AALCO/44/NAIROBI/2005/SD/S 13

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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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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-SEVENTH 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-seventh session of the UNCITRAL was held in New York from 14 to 25 June 2004. The Commission had on its agenda, *inter alia*, the following six topics for consideration:-

(i) Finalization and adoption of the draft UNCITRAL Model Legislative Guide on Insolvency Law;

(ii) Arbitration;

(iii) Transport Law;

(iv) Electronic Commerce;

(v) Security Interests; and

(vi) Possible future work in the area of Public Procurement.

3. This report examines the UNCITRAL's deliberations at its thirty-seventh session relating to the above topics. At this Session, the Commission primarily focused its attention on the Finalization and adoption of the draft UNCITRAL Model Legislative Guide on Insolvency Law, a brief overview of which is provided hereunder.

1. UNCITRAL MODEL LEGISLATIVE GUIDE ON INSOLVENCY LAW

A. Background

4. 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. 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.

5. Subsequently, the Commission at its thirty-third session (2000) endorsed the recommendation of the Working Group V (Insolvency Law) made its twenty-second session (1999) and gave the Working Group V the mandate 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.[1]

6. The Commission at its thirty-fourth session (2001), confirmed that the mandate given to the Working Group V 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.

7. At the thirty-sixth session (2003), the Commission approved in principle the policy considerations reflected in the draft Legislative Guide and the key objects, general features and structure of an insolvency regime and commended 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. The Commission 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.[2]

B. Consideration by the Commission at its current Session

8. At the current session, the Commission had before it (a) the draft Legislative Guide on Insolvency Law;[3] (b) the report of the thirtieth session of the Working Group;[4] and (c) proposal for revision of the draft Guide based upon the deliberation of the Working Group at its thirtieth session.[5] The Commission after considerable deliberations, proposed certain amendments to the final text. The Commission adopted the UNCITRAL

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1 For the report of the session, see A/CN.9/469.
2 A/CN.9/XXXVI/CRP.1/Add.8.
3 A/CN.9/WG.V/WP.70, Parts I and II
4 A/CN.9/551
5 A/CN.9/558

Legislative Guide on Insolvency consisting of the text of A/CN.9/WG.V/WP.70 Parts I and II, as amended by A/CN.9/559 and Add. 1-3 with amendments adopted by the Commission at the current session.

OVERVIEW OF THE MODEL LEGISLATIVE GUIDE ON INSOLVENCY LAW

Organization and scope of the Guide

9. The main purpose of the Model Legislative Guide on Insolvency Law (herein after referred to as 'Guide') is to assist in the establishment of an efficient and effective legal framework to address the financial difficulty of debtors. It is intended to be used as a reference by national authorities and legislative bodies when preparing new laws or reviewing the adequacy of existing laws and regulations.

10. The Guide provides multiple model solutions to address the issues central to an effective and efficient insolvency law, thereby assisting the reader to evaluate different approaches available and to choose the one most suitable in the national context. The first section of each chapter of the Guide contains a commentary identifying the key issues for consideration and discussing and analysing the various approaches adopted by insolvency laws. The second part of each chapter contains a set of recommended legislative principles.

PART I: DESIGNING THE KEY OBJECTIVES AND STRUCTURE OF AN EFFECTIVE AND EFFICIENT INSOLVENCY REGIME

11. When a debtor become insolvent and unable to pay his debts and liabilities, a range of interests needs to be accommodated by a legal mechanism. While addressing this, the legal mechanism must strike a balance not only between the different interests of the stakeholders (creditors, guarantors, employees etc.) but also between those interests and the relevant social, political and other policy considerations that impact upon the economic and legal goals of insolvency.

Key objectives of an effective and efficient insolvency regime

12. Although country approaches might vary on the type of the insolvency regime, there is broad agreement that an insolvency regime should aim to achieve the following objectives:

1. Provide certainty in the market to promote economic stability and growth;
2. Maximize value of assets;
3. Strike a balance between liquidation and reorganization;
4. Ensure equitable treatment of similarly situated creditors;
5. Provide for timely, efficient and impartial resolution of insolvency;
6. Preserve the insolvency estate to allow equitable distribution to creditors;
7. Ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information;
8. Recognize existing creditor rights and establish clear rules for ranking of priority claims; and
9. Establish a framework for cross-border insolvency.

General features of an insolvency law

13. Designing an effective and efficient insolvency law involves the consideration of a common set of issues relating to both the legal framework (rights and obligations of the parties, both substantively and procedurally) and the institutional framework (to implement these rights and obligations) required.

Insolvency proceedings

14. There are two main types of proceedings followed by majority of insolvency laws. They are reorganization and liquidation. However, no straitjacket division or distinction could be done between these two proceedings and it is desirable that an insolvency law provides more than a choice between a single, narrowly defined type of reorganization and strictly traditional liquidation. Since the concept of reorganization can accommodate a variety of arrangements, it is desirable that an insolvency law adopt an approach that is not prescriptive and supports arrangements that will achieve a result that provides more value to creditors than if the debtor was liquidated.

Reorganization

15. Reorganization proceeding is a means of resolving a debtor's financial difficulties and is designed to save a company or, failing that, a business. The term "reorganization" is used in the Guide in a broad sense to refer to the type of proceedings whose ultimate purpose is to allow the debtor to overcome its financial difficulties and resume or continue normal commercial operations even though in some cases it may include a reduction in the scope of the business, its sale as a going concern to another company or its eventual liquidation. Reorganization proceedings are designed to give a debtor some breathing space to recover from its temporary liquidity difficulties or more permanent over-indebtedness and, where necessary, provide it with an opportunity to restructure its operations and its relations with creditors. Where reorganization is possible, generally it will be preferred by creditors if the value derived from the continued operation of the debtor's business will enhance the value of their claims.

Liquidation

16. The type of proceedings referred to as "liquidation" is regulated by the insolvency law and generally provides for a public authority to take charge of the debtor's assets, with a view to terminating the commercial activity of the debtor, transforming non-monetary assets into monetary form and subsequently distributing the proceeds of sale or realization of the assets proportionately to creditors. Although generally requiring the sale or realization of assets to occur in a piecemeal manner as quickly as possible, some insolvency laws permit liquidation to involve sale of the business in productive units or as a going concern. Liquidation usually results in the dissolution or disappearance of the debtor as a commercial legal entity.

17. Approaches of insolvency law differ widely as to the structure of the procedure that leads to the choice of one of these processes. Some insolvency laws provide for unitary, flexible insolvency proceedings with a single commencement requirement alternatively resulting in liquidation or reorganization, depending on the circumstances of the case. Other laws provide for two distinct proceedings, each setting forth its own

access and commencement requirements, with different possibilities for conversion between the two proceedings. Those laws that treat liquidation and reorganization proceedings as distinct from one another do so on the basis of different social and commercial policy considerations. However, a significant number of issues are common to both liquidation and reorganization, resulting in considerable overlaps and linkages between them, in terms of both procedural steps and substantive issues.

Institutional framework

18. An insolvency law is depended not only on a developed legal system, but also on a developed institutional framework for administration of the law. The insolvency system will only be effective if the courts and officials responsible for its implementation have the necessary capacity to provide the most efficient, timely and fair outcome to those for whose benefit an insolvency system exists.

PART II: CORE PROVISIONS OF AN EFFECTIVE AND EFFICIENT INSOLVENCY REGIME

19. Part Two of the Guide focuses on the content of the insolvency law and the core elements that are regarded as necessary for insolvency proceedings conducted under the law to be effective and efficient.

Chapter I analyses application and commencement criteria.
Chapter II considers the effects of commencement of insolvency proceedings on the debtor and its assets, including constitution of an insolvency estate, protection and preservation of the estate, use and disposal of assets, post-commencement finance, treatment of contracts, exercise of avoidance provisions, rights of setoff, and financial contracts and netting.
Chapter III examines the roles of the debtor and the insolvency representative in insolvency proceedings and their various duties and functions, as well as mechanisms to facilitate creditor participation.
Chapter IV examines, in particular, issues relating to the reorganization plan and expedited reorganization proceedings.
Chapter V addresses different types of creditor claims and their treatment, as well as establishment of priorities for distribution.
Chapter VI deals with issues relating to the resolution of insolvency proceedings, including discharge and closure.
Chapter VII sets forth the UNCITRAL Model Law on Cross-Border Insolvency and its Guide to Enactment.

