PROGRESS REPORT CONCERNING THE LEGISLATIVE ACTIVITIES OF THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

A. BACKGROUND

1. AALCO Secretariat has been in the practice of preparing reports to the annual session of the Organization that focus on the legislative activities of UN 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 activities of international trade law bodies. The report contains reference to important developments within the following bodies:-

(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

B. REPORT OF THE WORK DONE BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AT ITS THIRTY-FIFTH SESSION

I. INTRODUCTION

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

2. The thirty-fifth session of the UNCITRAL was held in New York from 17 to 28 June 2002. The Commission had on its agenda, *inter alia*, the following eight topics for consideration:-

(i) Draft Model Law on International Commercial Conciliation;
(ii) Arbitration;
(iii) Insolvency Law;
(iv) Security Interests;
(v) Electronic Commerce;
(vi) Transport Law;
(vii) Private Financed Infrastructure Project; and
(viii) Enlargement of the Membership of the Commission.

3. The Asian-African Legal Consultative Organization (AALCO) was represented at the session by Dr. Ahmed Jassim Al-Gaa'tri, Deputy Secretary General of AALCO. The Deputy Secretary General offered certain observations as to the ongoing work of the Commission relating to Arbitration and Electronic Commerce. As regards the enlargement of the membership of the Commission, he reflected the view of the AALCO Member States, that such expansion should accommodate both the interest of the various countries in the new economic order and the position the concerned countries occupy in the international plane.

4. This brief report is primarily focused on examining the UNCITRAL's work at its thirty-fifth session relating to Draft Model Law on International Commercial Conciliation, Insolvency Law, Security Interests and Transport Law.

II. DRAFT UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION

A. Background

5. The Commission, it may be recalled, at its thirty-second session (1999), had before it a note entitled "Possible future work in the area of international commercial arbitration".[1] At that session, the Commission decided to evaluate the acceptability of ideas and proposals for improvement of UNCITRAL Model Law on Arbitration (1985), UNCITRAL Arbitration Rules, UNCITRAL Conciliation Rules and practices thereof. The Commission entrusted the work to one of its working groups, which is named as Working Group II (Arbitration and Conciliation), and decided that the priority items should include work on conciliation. The Model Law on Conciliation was drafted over three sessions of the Working Group being the thirty-third, thirty-fourth and thirty-fifth sessions.[2]

6. At the thirty-fifth session, the Working Group completed its examination of the provisions and considered the draft guide to enactment.[3] The draft Model Law together with the draft guide to enactment and use was circulated to Members consideration and adoption. The Commission, after consideration of the texts of the draft Model Law as revised by the drafting group, adopted the Model Law on International Commercial Conciliation at its 705th meeting on 24 June 2002.

B. Draft Model Law on International Commercial Conciliation: An Overview

7. The Commission, at its current session, after consideration of the draft Model Law on International Commercial Conciliation and the draft Guide to Enactment prepared by the Secretariat, adopted the Model Law on International Commercial Conciliation, together with the Guide to Enactment. The following pages seek to provide an overview of the Model Law, which consist of 14 articles and the Guide Enactment of the Model Law. The Model Law is structured as follows:

Article 1.	Scope of application and definitions
Article 2.	Interpretation
Article 3.	Variation by agreement
Article 4.	Commencement of conciliation proceedings
Article 5.	Number and appointment of conciliators
Article 6.	Conduct of conciliation
Article 7.	Communication between conciliator and parties
Article 8.	Disclosure of information
Article 9.	Confidentiality
Article 10.	Admissibility of evidence in other proceedings
Article 11.	Termination of conciliation proceedings

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1 A/CN.9/460

2 A/CN.9/506, A/CN.9/487 and A/CN.9/506

3 The report of the Working Group is contained in document A/57/17

Article 12. Conciliator acting as arbitrator
Article 13. Resort to arbitral or judicial proceedings
Article 14. Enforcement of settlement agreement

(a) Definition and Scope of Application (Article 1)

8. Article 1 delineates the scope of the Model Law and defines conciliation generally and its international application specifically. The primary intention of article 1 is to determine the range of matters the Model Law is intended to cover. The Model Law applies to all international commercial conciliation

9. For the purpose of this Model Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person, or a panel of persons, to assist them in their attempt to reach an amicable settlement of their disputes arising out of or relating to a contractual or other legal relationship. The conciliator or the panel of conciliators does not have the authority to impose the parties a solution to the dispute.

