretariat of the application and implementation of the UN Set since its adoption by the General Assembly in 1980.

25. That session will also review UNCTAD´s work on technical assistance and capacity building, and consider studies on:

(a) Ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment; and

(b) Best practices for defining respective competencies and settling of cases, which involve joint actions of competition authorities and regulatory bodies.

26. The next session of the IGE will also consider for consultations the following issues: (a) an interactive discussion to achieve a better understanding of the strengths and weaknesses of peer review; (b) cooperation and dispute mediation mechanisms in regional integration agreements; (c) evidence gathering and cooperation in hard-core cartel investigations; and (d) advocacy in promoting awareness of competition policy in developing countries.

3. COMMISSION ON ENTERPRISES, BUSINESS FACILITATION AND DEVELOPMENT

A. Expert Meeting on Development of Multimodal Transport and Logistic Services

27. The Expert Meeting on Development of Multimodal Transport and Logistic Services was held in Geneva from 24–26 September 2003. Experts had before them the background document prepared by the secretariat, entitled “Development of multimodal

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competition, competitiveness and development; and inputs into possible international agreements on competition. Meeting annually, the IGE reports to the Commission on Investment, Technology and Related Financial Issues.

transport and logistics services".[28] The objective of the meeting was to help Governments and the trade and transport industry examine policy alternatives and actions in the wake of new developments so as to promote the development of multimodal transport and logistics services.

28. In the Expert Meeting, analyses was made regarding the present situation and discussed ways and means to promote multimodal transport and to overcome the existing obstacles faced by developing countries. The Expert Meeting discussed the requirements for improving multimodal transport and logistic services, including infrastructure and technology, security and safety, facilitation, legal framework and market access, bearing in mind the situation of developing countries. Developing countries, in particular LDCs, small island States and landlocked countries, are benefiting only to a limited extent from the potential advantages of multimodal transport or logistic services. Thus they risk further marginalization in the global economy. The current high transport costs of these countries results in a downward spiral of lower demand and correspondingly lower supply. Policy makers need to reverse this vicious circle and promote trade through better and less costly transport services.

29. It was recognized that the existence of an appropriate legal framework for multimodal transport was essential for its development. It was pointed out, however, that national transport laws in a number of developing countries were often outdated and needed modernization, and that there was no specific legal framework for multimodal transport. At the international level there was no uniform legal regime in force to govern liability arising from multimodal transportation. The United Nations Convention on International Multimodal Transport of Goods, 1980 had not received the required number of ratifications to enter into force. The UNCTAD/ICC Rules for Multimodal Transport Documents, which entered into force in 1992, were contractual provisions and required incorporation into commercial contracts, and they gave precedence to any mandatory international convention or national law.

30. It was noted that the practical way forward may a concerted effort by national Governments and international organizations to overcome these difficulties appears necessary. UNCTAD, in cooperation with other relevant organizations and regional and subregional organizations of developing countries, was called upon to put in place the necessary mechanisms to support developing countries' endeavours to participate in and fully benefit from opportunities offered by modern multimodal transport and logistics services. This was considered to be a crucial element of a coherent strategy for integrating developing countries into the world economy and enhancing a trade-based development process.

B. Expert Meeting on Measuring Electronic Commerce as an Instrument for the Development of the Digital Economy

31. The Expert Meeting on Measuring Electronic Commerce as an Instrument for the Development of the Digital Economy was convened from 8 to 10 September 2003, pursuant to the decision taken by the Commission on Enterprise, Business Facilitation and Development at its seventh session. The Meeting was to address the subject of the statistical measurement of access to and use of ICT by enterprises, including e-commerce.

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[28] TD/B/COM.3/EM.20/2

32. The Expert Meeting brought together representatives from national statistical offices, international organizations and other institutes involved in information society measurements. The meeting provides a framework for introducing developing countries´ views into the existing debates and initiatives on e-statistics; identifying key indicators on ICT usage; and exploring the need for future work to establish an international database on ICT usage and e-business.

33. Experts greatly appreciated the fact that the meeting brought together practitioners from many countries, developed as well as developing. A proposal was made on a set of core indicators for ICT measurement that could be collected by all countries. These would focus on e-readiness and usage indicators for businesses and households, as it would be premature to attempt to measure impact. The collection of such a set of indicators in developing countries should be possible without major resource implications. Experts stressed that the international comparability of data is vital for policy makers. Such a common set of indicators would be the first dataset on e-business that would be comparable at the international level.