I. APPLICATION AND COMMENCEMENT

A. Eligibility: debtors to be covered by an insolvency law

20. The first issue that an insurance law should determine is identifying the debtors that may be subject to insolvency proceedings. The design of eligibility provisions for an insolvency law raises two basic questions. Firstly, whether the law should distinguish between debtors who are natural persons and debtors which are some form of limited liability enterprise or corporation or other legal person, each of which will raise not only different policy considerations, but also considerations concerning social and other

attitudes. Secondly, the types of debtors (regardless of the question of whether the debtor is a legal or natural person), if any, that should be excluded from the application of the law.

21. As regards 'eligibility' the Guide states that the law should govern insolvency proceedings against all debtors that engage in commercial activities, whether natural or legal persons, including State-owned enterprises, and whether or not those commercial activities are conducted for profit. Any exclusion from the application of the law should be limited and clearly identified in the law.

22. In addition to possessing the necessary business or commercial attributes, a debtor must have a sufficient connection to the State to be subject to its insolvency laws (Jurisdiction). In the regard the Guide suggests that the law should specify which debtors have sufficient connection to a State to be subject to its application. The grounds upon which a debtor can be subject to the law should include:

(a) that the debtor has its centre of main interests in the State; or
(b) that the debtor has an establishment in the State.

The law should clearly indicate the court that has jurisdiction over the commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings.

B. Commencement of proceedings

23. The commencement standard is central to the design of an insolvency law. By providing the basis upon which insolvency proceedings can be commenced is instrumental to identifying the debtors that can be brought within the protective and disciplinary mechanisms of the insolvency law and determining who may make an application for commencement, whether the debtor, creditors or other parties.

24. The purpose of provisions on commencement of insolvency proceedings is to facilitate access for debtors and creditors to the remedies provided by the law; establish commencement criteria that are transparent and certain; enable applications for insolvency proceedings to be made and dealt with in a speedy, efficient and cost effective manner; establish safeguards to protect both debtors and creditors from improper use of the application procedure; and establish requirements for effective notification of commencement of proceedings.

25. The Guide recommends that the law should specify the parties permitted to make an application for commencement of insolvency proceedings which should include the debtor and any of its creditors. The law may establish a presumption that, if the debtor fails to pay one or more of its mature debts, and the whole of the debt is not subject to a legitimate dispute or offset in an amount equal to or greater than the amount of the debt claimed, the debtor is generally unable to pay its debts. The law should also specify that, where the decision to commence proceedings is to be made by the court, the court may deny the application to commence and, where appropriate, impose costs or sanctions against the applicant. The law also should also provide for the issue of notice; the

treatment of debtors whose assets are insufficient to meet the costs of administering the insolvency proceedings; and dismissal of insolvency proceedings.

II. TREATMENT OF ASSETS ON COMMENCEMENT OF INSOLVENCY PROCEEDINGS

A. Assets constituting the insolvency estate

26. The most fundamental issue in an insolvency proceeding is the need to identify, collect, preserve and dispose of assets that belong to the debtor. Many insolvency systems place these assets under a special regime sometimes referred to as the insolvency estate. The estate may be expected to include all assets of the debtor including rights and interests in property wherever located, whether or not in the possession of the debtor at the time of commencement, and including all tangible and intangible assets.

27. For this purpose, the Guide recommends that the legislative provisions should contain the following:

> *Assets constituting the estate:* The law should identify the assets that will constitute the estate, including:
>
> (a) assets of the debtor including the debtor's interest in assets subject to a security interest and in third party -owned assets as at commencement of insolvency proceedings;
> (b) assets acquired after commencement of the insolvency proceedings; and
> (c) assets recovered through avoidance and other actions.
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> *Assets excluded from the estate where the debtor is a natural person.*

B. Protection and preservation of the insolvency estate

28. One of the primary objectives of an insolvency system is the establishment of a protective mechanism to ensure that the value of the insolvency estate is not diminished by the actions of the various parties and allows the insolvency proceedings to be administered in a fair and orderly manner. There is also a need to determine the scope of those measures and the parties to whom they apply; establish the method, time and duration of application of those measures; and establish the grounds for relief from those measures. The parties from whom the estate needs the greatest protection are the debtor and its creditors.

29. The Guide recommends that the legislative provision should include provision relating to:

> *Provisional measures:* The law should specify that the court may grant relief of a provisional nature, at the request of the debtor, creditors or third parties, where relief is needed to protect and preserve the value of the assets of the debtor or the interests of creditors which include:
>
> (a) staying execution against the assets of the debtor

(b) entrusting the administration or supervision of the debtor's business;

(c) entrusting the realization of all or part of the assets of the debtor to an insolvency representative or other person designated by the court; and
(d) any other relief of the type applicable automatically on commencement of proceedings.

30. Further, the law should also include provisions relating to indemnification in connection with provisional measures; Balance of rights between debtor and insolvency representative; notice to interested parties; modification or termination of provisional measures; Termination of provisional measures on commencement of insolvency proceedings.

C. Use and disposal of assets

31. In the conduct of an insolvency proceedings, whether liquidation or reorganization, it often requires assets of the insolvency estate, and assets in the possession of the debtor being used in the debtor's business, to continue to be used or disposed of, in order to enable the goal of the particular proceedings to be realized, including the maximization of the value of the debtors assets. For these reasons, it is desirable that an insolvency law includes provisions on the use, or disposal of assets of the insolvency estate, and third party-owned assets, addressing the conditions upon which those assets may be used or disposed of and the provision of protection for the interests of third party owners and secured creditors.

32. The Guide recommends that the legislative provision should include provision relating to:

Power to use and dispose of assets of the estate: The law should permit the use and disposal of assets of the estate in the ordinary course of business; and the use or disposal of assets of the estate other than in the ordinary course of business, subject to the requirements that the law should specify that adequate notice of any disposal be given to creditors and that they have the opportunity to object and the public auctions are publicised.

D. Post-commencement finance

33. The continued operation of the debtor's business after the commencement of insolvency proceedings is critical to reorganization and, to a lesser extent, liquidation where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services. To meet these exigencies, a debtor may have to seek financing from third parties. However, a number of jurisdictions restrict the provision of new money in insolvency or do not specifically address the issue of new finance or the priority for its repayment in insolvency, creating uncertainty.

34. Taking this into consideration, the Guide recommends that a provision for post-commencement finance should be incorporated and the law should:

- facilitate finance to be obtained for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the assets of the estate. The law may require authorization by the court or creditors;
- ensure appropriate protection for the providers of post-commencement finance and if the existing secured creditor does not agree, the law should provide that the court may authorize the creation of a security interest having priority over pre – existing security interest provided specified conditions are satisfied;
- ensure appropriate protection for those parties whose rights may be affected by the provision of post-commencement finance.

E. Treatment of contracts

35. Achieving the objectives of maximizing the value of the estate and reducing liabilities and, in reorganization, enabling the debtor to survive and continue its affairs to the maximum extent possible in an uninterrupted manner may involve taking advantage of those contracts that are beneficial and contribute value to the estate, and rejecting those that are burdensome, or those where the ongoing costs of performance exceed the benefit to be derived from the contract. However, the decision of how a contract is to be treated in insolvency raises demands weighting of number of competing interests to ensure that an appropriate balance is achieved between general public policy goals, the goals of insolvency and the need for predictability in commercial relations.

36. The Guide recommends that a provision on treatment of contracts should be incorporated with the purpose of

- establishing the manner in which contracts, under which both the debtor and its counterparty have not yet fully performed their respective obligations, should be addressed in the law;
- define the scope of the powers to deal with these contracts and the situations in which and by whom these powers may be exercised;
- identify the types of contracts that should be excluded from the exercise of these powers; and
- identify the kinds of protection that will be available to counterparties to continued contracts.