10. Under the Model Law, a conciliation is "international" when the parties to an agreement to conciliate:

- have their place of business in different States; or
- if the State in which the parties have their places of business is different from either:
- the State in which a substantial part of the obligation of the commercial relationship is to be performed; or
- the subject matter of the dispute is closely connected.

11. A footnote to this article clarifies that the term "commercial" should be given a wider interrelation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

12. The Model Law excludes from its purview the cases where a judge or an arbitrator in the course of a court or arbitral proceeding, attempts to facilitate a settlement. As explained in the Guide to Enactment, this process may be either at the request of the parties that are in dispute or in the exercise of the judge's prerogatives or discretion. Another area of exclusion noted by the Guide to Enactment is the conciliations relating to collective bargaining relationship between the employers and employees.

(b) Interpretation (Article 2)

13. Article 2 provides guidelines for the interpretation of the Model Law by courts and other national and local authorities. The Model Law provides that while interpreting this law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. Any questions concerning matters governed by this Law, which are not settled in it, are to be settled in conformity with the general principles on which this Law is based. The Guide of Enactment to the Model Law refers to a non-exhaustive list of general principles on which the Model law is based.[4]

(c) Rules Relating to Conciliation Proceedings (Article 4 to 12)

14. The Model Law, under Article 4 to 12 covers procedural aspects of conciliation. These provisions will have particular application to the circumstances where the parties have not adopted rules governing conciliation, and thus are designed to be in the nature of default provisions. This traditional rule of party autonomy is encapsulated in Article 3. They also assist parties in dispute that may have defined dispute resolution processes in their agreement, in this context acting as a supplement to their agreement.

(i) *Commencement of Conciliation Proceedings* (Art. 4)

15. Article 4 addresses the question of when a conciliation proceeding can be understood to have commenced. According to this article, conciliation commences on the day when the parties to a dispute agree to engage in such a proceeding (Art. 4 (1). The Guide to Model Law clarifies the effect of this provision that, even if there exists a provision in a contract requiring the parties to engage in conciliation or a court or tribunal directs parties to engage in conciliation proceedings, commencement of conciliation proceedings will not be construed until the parties agree to engage in such proceedings.

16. Paragraph 2 of this provision provides that a party that has invited another to engage in conciliation may treat this invitation as having been rejected if the other party fails to accept that invitation within 30 days from the time when the invitation was send. The Model Law does not address situation where an invitation to conciliate is withdrawn after it has been made.

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[4] The general principles on which the Model Law is based are:

(1) to promote conciliation as a method of dispute settlement by providing international harmonized legal solutions to facilitate conciliation which respect the integrity of the processes, promote active party involvement and autonomy by the parties;
(2) to promote the uniformity of the law;
(3) to promote frank and open discussion of parties by ensuring confidentiality of the process, limiting disclosure of certain information and facts raised in the conciliation in other subsequent proceedings, subject only to the need for disclosure required by law or for the purposes of implementation or enforcement;
(4) to support developments and changes in the conciliation process arising from technological developments such as electronic commerce.

(ii) *Number and Appointment of Conciliators* (Art. 5)

17. The Model Law under article 5 provides that the number of conciliator shall normally be one, unless the parties agree that there shall be a panel of conciliators.