34. The Experts Meeting considered that UNCTAD could help create the political will for the development of national e-strategies, and for the development and harmonization of e-measurement. Moreover, UNCTAD should collaborate and assist developing countries to develop their national e-measurement strategy. To this end, it was proposed to create a virtual forum for online information and tools exchange between statistical offices from developed countries and developing countries. UNCTAD could also share models of some specific national/regional surveys on ICT and e-commerce. Finally, it was decided that the experience of this and future meetings could be further discussed in UNCTAD's 2004 *Electronic Commerce and Development Report.*

C. Expert Meeting on Policies and Programmes for Technology Development and Mastery, Including the Role of FDI

35. The Expert Meeting on Policies and Programmes for Technology Development and Mastery, Including the Role of FDI was held in Geneva from 16–18 July 2003. The Expert Meeting examined the policies and programmes that Governments can consider for the purpose of improving competitiveness and upgrading their technological development: policy changes conducive to moving up the technology ladder, including transfer of technology; technology development to meet international norms and certification; and financial and fiscal measures to promote collective action among institutions and actors for "linking, leveraging and learning".

36. The Expert Meeting examined policies and programmes that Governments can consider for the purpose of improving competitiveness of their enterprises and upgrading their technological development. Several studies show that only a handful of developing countries have managed to narrow the "technology gap" compared to developed economies, with many countries falling further behind. Most of the successful countries are located in Asia. The experts analysed closely the successful cases in Asia and considered what the lessons other developing countries could draw from these experiences. They found that critical factors behind the success of the Asian economies were: (1*)* vision and commitment of government; (2) skills training; (3) attracting export-oriented FDI; (4) support for local industry; and (5) local technological efforts in terms of R & D.

37. The main conditions for the rise of the Asian economies could also be summed up as the right *framework conditions, sound industrial policy and good timing* - namely the boom in the semi-conductor industry. The experts questioned whether it was feasible to replicate the policies followed in Asian countries in Africa or Latin America as both the international framework and the opportunities were different today. Nevertheless, the principles behind the success of Asian countries provide guidance to policy makers in other countries. A key finding was also that the drivers for technology development (such as skills development, research and development capabilities, ability to attract FDI, strengthening local enterprises, infrastructure etc.) are interrelated. Therefore government cannot afford to neglect any of the key drivers for technology if they wish to create a virtuous circle for technological development.

38. A critical part of the meeting was to check whether the policies considered by the experts are compatible with WTO rules. What emerged was that very few of the policies were completely immune to countervailing measures. The experts noted that developing countries have a golden opportunity to initiate proposals to clarify and improve WTO rules, particularly the Agreement on Subsidies and Countervailing Measures (ASCM), before the Ministerial Conference in Cancun.

D. THE ELEVENTH UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD XI)

39. The eleventh United Nations Conference on Trade and Development (UNCTAD XI) will be held at the Anhembi Conference Centre in Sao Paulo, Brazil, from 13 to 18 June 2004.[29]

40. According to the Secretary-General of UNCTAD, UNCTAD XI represents an "unprecedented opportunity" to help developing countries meet the challenges ahead. It will "strengthen the links between international and national efforts to promote economic growth and sustainable development". At the international level, such efforts involve processes and negotiations ranging from resolving financial crises to multilateral trade talks. Nationally, the focus is on diversifying and enhancing productive capacity. Specifically, the conference will endeavour to formulate the best public policies for increasing export competitiveness. Such policies can include the use of national innovation systems, the creation or adaptation of technologies, enhancing value added, and increasing the skills of the workforce.

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[29] Held every four years, the Conference is the organization's highest policy-making body. It formulates policy guidelines and decides on the programme of work. Nine Conferences have been held so far: Geneva (1964), New Delhi (1968), Santiago (1972), Nairobi (1976), Manila (1979), Belgrade (1983), Geneva (1987), Cartagena de Indias, Colombia (1992), Midrand (1996) and Bangkok (2000).