F. Avoidance proceedings

37. Insolvency proceedings, both liquidation and reorganization, may commence at lengthy periods after a debtor first becomes aware that such an outcome cannot be avoided. In that intervening period, there may be significant opportunities for the debtor to attempt to hide assets from creditors, incur artificial liabilities, make donations or gifts to relatives and friends, or pay certain creditors to the exclusion of others.

38. The purpose of avoidance provisions is to reconstitute the integrity of the estate and ensure the equitable treatment of creditors; provide certainty for third parties by establishing clear rules for the circumstances in which transactions occurring prior to the commencement of insolvency proceedings involving the debtor or the debtor's property may be considered injurious and therefore subject to avoidance; enable the commencement of proceedings to avoid those transactions; facilitate the recovery of money or assets from persons involved in transactions that have been avoided.

39. For this purpose, the Guide recommends that the legislative provisions should contain:

> *Avoidable transactions*: The law should include provisions which apply retroactively and are designed to overturn transactions, involving assets of the debtor or the estate and which have the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors. The law should specify the following types of transactions as avoidable:
>
> (a) transactions intended to defeat, delay or hinder the ability of creditors to collect claims;
>
> (b) undervalued transactions; and
>
> (c) preferential transactions.

40. The law should also establish the suspect period, specify related person transactions and transactions that are exempted from avoidance actions.

G. Rights of set-off

41. The purpose of provisions on set-off is to provide certainty with respect to the effect of the commencement of insolvency proceedings upon the exercise of set-off rights; specify the types of obligations that may be set-off after commencement of insolvency proceedings; and specify the effect of other provisions of the law (e.g. avoidance provisions and the stay) on the exercise of rights of set-off.

42. The Guide recommends that the law should protect a general right of set -off existing under general law that arose prior to the commencement of insolvency proceedings, subject to the application of avoidance provisions.

H. Financial contracts and netting

43. The purpose of provision on netting and set -off in the context of financial transactions is to reduce the potential for systemic risk that could threaten the stability of financial markets by providing certainty with respect to the rights of parties to a financial contract when one of those parties fails to perform for reasons of insolvency.

44. The Guide recommends that the law should recognize contractual termination rights associated with financial contracts that permit the termination of those contracts and the set-off and netting of outstanding obligations under those contracts promptly after the commencement of insolvency proceedings. Where the law stays the termination of contracts or limits the enforceability of automatic termination clauses on commencement of insolvency proceedings, financial contracts should be exempt from such limitations.

45. Once the financial contracts of the debtor have been terminated by a counterparty, the law should permit the counterparty to net or set -off obligations under those terminated financial contracts to establish a net exposure position relative to the debtor and to enforce and apply their security interest to obligations arising out of financial contracts. Financial contracts should be defined broadly enough to encompass existing

varieties of financial contracts and to accommodate new types of financial contracts as they appear.

III. PARTICIPANTS

46. In this part the Guide provides for the rights and duties of the participants in an insolvency proceedings. Participants include the debtor, creditors, insolvency representatives and other interested parties.

A. The debtor

47. To ensure the efficient and effective conduct of the proceedings, and provide certainty for all parties involved it is desirable that an insolvency law clearly establishes the extent of the debtor's rights and obligations. For this purpose it is necessary that the insolvency law should establish the rights and obligations of the debtor during the insolvency proceedings; address the remedies for failure of the debtor to meet its obligations; and address issues relating to management of the debtor in insolvency proceedings.

48. The Guide recommends that the insolvency law should establish:

Rights of the debtors which include:

- Right to be heard
- Right to participate and request information
- Right to retain property to preserve the personal rights of the debtor

Obligations of the debtor in respect of insolvency proceedings should include:

- to cooperate with and assist the insolvency representative to perform its duties;
- to provide accurate, reliable and complete information relating to its financial position and business affairs that might be requested by the court, the insolvency representative, creditors and/or the creditor committee;
- to enable the insolvency representative to take effective control of the estate and to facilitate or cooperate in the recovery by the insolvency representative of the assets;
- where the debtor is a natural person, to provide notice to the court if it proposes or is forced to leave its habitual place of residence and, where the debtor is a legal person, to obtain the consent of the court or the insolvency representative to the movement of the headquarters of the debtor.

B. The insolvency representative

49. The insolvency representative plays a central role in the effective and efficient implementation of the insolvency law, with certain powers over debtors and their assets, a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. The insolvency representative may be an individual or, a corporation or other separate legal entity.

50. The law should specify that the insolvency representative has an obligation to protect and preserve the assets of the estate and outline the insolvency representative's duties and functions with respect to the administration of the proceedings and preservation and protection of the estate. The law should also fix liability for non-performance and establish the grounds and procedure for removal of the insolvency representative. In the event of the death, resignation, or removal of the insolvency representative, the law should establish a mechanism for appointment of a replacement and specify whether or not court approval of the replacement is necessary.

C. Creditors - participation in insolvency proceedings

51. The purpose of provisions on participation of creditors in insolvency proceedings is to:

- facilitate participation of creditors in insolvency proceedings;
- provide a mechanism for the appointment of a creditor committee or other creditor representative where to do so would facilitate the participation of creditors in the insolvency proceedings;
- ensure the right of creditors to access information on the insolvency proceedings;
- specify the functions and responsibilities of the creditor committee.

52. The Guide recommends that the insolvency law should specify that creditors, both secured and unsecured, are entitled to participate in insolvency proceedings and identify what that participation may involve in terms of the functions that may be performed. The law should specify the matters on which a vote of creditors is required and establish the relevant eligibility and voting requirements. In particular, the law should require the vote of creditors to approve or reject a reorganization plan.

53. The law should also provide for convening a meeting of creditors and should facilitate the active participation of creditors in insolvency proceedings such as through a creditor committee or other mechanism for representation. The law should also provide for the eligibility of Creditors that may be appointed to a creditor committee, Mechanism for appointment to a creditor committee and Rights and functions of a creditor committee. The law should also specify that members of a creditor committee are exempt from liability for their actions in their capacity as members of the committee unless they are found to have acted fraudulently or to be guilty of willful misconduct and provide provisions for removal and replacement of members of a creditor committee.

D. Party in interest's right to be heard and to appeal

54. The law should specify that a party in interest has a right to be heard on any issue in the insolvency proceedings that affects its rights, obligations or interests. It should also provide for that a party in interest may appeal from any order of the court in the insolvency proceedings that affects its rights, obligations or interests.

IV. REORGANIZATION

A. The reorganization plan

55. Insolvency laws generally address a number of issues in relation to the reorganization plan, such as the nature or form of the plan; when the plan is to be prepared; who is able to prepare the plan; what is to be included in the plan; how the plan is to be approved by creditors (and confirmed by the court where that is a requirement); the effect of the plan and how it is to be implemented.

56. The purpose of provisions relating to the reorganization plan is to:

(a) facilitate the rescue of businesses subject to the law, thereby preserving employment and, in appropriate cases, protecting investment;
(b) identify those businesses that are capable of reorganization;
(c) maximize the value of the estate;
(d) facilitate the negotiation and approval of a reorganization plan and establish the effect of approval, including a mechanism to make a plan binding on the debtor, all creditors and other interested parties;
(e) address the consequences of a failure to propose an acceptable reorganization plan or to secure approval of the plan by creditors, including conversion of the proceedings to liquidation in certain circumstances;
(f) provide for the implementation of the reorganization plan and the consequences of failure of implementation.