18. Paragraph 3 of this provision stipulates the procedure for the appointment of conciliators. It lays down the general rule that the parties shall endeavor to reach agreement on a conciliator or conciliators. The Model Law provides three alternatives for the parties in appointing conciliators. They are:

(a) unless the parties agree that there shall be two or more conciliators, there shall be only one conciliator;
(b) by agreement between parties, when there are two or more conciliator.
(c) when no agreement may be reached on a conciliator, paragraph 4 of article 5 provides that the parties may seek assistance of an appropriate institution or person to recommend or directly appoint one or more conciliators.

19. Paragraph 5 obligates a person who is approached to act as a conciliator to disclose any circumstance likely to raise justifiable doubts as to his or her impartiality or independence. This obligation exists throughout the period of conciliation. The Guide to Enactment explains that any consequence of the failure to disclose such information is left to the provisions of the law in the enacting State.

(iii) *Conduct, Communication and Confidentiality in Conciliation Proceedings* (Arts. 6-9)

20. Article 6, paragraph 1, stipulates that the parties are free to agree, by reference to a set of rules or otherwise, the manner in which the conciliation is to be conducted. In the absence of such explicit agreement, the conciliator may conduct the proceedings in such manner, as the conciliator or conciliators considers appropriate, taking into account the circumstance of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

21. Paragraph 3 obligates the conciliator to maintain fair treatment of the parties, taking into account the circumstance of the case. An explanation in the Guide to Enactment provides that the reference in this subsection to maintaining fair treatment of the parties is intended to govern the conciliation process and not the settlement agreement.

22. Article 7 stipulates that the conciliator, unless otherwise agreed by the parties, may communicate with the parties together or with each of them separately.

23. Article 8 stipulates the limitations in disclosure of information between the parties. It provides that whenever information is passed from a party to the conciliator, that information may be disclosed to the other party. However, the conciliator has the

duty not to disclose the information when the party that gave the information made it subject to a specific condition that it be kept confidential. As explained in the Guide to Enactment, the term "information" covers all relevant information communicated by a party to the conciliator, including communications that took place before the actual commencement of the conciliation.

24. Article 9 imposes a duty of confidentiality over all information relating to the conciliatory proceedings, except where there is an agreement between the parties or disclosure is required under the law or for the purpose of implementation or enforcement of a settlement agreement.

(iv) *Admissibility of evidence in other proceedings* (Art. 10)

25. Article 10 prohibits the parties to a conciliation proceedings, the conciliator, and third party, including those involved in the administration of the conciliation proceeding to rely on or introduce evidence or testimony in subsequent arbitral, judicial or similar proceedings, regarding:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
(b) Statements or admissions made by a party in the course of the conciliation proceedings;
(c) Proposals made by the conciliator;
(d) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;
(e) A document prepared solely for purposes of the conciliation proceedings.

26. Except to the extent required under the law or for the purpose of implementation or enforcement of a settlement agreement, no tribunal, court or competent governmental authority shall:

(a) order disclosure of the information emanated in the previous paragraph; and
(b) if such information is offered as evidence, treat it as inadmissible.

(v) *Termination of Conciliation* (Art. 11)

27. The conciliation proceedings can be terminated:

(a) by the conclusion of a settlement agreement by the parties;
(b) by a declaration of the conciliator;
(c) by a declaration of the parties;
(d) by a declaration of a party to the proceedings to the other party and the conciliator.

(d) Miscellaneous provisions (Arts. 12-14)

28. The remaining provision of the Model Law address post-conciliation issues to avoid uncertainty from an absence of statutory provisions governing these issues.

29. Article 12 stipulates that, unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of other dispute that has arisen from the same contract. The purpose of this article is to provide greater confidence conciliation as a method of dispute settlement.

30. Article 13 provides for the situation where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time arbitral or judicial proceedings. The arbitral tribunal or the court shall give effect to such an undertaking, except to the extent necessary for a party to preserve its rights. An initiation of such proceedings is not in itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

31. Article 14 stipulates that if the parties conclude an agreement settling a dispute, the settlement agreement is binding and enforceable. The Model Law has left the enacting State the option of selecting the method of enforcing the settlement agreement. The footnote of this provision provides that the enacting State may consider making the enforcement procedure mandatory.