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

1. This part of the report highlights the UNIDROIT's activities related to its current work programme.[30]

A. International Interests in Mobile Equipment

2. It may be recalled that the UNIDROIT Convention on International Interests in Mobile Equipment and a Protocol on Matters Specific to Aircraft Equipment were opened to signature on 16 November 2001. The essential purpose of the Convention is to provide for the constitution and effects of a new international interest in mobile equipment, defined so as to embrace not only classic security interests but also what is increasingly recognized as their functional equivalent namely the lessor's interest under a leasing agreement. The efficacy of the international interest is conditional upon its registration in an International Registry to be established under the Convention. The latter is intended to be supplemented by separate Protocols for each of the different categories of equipment encompassed by its sphere of application, the first of which is the Aircraft Protocol. Each Protocol is intended to contain those equipment-specific rules necessary to adapt the rules of the Convention to fit the special pattern of financing in respect of the relevant category.

3. Currently UNIDROIT is working on the preparation of draft Protocols which would cover the categories of railway rolling stock and Space assets.

4. A preliminary draft Protocol on Matters specific to Railway Rolling Stock is under consideration by a Committee of Governmental Experts, under the joint auspices of UNIDROIT and Intergovernmental Organization for International Carriage by Rail (OTIF). Three sessions of the Committee of Governmental Experts have met so far.[31] At this unusually long session, the special Rail Registry Task Force met several times to achieve a compromise on the preliminary draft Rail Protocol's registry provisions. For the first time the Joint Committee of governmental experts had sufficient time to consider the entirety of the provisions of the preliminary draft Protocol and the Drafting Committee

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30 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. The 2002-2004 Triennium Work Programme as approved by the UNIDROIT General Assembly, December 2001 is as follows: International interests in mobile equipment; Principles of international commercial contracts; Franchising; Principles and rules of transnational civil procedure; Transactions on transnational; Model Law on Leasing; and Uniform rules applicable to transport.

31 The third session (5 to 13 May 2003) of the Joint OTIF/UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock was attended by 41 delegates, representing 25 States, and by four Organisations.

was able to meet three times to finalise the text finally adopted by the Joint Committee of governmental experts at its last meeting.

5. A preliminary draft Protocol on Matters specific to Space Property was submitted to the UNIDROIT's Governing Council. The Council, in September 2001, approved the transmission of the preliminary draft to Governments. The first session of the UNIDROIT Committee of Governmental Experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Property is held in Rome from 15 to 19 December 2003.

B. Principles of International Commercial Contracts

6. Following the great success met by the UNIDROIT Principles of International Commercial Contracts in both contract and arbitration practice since their publication in 1994, the Governing Council in 1997 decided to reconvene a working group for the preparation of Part II covering a number of additional topics which had not been dealt with in the first edition. So far the Working Group has held six sessions.

7. The Working Group for the Preparation of Principles of International Commercial Contracts held its sixth and final session in Rome (Italy) from 2 to 6 June 2003. The session was devoted to the examination of the revised draft Chapter on the Authority of Agents prepared by M.J. Bonell, the revised draft Chapter on Limitation Periods prepared by P. Schlechtriem, the revised draft Chapter on Assignment of Rights, Transfer of Obligations and Assignment of Contracts prepared by M. Fontaine, the revised draft Chapter on Set-Off prepared by C. Jauffret-Spinosi, the revised draft Chapter on Third Party Rights prepared by M. Furmston, the draft Article on Inconsistent Behaviour prepared by P. Finn, the draft Article on Discharge (Renunciation) prepared by A. Hartkamp, and the draft Provision on Abuse of Rights prepared by P.-A. Crépeau. The Group agreed on the final version of the new draft Chapters and provisions which are to be included in the new edition of the UNIDROIT Principles, the publication of which is expected by the end of 2004, following authorisation by the Governing Council of the Institute.[32]

C. Principles and rules of transnational civil procedure

8. The decision to include this item in the Work Programme was taken pursuant to a proposal by the American Law Institute (ALI) to prepare uniform rules of procedure (including, if appropriate, provisional measures) applicable to transnational disputes once the question of jurisdiction has been settled but before the question of recognition and enforcement of the judgment arises. After a feasibility study prepared by Professor R. Sturner, the Governing Council at its 78th session in 1999 decided to set up a joint ALI/UNIDROIT Study Group for the preparation of Principles and Rules of Transnational Civil Procedure. The Group has held four sessions.