B. Expedited reorganization proceedings

57. The Guide, for the court to take advantage of the voluntary negotiations and consents to a restructuring plan obtained prior to the commencement of reorganization proceedings under the insolvency law and for the insolvency law to permit the court to expedite those reorganization proceedings, has provided for a provision for expedited reorganization proceedings. More specifically, the purpose of provisions is to:

(a) recognize that voluntary restructuring negotiations;
(b) encourage and facilitate the use of informal negotiation;
(c) develop a procedure under the law that will:

(i) preserve the benefits of voluntary restructuring negotiations where a majority of each affected class of creditors agree to a plan;
(ii) minimize time delays and expense and ensure that the plan negotiated and agreed in voluntary restructuring negotiations is not lost;
(iii) bind those minority members of each affected class of creditors and shareholders who do not accept the negotiated plan ;
(iv) be based upon the same substantive requirements, but shortened time periods, as reorganization proceedings under the law, including essentially the same safeguards;
(d) suspend, with appropriate safeguards, requirements in other laws that may prevent or inhibit the use of processes which delay the invocation of the law.

V. MANAGEMENT OF PROCEEDINGS

A. Treatment of creditor claims

58. Claims by creditors operate at two levels in insolvency proceedings—firstly, for purposes of determining which creditors may vote in the proceedings and how they may vote and secondly, for purposes of distribution. The procedure for submission of claims and their admission is therefore a key part of the insolvency proceedings and consideration should be given to determining which creditors should be required to submit claims, the procedures applicable to the submission, verification and admission or denial of claims, the consequences of failure to submit a claim, and review of decisions concerning the admission or denial of claims. An insolvency law should also address the effect of submission and admission of claims, as this will be key to creditor participation.

59. The purpose of provisions on creditor claims is to:

(a) define the claims that can or are required to be submitted and the treatment to be accorded to those claims;
(b) enable persons who have a claim against a debtor to submit claims against the estate;
(c) establish a mechanism for verification and admission of claims;
(d) provide for review of disputed claims;
(e) ensure that similarly ranked creditors are treated equally.

B. Priorities and distribution [of proceeds of liquidation]

60. There are many diverse and competing interests in insolvency proceeding and the rights of creditors are governed by a number of different laws. While many creditors may have similar claims, others may have superior claims or hold superior rights. For these reasons, insolvency laws generally rank creditors for the purposes of distribution of the proceeds of the estate in liquidation by reference to their claims, an approach not inconsistent with the objective of equitable treatment. Establishing a clear and predictable ranking system for distribution can help to ensure that creditors are certain of their rights at the time of entering into commercial arrangements with the debtor.

61. The Guide recommends that the legislative provision on priority and distribution should:

(a) establish the order in which claims should be satisfied from the estate;
(b) ensure that similarly ranked creditors are satisfied proportionately out of the assets of the estate;
(c) specify limited circumstances in which priority in distribution is permitted.

The Guide recommends that the law should specify that secured claims should be satisfied from the security in liquidation or pursuant to a reorganization plan, subject to claims that are superior in priority to the secured claim, if any. The law should also specify that claims other than secured claims, are ranked in the following order: Administrative costs and expenses; Claims with priority; Ordinary unsecured claims; and Deferred or subordinated claims. The law should specify that in the event that there is a surplus after all claims have been satisfied in full, the surplus is returned to the debtor.

C. Applicable law governing in insolvency proceedings

62. The applicable law governing insolvency proceedings would (a) facilitate commerce by providing a clear and transparent basis for predicting the law that will apply in the context of insolvency proceedings; and (b) provide courts with clear and predictable rules for determining the law applicable in the context of insolvency proceedings.

63. For this purpose, the Guide recommends that the insolvency law should provide of the place where insolvency proceedings are commenced and should apply to all aspects of the conduct, administration and conclusion of those insolvency proceedings

VI. CONCLUSION OF PROCEEDINGS

A. Discharge

64. Following distribution in the liquidation of the estate of a natural person debtor or in the case of reorganization, it is likely that a number of creditors will not have been paid in full. An insolvency law will need to consider whether these creditors will still have an outstanding claim against that individual debtor or, alternatively, whether the debtor will be released or "discharged" from those residual claims.

65. The purpose of provisions on discharge is to enable a natural person debtor to be finally discharged from liabilities for pre -commencement debts, thus providing the debtor with a fresh start and establish the circumstances under which discharge will be granted and the terms of that discharge.

66. The Guide recommends that the insolvency law may specify that the discharge may not apply until after the expiration of a specified period of time following commencement, during which, the debtor is expected to cooperate with the insolvency representative. Upon the expiration of such time period, the debtor may be discharged where the debtor has not acted fraudulently and has cooperated with the insolvency representative in performing its obligations under the insolvency law. The law may specify that the discharge be revoked where it was obtained fraudulently.

67. Where the insolvency law provides that certain debts are excluded from the discharge such debts should be kept to a minimum to facilitate the debtor's fresh start and should be set forth in the insolvency law. Where the insolvency law provides that the discharge may be subject to conditions, those conditions should be kept to a minimum to facilitate the debtor's fresh start.

B. Conclusion of proceedings

68. Insolvency laws adopt different approaches to the manner in which a proceeding is to be concluded, the pre -requisites for closure and the procedures to be followed. As regards liquidation, the law should specify that liquidation proceedings should be closed following final distribution or a determination that no distribution can be made. As regards reorganization, the law should specify that reorganization proceedings should be closed when the reorganization plan is fully implemented or at an earlier date determined by the court.

2. ARBITRATION

A. Background

69. 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 II should be requirement of written form of the arbitration agreement, enforcement of interim measures of protection and possible enforcement of an award that had been set-aside in the State of Origin. The Working Group II commenced its work at its thirty-second session in March 2000.

70. The Commission at its thirty-fifth session (2002) considered the Working Group II 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 requested the Secretariat to prepare a revised draft, based on the discussion in the Working Group II, for consideration at the thirty-seventh session of the Working Group.

71. The Commission at its thirty-sixth session (2003) noted that it was unlikely that all the topics could be finalized by the Working Group II before the thirty-seventh session of the Commission in 2004. The Commission directed the Working Group II 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. At that session, the Commission's focused on four aspects i.e., Power of an arbitral tribunal to order interim measures of protection, Provision allowing for interim measures to be sordered *ex parte* by an arbitral tribunal, Recognition and enforcement of interim measures of protection, Provision expressing the power of the court to order interim measures.

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

70. The Commission at its current session took note with appreciation of the report of Working Group II on the work at its thirty-ninth and fortieth sessions.[6] The Commission noted that the Working Group II had continued its discussions on a draft text for a revision of article 17 of the UNCITRAL Model Law on International Commercial Arbitration on the power of an arbitration tribunal to grant interim measures of protection issued by an arbitral tribunal, and on a draft provision on the recognition and enforcement of interim measures of protection issued by an arbitral tribunal for insertion as a new article of the Model Law, tentatively numbered 17 bis. The Commission also commended the Working Group for the progress accomplished so far regarding the issue of interim measures of protection.

71. As regards the review of draft article 17 and 17 bis of the Model law, including finalizing its position on how to deal with *ex parte* interim measures in the Model Law, the Working Group II informed the Commission that its intents to complete the work in forthcoming two sessions. However, the Commission also noted that the issue of *ex parte* interim measures, which remained a point of controversy, should not delay progress on the revision of the Model Law.

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6 A/CN.9/545 and A/CN.9/547

72. The Commission also noted that the Working Group II is yet to complete its work in relation to draft article 17 ter dealing with interim measures issued by State courts in support of arbitration and in relation to the 'writing requirement' contained in article 7 (2) of the Model Law and article II (2) of the New York Convention on the Enforcement of Arbitral Awards.

C. Future work of the Commission

73. The Commission, with respect to future work in the field of settlement of commercial disputes, took note that it had agreed that 'arbitrability' as well as a revision of UNCITRAL Arbitration rules (1976) and UNCITRAL Notes on Organizing Arbitral Proceedings (1996) a topic that had been accorded low priority, could be reassessed when considering future work. The Commission expressed support for the Working Group II to consider the possibility of undertaking a limited revision of the UNCITRAL Arbitration Rules. The Commission noted that 2005 would mark the twentieth anniversary of adoption of the Model Law and agreed that conferences to celebrate that anniversary should be organized in different regions to consider the experiences of courts and arbitral tribunals with domestic enactment of Model Law.

3. TRANSPORT LAW

A. Background

74. 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 III was given free hand to study the desirability and feasibility of dealing with door-to-door transport operations, or certain aspects of those operations.

75. The Commission at its thirty-fifty session (2002) took note of the report of the Working Group III, where it undertook a preliminary review of the provisions of the draft instrument on transport law. The Commission 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 III 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.

76. At its thirty-sixth session (2003), the Commission took note of the fact that the Working Group III has reached a particularly difficult phase of its work and further invited the Working Group III 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.

77. The Working Group III at its twelfth session began its review of the draft instrument on the carriage of goods wholly or partly by sea and discussed various proposals, including the proposal of the United States[7] regarding 10 aspects of the draft instrument. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group.[8]

B. Considerations at the current session of the Commission

78. At the current session, the Commission took note of the twelfth and thirteenth session of the Working Group III.[9] The Commission appreciated that the Working Group had continued its consideration of the draft instrument on the carriage of goods by sea. The Commission was informed that the Working Group III had proceeded with its second reading of the draft instrument, and had made progress regarding a number of difficult issues, such as those regarding the scope of application of the instrument and of key liability provisions.

79. With respect to the time frame for completion of the draft instrument, a number of delegations were of the view that it would be desirable to complete a third reading of the draft text with a view to its adoption by the Commission in 2006. The Commission agreed that 2006 would be the desirable time for the completion of the project, but also agreed

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7 A/CN.9/WG.III/WP.34

8 Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003)

9 A/CN.9/544 and A.CN.9/552

that the issue of establishing a deadline for such completion should be revisited at its thirty-eight session.

4. ELECTRONIC COMMERCE

A. Introduction

80. 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 (Working Group IV) 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 IV. 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 IV at its thirty-eighth session, which included the preparation of an international instrument dealing with selected issues on electronic contracting.

81. At its 35th session, the Commission took note of the different view that were expressed within the Working Group IV concerning the form and scope of its instrument, including proposals that consideration should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation.[10]

B. Consideration of the item at its current session

82. At its current session, the Commission took note of the reports of the Working Group IV on the work of its forty-second session[11] held in Vienna (November 2003) and its forty-third session[12] held in New York (May, 2004). The Commission appreciated the work of the Working Group IV and informed that the Working Group IV had undertaken a review of articles 8-15 of the revised text of the preliminary draft convention at its forty-second session and reviewed article X and Y as well as article 1-4 at its forty-third session.

83. The Commission supported the incorporation in the draft convention provision aimed at removing possible legal obstacles to electronic commerce that might arise under existing international trade related instruments. The Commission informed that the work of the Working Group IV would be complete with a view to enable the Commission to review and approve it by 2005.

C. Future work on electronic commerce

84. Though no formal decision was reached on the future work of on electronic commerce, the Commission noted a suggestion that the Working Group IV should consider the preparation of guidelines to assist States with the establishment of a comprehensive legal framework to facilitate the use of electronic commerce. Possible elements of such guideline could include data protection issues, intellectual property rights and electronic fraud issues. The Secretariat was requested to prepare a study to facilitate discussion by the Commission at its thirty-eighth session in 2005.

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

11 A/CN.9/546

12 A/CN.9/548

5. SECURITY INTERESTS

A. Background

85. 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.[13] 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.

86. Reflecting on the note of the Secretariat on security interests in its thirty-fourth session (2001),[14] 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.[15] The Working Group on Security Interests (Working Group VI) held its first meeting in New York from 20 to 24 May 2002. The Working Group VI considered chapters I to V and X of the first preliminary draft guide on secured transactions, prepared by the Secretariat.[16]

87. The Commission at its 35th Session (2002) took note of the work done by the Working Group VI and confirmed that the mandate of the Working Group VI should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide. The Working Group VI, 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 VI 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).

88. At its 36th session (2003), the Commission noted with appreciation the progress made by the Working Group IV in its work. At that session the Commission had before it the reports of Working Group VI on the work of its second and third sessions[17] as well as the report of the first joint session of Working Group V and VI.[18] At the second session (Vienna, 17-20 December 2002), the Working Group had considered chapters VI, VII and IX of the first preliminary draft guide on secured transactions, prepared by the Secretariat.[19] At its third session (New York, 3-7 March 2003), the Working Group IV considered chapters VIII, XI and XII of the first preliminary draft guide on secured transactions and chapters II and III (paras. 1-33) of the second version of the draft guide.

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13 A/CN.9/475
14 A/CN.9/496
15 For the report of the colloquium, see A/CN.9/WG.VI/WP.3
16 A/CN.9/WG.VI/Wp.2 AND Add 1-5 and 10.
17 A/CN.9/531 and A/CN.9/532
18 A/CN.9/535
19 (A/CN.9/WG.VI/WP.2 and Addenda 6, 7 and 9)

B. Consideration at the current session of the Commission

89. At its current Session, the Commission considered the reports of the fourth sessions of the Working Group VI.[20] At that session the Working Group VI had considered chapters IV (Creation), IX (Insolvency), I (Introduction), II (Key Objectives), and paragraphs 1 to 41 of chapter VII (Priority) of the draft guide.[21] The Commission commended Working Group VI for having completed the second reading of the draft guide on secured transaction, and the third reading of the chapter on publicity, priority, insolvency and conflict of laws. The Commission noted that the Working Group had agreed that publicity should be a precondition of the effectiveness of security rights against third parties and of ensuring the protection of third parties.

90. The Commission noted that a preliminary consolidated set of recommendations might be ready by early 2005 and welcomed the preparation of additional chapters on various types of assets such as negotiable instruments, deposit accounts, letters of credit and intellectual property rights. After discussion, the Commission confirmed the mandate given to the Working Group VI and requested to expedite its work so as to submit the draft guide to the Commission for final adoption as soon as possible, hopefully by 2006.

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20 A/CN.9/531 and A/CN.9/532

21 Report of Working Group VI (Security Interests) on the work of its fourth session (Vienna, 8 - 12 September 2003)

6. POSSIBLE FUTURE WORK IN THE AREA OF PUBLIC PROCUREMENT

91. The deliberations in the Commission on this topic were based on a note prepared by the UNCITRAL Secretariat on the future work on public procurement at the thirty-sixth session.[22] 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.

92. Strong support was expressed for the inclusion of procurement law in the work programme of the Commission. 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. The Commission mandated the Secretariat to prepare a study for consideration by a working group that might be convened in the third quarter of 2004.

93. At it current session, the Commission had before it the note prepared by the Secretariat. The Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement and the experience gained in the use of the Model Law as a basis of law reform. This could also include considering simplifying the presentation of the model provisions.

94. After deliberations, the Commission entrusted the drafting of the proposals for the revision of the Model Law to its Working Group I (Procurement). The Working Group I was given a flexible mandate to identify issues to be addressed in its considerations.

7. DATE AND PLACE OF THE THIRTY-EIGHTH SESSION OF THE COMMISSION

95. The Commission approved holding its thirty-eighth session in Vienna from 4 to 22 July 2005.

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22 A/CN.9/539

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

1. This part of the report aims at highlighting some of the activities carried out in the year 2004 that may be of interest to the AALCO Member States.

A. ELEVENTH SESSION OF THE UNCTAD

2. The eleventh session of the United Nations Conference on Trade and Development was held in accordance with General Assembly resolutions 1995 (XIX) of 30 December 1964 and 57/235 of 20 December 2002, in São Paulo, Brazil, from 13 to 18 June 2004. The Member States of the UNCTAD agreed on a declaration entitled "UNCTAD XI – The Spirit of São Paulo".

(i). UNCTAD XI – The Spirit of São Paulo

3. Member States expressed their commitment to joining all their efforts in the achievement of the goals established in the Millennium Declaration, the Monterrey Consensus, the Programme of Action for the LDCs, the Almaty Programme of Action, the Barbados Programme of Action, the Johannesburg Declaration on Sustainable Development and the Plan of Implementation agreed at the World Summit on Sustainable Development, and the Declaration of Principles and the Plan of Action of the World Summit on the Information Society, as well as initiatives for UN reform, strengthen multilateralism and establish a roadmap for actions at the national and international levels in the process of mobilizing resources for development and of providing an international environment supportive of development in the agreed timeframes.