9. At the fourth session of the Working Group (19 to 23 May 2003), the main focus was on the examination of the draft Principles of Transnational Civil Procedure and of the draft Rules of Transnational Civil Procedure with Comments. After extensive discussion the Group succeeded in finalising the black letter rules and the comments of the draft

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[32] Detailed report on the session is contained in UNIDROIT 2003 Study L – Misc. 25

Principles, while with respect to the draft Rules it invited the Rapporteurs to revise the text in the light of the discussion. The final drafts of the Principles of Transnational Civil Procedure and of the Rules of Transnational Civil Procedure will be submitted to the American Law Institute and to the UNIDROIT Governing Council at their annual meetings in 2004 for approval.

D. Transactions on transnational and connected capital markets

10. The Governing Council of UNIDROIT, at its 80th session (2001), decided to include a project under the above mentioned preliminary title in the Work programme. Five topics had attracted the widest degree of support. Five topics had attracted the widest degree of support and were included in the project. In view of budgetary restrictions, the project is being conducted on an item-by-item basis.[33] The Secretariat was authorized to set up one or more Study Group(s) depending on the availability of resources. A restricted Study Group on item (1) (Securities held with an intermediary) held two Sessions. At it second session (12-14 March 2004), it focused first on the criteria that should govern whether a particular matter needs to be governed by a harmonized rule. It concluded that a rigorous approach should be adopted, and that a harmonized rule should be regarded as appropriate if it is clearly required for the reduction of legal or systemic risk or the promotion of market efficiency.

[33] The items are: (1) The creation of clear and consistent rules for the taking of securities, especially securities held indirectly through intermediaries in multi-tier holding patterns and evidenced by book entries in the investor's account, as collateral. (2) The creation of standardized "global shares" permitting trade of such shares on more than one (national) stock exchange so as to make foreign capital markets accessible to a wider range of companies with limited means to create genuinely global shares on a case-by-case basis. (3) The development of rules capable of enhancing trading on emerging markets. (4) The development of harmonized or uniform substantive rules applicable to so-called "delocalised" transactions. Such delocalisation may be the consequence of mergers between markets located in different jurisdictions or it may be technologically induced where: Electronic Communications Networks" (ECNs) are used for trading and even initial public offerings of securities. (5) The examination of the desirability and feasibility of rules for world-wide takeover bids.

IV. REPORT ON THE WORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

1. This part of the report seeks to provide an overview of the major activities of the Hague Conference during the year 2003.[34]

A. Special commission on maintenance obligations

2. The meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance was held in The Hague from 5 to 16 May 2003. Four Preliminary Documents were prepared for the Commission, three of which had been previously circulated to participants.[35]

3. The discussions in the Special Commission concerned successively Administrative Co-operation, Recognition and Enforcement, Jurisdiction, Applicable Law, building Co-operation and securing Compliance, and questions of Scope. The Commission ended with a review and approval of Working Documents Nos 1 and 2 of the Working Group (Drafting Committee). During the Special Commission, the Chair of the meeting proposed the creation of a Working Group, which would later become a Drafting Committee for the preparation of a preliminary draft of the new instrument on Maintenance. A Working Group on Applicable Law was also created during the Special Commission.

B. Special Commission Hague Legalization, Service and Evidence Conventions

5. The Nineteenth Diplomatic Session requested the Secretary General to convene a Special Commission to study the practical operation of the Hague Conventions on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matter, of 15 November 1965, on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970, as well as on Abolishing the Requirement of Legalization for Foreign Public Documents of 5 October 1961.

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34 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 made up 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 programme for the period 1996-2004 includes issues relating to: Maintenance Obligations; Legalisation, Service & Evidence; International Child Abduction; Intercountry Adoption; Jurisdiction and foreign judgments in civil and commercial matters Electronic commerce; and Cooperation with UNCITRAL on Insolvency.

35 Preliminary Document No 1, *Information Note and Questionnaire concerning a new global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance, sent out to National Organs* in June 2002; Preliminary Document No 2, *Compilation of Responses to the 2002 Questionnaire concerning a new global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance*; Preliminary Document No 3, *Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance, Report of which was sent out to National Organs* in April 2003; and Preliminary Document No 4, *Parentage and International Child Support-Responses to the 2002 Questionnaire and an Analysis of the Issues*, Report was sent out to National Organs in April 2003.