4. The Member States recognized that globalization has posed important challenges and opened up new opportunities for many countries, its consequences have been highly unequal between countries and within countries. Most developing countries, however, especially African countries and LDCs, have remained on the margins of the globalization process. The contrasts between developed and developing countries that marked the world in the early 1960s are still present today. In fact, the gap between them has increased in many respects.

5. Member States agreed that there is a need to focus on the ability of international trade to contribute to poverty alleviation. The plight of the least developed countries has been recognized by the UNCTAD Member States. They affirmed that they should receive the utmost attention from the international community. They expressed their commitment to generate and better utilize additional international resources, market access and technical assistance for the LDCs in order to enable them to establish, in the context of effective national policies, a solid base for their development processes. They also agreed that multilateral trade negotiations, under the Doha Work Programme, should be accelerated with a view to an early and successful conclusion that fully reflects the level of ambition agreed to at Doha.

6. Member States recognized that improved coherence between national and international efforts and between the international monetary, financial and trading systems is fundamental for sound global economic governance. They also emphasized the

need for a more comprehensive Global System of Trade Preferences among Developing Countries, which should also address the problems of the LDCs.

7. The Spirit of São Paulo says that "The decisions we have adopted at this UNCTAD XI, in addition to the Bangkok Plan of Action, form a solid basis to build upon and are essential instruments in our continued commitment to support UNCTAD in fulfilling its mandate as the focal point within the United Nations for the integrated treatment of trade and development, on the road to its twelfth session in 2008."

(ii) São Paulo Consensus

8. The Conference also adopted the Sao Paulo Consensus, which reaffirmed that the Bangkok Plan of Action should continue to guide UNCTAD's work in the years to come. Consensus was reached that UNCTAD XI constitutes an opportunity to identify new developments and issues in the area of trade and development since Bangkok, and to generate greater understanding of the interface and coherence between international processes and negotiations on the one hand and the development strategies and policies that developing countries need to pursue on the other. It was agreed that UNCTAD could play an important role in helping to ensure that coherence for development. Advancing this objective was the overarching goal of the São Paulo Conference.

9. While recalling the consensus reached at International Conference on Financing for Development in Monterrey in 2002 that globalization should be fully inclusive and equitable, the Conference affirmed that while each country has primary responsibility for its own economic and social development, national efforts need to be complemented and supported by an enabling global environment, strong growth of the world economy, and international efforts to enhance the coherence and consistency of the international monetary, financial and trading systems in support of development.

10. The Consensus have sections on Development Strategies in a Globalizing World Economy; Building Productive Capacities and International Competitiveness; Assuring Development Gains from the International Trading System and Trade Negotiations; and Partnership for Development. Policy analysis, policy response and UNCTAD's contribution are dealt in each section.

B. EIGHTH SESSION OF THE COMMISSION ON TRADE IN GOODS AND SERVICES, AND COMMODITIES

11. The eighth session of the Commission on Trade in Goods and Services, and Commodities was held from 9 to 13 February 2004. During the session the Commission held three plenary meetings and eight informal meetings.

12. The Commission adopted the agreed recommendations on Market Access, Market Entry and Competitiveness and Trade in Services and Development Implications. It was decided that UNCTAD should continue its policy-oriented analysis, consensus building and capacity building activities on services to contribute to assuring development gains to developing countries accruing from international trade and trade negotiations in the areas such as: Assessment of trade in services; Sector-specific studies in areas and sectors of interest to developing countries, with particular emphasis on infrastructure and essential

services; Identifying opportunities for developing countries in new and dynamic services sectors and through outsourcing; Analysis of approaches to further commitments in GATS Mode 4; Identifying opportunities and issues for beneficial integration of developing countries into regional trade arrangements; Assisting developing countries in multilateral trade negotiations in implementing GATS, particularly Articles IV and XIX; Enhancing analytical work on cross-cutting issues of special interest to developing countries, such as domestic regulations, and GATS rules; and analysis of economic implications of security measures on trade in services.

13. It was agreed that It should examine tariff and non-tariff barriers, including technical barriers and other market entry conditions, such as behind-the-border measures, that are obstacles to international trade, with special attention to those affecting developing-country exports and It should deepen its work on preferences, South-South trade (including the Global System of Trade Preferences among Developing Countries – GSTP), and the interface between regional and global trade agreements and processes and their trade and development implications and impact.

14. However, no agreement was reached on recommendations under agenda item Trade, Environment and Development. The representative of the country who spoke on behalf of the Group of 77 and China welcomed UNCTAD's intergovernmental work, policy analysis and capacity-building activities in the area of trade, environment and development. Suggestion was made that UNCTAD should continue to play an important role in addressing trade, environment and development linkages and in following up on the Johannesburg Plan of Implementation, paying special attention to the needs of developing countries, especially in areas such as market access; trading opportunities for environmentally preferable products; environmental goods and services; biotrade; traditional knowledge; environmentally sound technologies; specific trade obligations in multilateral environmental agreements; promotion of trade and investment opportunities arising from the Clean Development Mechanism; assessment of sustainable development implications of trade liberalization; and enhancing understanding of the environmental and developmental implications of biotechnologies.

15. The representative of another country said it was regrettable that, in the discussions on draft recommendations on agenda item Trade, Environment and Development, the United States delegation had opposed a reference to traditional knowledge, an issue of fundamental importance to developing countries. That stance had prevented the Commission from agreeing on recommendations in an important area of its work. African Group and the Least Developed Countries said that the inability to reach agreement under agenda item Trade, Environment and Development was to be regretted.

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

16. The session adopted recommendations for the UNCTAD Secretariat taking into account the discussions at the present session, which recommended that UNCTAD should continue its work on investment, technology and enterprise development through research and policy analysis, technical assistance and capacity and consensus building. In particular, UNCTAD should:

- Continue to examine the impact of Foreign Direct Investment (FDI) on development with a view to helping developing countries attract FDI, benefit from it and maximize its positive effects and face challenges derived from it. Particular attention should be paid to FDI in services, given the increasing importance of this sector in the world economy. Attention should also be paid to how to foster FDI at the regional level and the need to strengthen human and institutional capacity building efforts at the subnational level to help developing countries attract FDI. The secretariat should also follow up on the work it has undertaken in the *World Investment Report 2003*, especially on issues of special interest to developing countries;
- Continue to analyse host and home country measures related to FDI, as well as issues related to good public and corporate governance in the FDI area, so as to identify best practices with regard to ways and means to enhance the developmental impact of Transnational Company's activities. It should also disseminate information on country experiences related to FDI policies and the interaction between foreign and domestic investment;
- Given the importance of reliable data for policy formulation, strengthen, in cooperation with relevant government agencies, data collection efforts and technical cooperation in improving and harmonizing FDI statistics**;**
- Continue the preparation of IPRs and strengthen the process for the implementation of the recommendations. Analytical work, particularly in the context of IPRs, should be complemented with the provision of technical assistance and capacity building. Linkages between foreign and local firms should be encouraged;
- Continue its work on international arrangements**,** with emphasis on the bilateral and regional dimensions, including in the context of North-South and especially South-South cooperation, and the needs of member countries in this regard. Furthermore, the secretariat should continue to facilitate an ongoing exchange of information and experiences in this area, including at the intergovernmental level.

17. Topics for the expert meetings for 2004 were approved at the session. These would be Expert Meeting on Good Governance in Investment Promotion and Expert Meeting on the Impact of FDI on Development

D. EIGHTH SESSION OF THE COMMISSION ON ENTERPRISE, BUSINESS FACILITATION AND DEVELOPMENT

18. The Eighth session of the Commission on Enterprise, Business Facilitation and Development was held at Geneva from 12 to 15 January 2004. It adopted the agreed recommendations on improving the Competitiveness of Small and Medium Enterprises (SMEs) through enhancing productive capacity; Efficient transport and trade facilitation to improve participation by developing countries in international trade; and Electronic commerce strategies for development.

19. On the item Improving the Competitiveness of SMEs through enhancing productive capacity, The Commission requested the UNCTAD secretariat, within its mandate and whenever appropriate in coordination with other relevant international bodies, to continue its work on policy analysis, technical assistance and capacity development in the field of enterprise competitiveness, focusing on enhancing the export

competitiveness of SMEs, including through possibilities of linking up to international supply chains as well as backward and forward linkages.

20. On the item Efficient transport and trade facilitation to improve participation by developing countries in international trade, it was agreed that UNCTAD should continue its work in the implementation of the recommendations adopted by the Commission at its seventh session, and more specifically, it should:

- Continue to review and analyse developments relating to efficient transport and trade facilitation, including multimodal transport and logistics services, as well as to the transfer of know-how and technological and managerial capabilities, and examine the implications thereof for developing countries;
- Continue to provide guidance and assistance to developing countries on the use of information and communication technologies for international transport services and for trade facilitation, in particular through the Advance Cargo Information System (ACIS) and the Automated System for Customs Data (ASYCUDA) programmes;
- Review and analyse the impact of security initiatives on the international trade and transport of developing countries, including the technical and financial implications, and contribute to discussions on that subject;
- Cooperate with other intergovernmental organizations in their work relating to the development of international legal instruments affecting international transport and trade facilitation, including multimodal transport; disseminate information on their implications for developing countries; and provide negotiating assistance to developing countries as appropriate, with attention to the ongoing work related to the Doha work programme in the World Trade Organization;
- Continue to analyse developments and provide assistance to developing countries in the area of trade facilitation. In this context, particular attention should be paid to the implementation of the Almaty Plan of Action and the identification of needs and priorities of developing countries in the area of trade facilitation.

21. On the item Electronic commerce strategies for development it was agreed that UNCTAD should

- Continue to conduct research and policy-oriented analytical work concerning the economic implications for developing countries of trends in the field of Information and Communication Technologies (ICT) and the latter's business applications, particularly in sectors of interest or potential for developing countries. It should also review and disseminate information about international discussions on issues related to the technological, commercial, legal or financial aspects of ICT, e-business and e-commerce;
- Assist developing countries in building their capacity to formulate and implement the economic components of their national e-strategies for development. In so doing, it should be actively involved in the implementation of the Action Plan and follow up the Declaration of Principles adopted at the first phase of the World Summit on the Information Society (WSIS). It should also undertake research and produce relevant studies to highlight key development aspects of pending issues to be discussed at the Tunis phase of the Summit;

- As part of its work to support ICT-related policy-making in developing countries, continue and develop in close cooperation with other international organizations its ongoing work in the area of the statistical measurement of ICT adoption and use by enterprises and households. In particular, it should contribute to, and coordinate, efforts undertaken nationally, regionally and internationally to establish a set of internationally comparable ICT statistical indicators. Such work should be designed to contribute to the monitoring of progress between the first and second phases of the WSIS and beyond;
- Continue to provide a forum for the international discussion of ICT-related policy issues relevant to economic development, facilitate the exchange of experiences in the field of the economic applications of ICT and ensure the inclusion of the development dimension in international discussions on such matters.

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.[23]

A. INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

2. The most significant development during 2004 occurred on 1 April 2004 with the satisfaction of the conditions for the entry into force of the Convention on International Interests in Mobile Equipment. The Convention was opened for signature in Cape Town on 16 November 2001. The conditions for the entry into force of the Convention are set out in Article 49 of the Convention. Following the deposit by the Government of the Federal Republic of Nigeria of its instrument of ratification on 16 December 2003, being the third instrument of ratification lodged with UNIDROIT in its capacity as depositary under the Convention, those conditions were satisfied and enabled the Convention's entry into force on 1 April 2004. The Convention's entry into force has effect, however, only as regards a category of objects to which a Protocol applies and as from the time of entry into force of that Protocol. The Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment is the only protocol currently open for signature.

3. 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

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23 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.

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.

4. As of 12 November 2004 two Governments lodged their instruments of ratification of, or accession to the Convention. Also during 2004 two Governments signed the Convention bringing the total number of Governments that signed the Convention to twenty-eight. The Convention ceased to be open to signature with its entry into force. The Aircraft Protocol will enter into force after the deposit of the eighth instrument of ratification, acceptance, approval or accession. During 2004 two Governments lodged their instruments of ratification of, or accession to the Aircraft Protocol. As five instruments of ratification, acceptance, approval or accession have been deposited, a further three such instruments are required to be deposited to bring the Aircraft Protocol into force and to bring the Convention into force as regards aircraft objects. Also during 2004 two Governments signed the Aircraft Protocol bringing the number of Governments who have signed the Aircraft Protocol to twenty-eight.

5. The Rail Working Group is proceeding with the preparation of an international registry system and related issues. It met in Brussels in September 2004, where it examined the documents prepared by members of the Working Group, dealing with the description of the main elements of the International Registry contemplated by the Convention as modified by the Rail Protocol, the particular structure of the Supervisory Authority, issues involving insurance, immunity and domicile, the Registrar, procedural rules for the Supervisory Authority and the draft regulation for the Registry. The Working Group will meet again in the course of February 2005 to examine, in particular, questions relating to the fee structure of the Registry. Negotiations are underway with several States which might be interested in calling the Diplomatic Conference for the adoption of the draft Rail Protocol towards the end of 2005.

6. The year 2004 witnessed considerable progress in the development of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets, even though a number of difficulties remain to be resolved. The progress achieved was to be measured in terms of both the success with which the second session of the UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Convention on Matters specific to Space Assets was able to grapple with the fundamental policy issues that had been thrown up during the first session of the Committee of governmental experts, held in Rome from 15 to 19 December 2003, and the success achieved by the Space Working Group in attracting a broader range of participation among the different sectors of the space industry. At the same time, work continued within the United Nations Committee on the Peaceful Uses of Outer Space on the question as to whether the United Nations should act as Supervisory Authority of the future international registration system for space assets to underpin the Convention as it will apply to space assets. The second session of the Committee of governmental experts was held in Rome from 26 to 28 October 2004. The session was essentially dedicated to an in-depth examination and discussion of a number of key policy issues, in particular, first, the concept of space assets, secondly, the issues involved in the application of the Convention and the preliminary draft Space Protocol to "debtor's rights" and "related rights", thirdly, the criteria for the identification of space assets and, fourthly, the application and modification of default remedies under the preliminary draft Space Protocol. The Committee of governmental experts also considered some of the issues raised by the creation of the future international registration

system for space assets to underpin the Convention as applied thereto. It set up a Sub-committee on the future international registration system, designed to permit the in-depth examination of a number of the key issues raised thereby, on which the Sub-committee was invited to report back to the Committee of governmental experts at its third session, provisionally set to be held in Rome from 2 to 6 May 2005. The work of the Sub-committee, at least initially, is to be co-ordinated by the UNIDROIT Secretariat and to be conducted by electronic means.

B. PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

7. The Governing Council of the UNIDROIT held from 19-21 May 2004 unanimously adopted the new edition of the UNIDROIT Principles of International Commercial Contracts. Compared to the 1994 edition, UNIDROIT Principles 2004 contains five new chapters. Those are Authority of Agents; Third Party Rights; Set-off; Assignment of Rights, Transfer of Obligations and Assignment of Contracts; Limitation Periods as well as an expanded Preamble and new provisions on Inconsistent Behaviour and on Release by Agreement. Moreover, wherever appropriate the 1994 edition was adapted to meet the needs of electronic contracting.

C. PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE

8. The General Council of the UNIDROIT (2004) expressed its satisfaction with the work accomplished by the Joint ALI/UNIDROIT Working Group for the preparation of Principles and Rules of Transnational Civil Procedure. After discussing some of its provisions, the Governing Council approved the text of the Principles of Transnational Civil Procedure. The Principles have also been approved by the American Law Institute at its 81st annual session in Washington, D.C. from 17 to 19 May 2004. The Rules of Transnational Civil Procedure will not be subject to formal adoption on the part of the Organisations that produced them.