6. The meeting of this Special Commission was held in The Hague from 28 October to 4 November 2003 and arrived at its Conclusions and Recommendations.[36] For the purpose of Conventions' practical operation, the need to promote uniform interpretation, foster mutual confidence and enhance the mutual benefits for States party to the Convention to exchange their respective experiences in operating the Conventions, as well as to promote the benefits of the Conventions to nonparty States, the Special Commission recommended to have more frequent meetings to review the practical operation of the Apostille, Evidence and Service Conventions. The Special Commission also recommended that review meetings on the practical operation of these three Conventions be held every five years. Besides consideration should be given to the possibility of reviewing the practical operation of the Hague Convention of 25 October 1980 on International Access to Justice. The Special Commission also noted that the spirit and letter of the Conventions do not constitute an obstacle to the usage of modern technology and that their application and operation can be further improved by relying on such technologies.

C. Future Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters

7. In accordance with the Decision of Commission I of the Nineteenth Session of the Conference of 24 April 2002, the Permanent Bureau set up an informal working group to prepare a text on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters to be submitted to a Special Commission.

8. The informal working group on the Judgments Project held three meetings and the third meeting was held from 25-28 March 2003.[37] Among the core areas identified by Commission I,[38] the informal working group chose to start working on choice of court agreements for commercial transactions. The group prepared a draft text, which focussed on choice of forum and the recognition and enforcement of judgments in civil and commercial matters, which it considered to be sufficiently advanced to be submitted to a Special Session now, or at least after one further meeting of the group.[39] The group also discussed other issues such as defendants's forum, counterclaims, and submission to the jurisdiction of the court. The group was not able to have an in depth discussion on these subjects within the time available to permit any final conclusions with respect to the possibility of drafting convention texts on these issues.

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36 The Special Commission was attended by 116 delegates representing 57 Member States, States party to one or more Convention under review, and observers, unanimously approved the following conclusions and recommendations. *See* "Conclusions and Recommendations adopted by the Special commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions". <www.hcch.net.org>

37 See Prel. Doc. No 20 at < ftp://ftp.hcch.net/doc/jdgm_pd20e.doc > for a Report of the first meeting held from 22-25 October 2002, Prel. Doc. No 21 at < ftp://ftp.hcch.net/doc/jdgm_pd21e.doc > for a Report of the second meeting held from 6-9 January 2003 and Prel. Doc. No 8 for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference at < ftp://ftp.hcch.net/doc/genaff_pd08e.pdf > for the text resulting from the third meeting.

38 Commission I identified as core areas choice of court agreements in B2B cases, submission, defendant's forum, counterclaims, trusts, and physical torts (see Prel. Doc. No 19 at < ftp://ftp.hcch.net/doc/jdgm_pd19e.doc >, p. 6).

39 For the Draft text see: <www.ftp.hcch.net/doc/workdoc49e.pdf>

9. In addition to this policy issue to be decided by the Member States of the Hague Conference, comments on the substance of the draft text, by Member States, non-Member States, international organisations and other interested parties, were also invited.

D. Co-operation with UNCITRAL on Insolvency

10. In the preparation of a Draft Legislative Guide on Insolvency,[40] the United Nations Commission on International Trade Law (UNCITRAL) has recently sought the co-operation of the Hague Conference with a view to assisting it in preparing commentaries and recommended legislative principles in relation to the law applicable to insolvency proceedings. A meeting of the Secretariats of the two Organizations took place in Vienna on 11-12 December 2003. Pursuant to this request, the Permanent Bureau has devised a Questionnaire to facilitate this work.[41]

(e) Organization of the work of the Conference

11. The Special Commission on General Affairs and Policy in its meeting in April 2003 concluded that as regards the organization of the work of the Conference, the Special Commission gives the highest priority to the preparation of a new global instrument on the recovery of child support and other forms of family maintenance, to the completion of the Explanatory Report on the Securities Convention, and to the pursuit of the judgments project. The Special Commission also underlined the core nature of the many services developed and activities undertaken by the Permanent Bureau to support the effective and consistent implementation of existing Conventions and recognized the need to secure funding to ensure continuity. The preparation of the Special Commission on the practical operation of the Service, Evidence and Legalization (Apostille) Convention was to be given high priority.

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40 The purpose of the Guide is to assist in the establishment of an efficient and effective legal framework to address the financial difficulty of debtors and is intended to be used as a reference by national authorities and legislative bodies when preparing new laws or reviewing existing laws and regulations.

41 *See* Information document on the UNCITRAL Draft Legislative Guide on Insolvency and questionnaire in relation to the law applicable to insolvency proceedings. <www.hcch.net.org>