D. TRANSACTIONS ON TRANSNATIONAL AND CONNECTED CAPITAL MARKETS

9. The General Council of the UNIDROIT (2004) took note with satisfaction of the information provided by Mr B. Sen, Member of the Governing Council and Chairman of the restricted Study Group, and by the Secretariat on the progress of the project and the keen international attention it was attracting. It took note of the proposed timetable, specifically that the Study Group was hoping to finish drafting the preliminary text of a substantive law Convention on securities held with an intermediary by end-2004, and that the intergovernmental negotiations that were to follow should be speeded up with a view to adopting the Convention in the course of 2006 or in early 2007.

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

1. This part of the report seeks to provide a brief overview of the select activities of the Hague Conference during the year 2004.[24]

A. SPECIAL COMMISSION ON MAINTENANCE OBLIGATIONS

2. At its June 2004 meeting, the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance decided that the Working Group on Applicable Law (WGAL) should proceed with its work. That decision resulted from the discussion of the Special Commission based on Working Document No 13 entitled "Proposal by the Working Group on the Law Applicable to Maintenance Obligations". As mentioned in Working Document No 13, the WGAL found that it would be very difficult to reach an agreement regarding a set of general rules on applicable law that would be acceptable to a large number of States, and therefore could be included in the mandatory part of the future Convention. As alternatives, two other paths were contemplated.[25] The discussion at the Special Commission confirmed these considerations. It seems to show in particular that certain States Parties to the 1973 Applicable Law Convention are interested in a revision of that instrument, and that some States which to date have not ratified the 1973 Applicable Law Convention could be interested in optional regulation of the issues of applicable law as part of the new Convention. In order to ascertain the possibility of finding a fairly speedy and simple agreement on the conflict rules to be included in an optional section, the WGAL and the Permanent Bureau have drawn up a questionnaire. It is based on the "Sketch of Provisions on Applicable Law" developed by the WGAL during its meeting on 15 June 2004.

B. FUTURE HAGUE CONVENTION ON INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

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24 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.

25 The first consists of including in the future instrument special rules dealing with specific problems caused by the absence of uniform rules on applicable law; the second consists of including in the instrument currently under discussion an optional section dealing with the issue of applicable law. This solution would allow a revision of certain disputed aspects of the 1973Hague Convention on the Law Applicable to Maintenance, while providing other interested States with an option to join a system of uniform conflict rules.

3. Draft report (Preliminary Document No.26 of December 2004) on Preliminary Draft Convention on Exclusive Choice Of Court Agreements drawn up for the attention of the Twentieth Diplomatic Session on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters was submitted.

4. The objective of the draft Convention is to make exclusive choice of court agreements as effective as possible in the context of international business. The hope is that the Convention will do for choice of court agreements what the New York Convention of 1958 has done for arbitration agreements. In order to achieve this objective, it is necessary to impose three obligations on the courts of Contracting States: the chosen court must be obliged to hear the dispute; all other courts must be obliged to decline jurisdiction; and the judgment given by the chosen court must be recognised and enforced by courts in other Contracting States.

5. These obligations are laid down by three key provisions in the Convention, Articles 5, 7 and 9. Article 5, which is addressed to the chosen court, provides that the court designated in an exclusive choice of court agreement has jurisdiction and must exercise it; Article 7, which is addressed to all courts in other Contracting States, provides that those courts must suspend or dismiss the proceedings before them; and Article 9, which is addressed to the court in which recognition is sought, provides that a judgment given by the court of a Contracting State designated in an exclusive choice of court agreement must be recognised and enforced.

6. The original project (the preliminary draft Convention 1999) was intended to be a "mixed" convention. This is a convention in which jurisdictional grounds are divided into three categories. There is a "white list", which contains a number of specified grounds of jurisdiction; there is a "black list", which contains other specified grounds of jurisdiction; and there is the so called "grey area", which consists of all other grounds of jurisdiction under the national law of Contracting States. The idea is that where the court has jurisdiction on a "white" ground, it can hear the case, and the resulting judgment will be recognised and enforced in other Contracting States under the Convention (provided certain other requirements are satisfied). "Black list" grounds are prohibited: a court of a Contracting State cannot take jurisdiction on these grounds. Courts are permitted to take jurisdiction on the "grey area" grounds, but the resulting judgment will not be recognised under the Convention. As work proceeded on drafting, however, it became apparent that it would not be possible to draw up a satisfactory text for a "mixed" convention within a reasonable period of time. The reasons for this included the wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, including the Internet, on the jurisdictional rules that might be laid down in the Convention. At the end of the First Part of the Nineteenth Session, held in June 2001, it was decided to postpone a decision on whether further work should be undertaken on the preliminary draft Convention. In order to find a way forward, the Commission on General Affairs and Policy of the Hague Conference, meeting in April 2002, decided that the Permanent Bureau, assisted by an informal working group, should prepare a text to be submitted to a Special Commission. It was decided that the starting point for this process would be such core areas as jurisdiction based on choice of court agreements in business-to-business cases, submission, defendant's forum, counterclaims, trusts, physical torts and certain other possible grounds.

7. After three meetings, the informal working group proposed that the objective should be scaled down to a convention on choice of court agreements in business-to businesscases. After positive reactions from the Member States were received, a meeting of the Special Commission was held in December 2003 to discuss the draft that had been prepared by the informal working group. This meeting of the Special Commission produced a draft text that was published as Working Document No 49. The draft Explanatory Report on Working Document No 49 is contained in Preliminary Document No 25 of March 2004. A further meeting was held in April 2004, which reconsidered this document and dealt with the remaining issues. The April 2004 meeting produced the draft considered in this Report.

8. If we apply the terminology explained in paragraph 4, we can say that the present draft provides for only one jurisdictional ground in the "white" list – an exclusive choice of court agreement. A court of a Contracting State selected in such an agreement must exercise jurisdiction, and other Contracting States must recognise and enforce the resulting judgment in accordance with the Convention. There is no "black" list in the sense previously explained, though courts of Contracting States other than that selected are not permitted to exercise jurisdiction in a case covered by the agreement. The "grey" area is accordingly very wide. It consists of all cases not covered by an exclusive choice of court agreement. Moreover, a "grey" area exists even where there *is* an exclusive choice of court agreement: since exclusive choice of court agreements concerning consumer contracts and employment contracts as well as some other subject matters are excluded from the scope of the Convention (Article 2), Contracting States are free to exercise, or not to exercise, jurisdiction in such cases. The courts of other Contracting States are free to recognise, or not to recognise, such judgments.

C. CO-OPERATION WITH UNCITRAL ON INSOLVENCY

9. In its preparation of a Draft Legislative Guide on Insolvency, the United Nations Commission on International Trade Law (UNCITRAL) has 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 Organisations has taken place in Vienna on 11 and 12 December 2003 in relation to this project. Pursuant to this request, the Permanent Bureau has devised a Questionnaire to facilitate this work, to which 14 responses have been received. In June 2004, the Draft Legislative Guide on Insolvency has been adopted.

D. ORGANIZATION OF THE WORK OF THE CONFERENCE

10. The Special Commission on General Affairs and Policy of the Conference in its meeting in April 2004 reiterated the importance of the Hague Conference providing a forum for the discussion of private international law issues raised by the use of electronic means of communications. It noted with interest that the Hague Conference, jointly with the Netherlands Government and the International Chamber of Commerce, will be hosting a conference on this subject in The Hague in October 2004, during the Netherlands Presidency of the Council of the European Union and requested the Permanent Bureau to co-ordinate closely with the UNCITRAL Working Group on electronic commerce and with experts from Member States in the preparation of this Conference. It also welcomed the involvement of the Hague Conference in the activities

of other national and international organisations such as UNCITRAL, WIPO and the American Law Institute, concerning these issues.