III. PREPERATION OF LEGISLATIVE GUIDELINES ON INSOLVENCY LAW

A. Background

32. 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.

33. 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. At that session the Commission had decided that given the consideration of this subject in other forums (like IMF, the World Bank and the International Bar Association), one session of the working group be held to ascertain what issues and the form the future work of UNCITRAL should assume.

34. Subsequently, the Working Group on Insolvency Law had held an exploratory session in Vienna from 6 to 17 December 1999 to consider the issues and the form of the

future work on the topic.[5] In line with the recommendation made by the Working Group, the Commission at it thirty-third session (2000) approved and authorized the Working Group to prepare:

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

35. In order to obtain the views and benefit from the expertise of other organizations working in this area (like IMF, Asian Development Bank, International Federation of Insolvency Professionals (INSOL), Committee of the Section of Business Law of the International Bar Association), the Commission decided that the Secretariat would organize a colloquium in cooperation with INSOL International and the International Bar Association (IBA)

36. Accordingly, the Commission at its thirty-fourth session (2001), had before it the report of the UNCITRAL – INSOL – IBA Global Insolvency Colloquium held at Vienna, from 4 to 6 December 2000. The Commission took note of the report of the Colloquium with satisfaction and discussed the recommendations, particularly with respect to the form that the future work might take and interpretation of the mandate given to the Working Group. Following its deliberations, the Commission confirmed that the mandate given to the Working Group at the thirty-third session of the Commission should be widely interpreted to ensure an appropriately flexible work product, which would take the form of legislative guide. Further the Commission suggested that the Working Group should bear in mind the need to be as specific as possible in developing the work.

37. The Working Group on Insolvency Law commenced the preparation of a legislative guide to insolvency law at its twenty-fourth session (2001) and continued its work at its twenty-fifth session and twenty-sixth session.

B. Working Group on Insolvency Law

38. The Working Group on Insolvency Law, it may be recalled, at its twenty-fourth session, held in New York from 23 July to 3 August 2001, had commenced consideration of the work with the first draft of the legislative guide on insolvency law, pursuant to the decisions taken by the Commission at its thirty-third (2000) and thirty-fourth sessions (2001).[6]

39. At that session, the Working Group commenced its work on draft legislative guide on insolvency law by inviting view on the statement of key objectives set forth in

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

[6] For the report of the session, see A/CN.9/504.

Part One and Core provisions of an effective and efficient insolvency regime set forth in Part Two.

40. The Working Group, at it twenty-fifth session held in Vienna from 3 to 14 December 2001, continued its work on the preparation of a legislative guide on insolvency law.[7] At this session the Working Group considered Part One (Key objectives of an effective and efficient insolvency regime) and the introduction to Part Two (Core Provisions of an effective and efficient insolvency system).

41. As regards the Key Objectives, it was suggested that key objectives would explain the reader of the draft Guide how policy decisions on various recommendations had been reached. Concerns were expressed regarding the tension between different objectives, which might render them inappropriate as currently drafted for use as benchmark. In this regard, it was suggested that the objectives be arranged in hierarchy, and that the ways of achieving a balance between them should be discussed. With respect to Introduction to Part Two, general support was expressed in favor of both informal (or out-of-court) and "hybrid" processes (i.e. processes which started as informal out-of-court negotiations and at some point of time become formal court-based proceedings). It was suggested that there is a need to develop a mechanism in insolvency law that gives necessary protection to enable the conversion of the informal out-of-court process to formal proceedings.

42. The Working Group further considered the remaining items in Part Two of the draft guide i.e. the application and commencement of the insolvency proceedings, consequences of commencement of insolvency proceedings, administration of proceedings, liquidation and distribution and reorganization plan. The Working Group reached no formal agreement on any item.

43. The Working Group, at it twenty-sixth session held in New York from 17 to 28 June 2002, continued its work on the preparation of a legislative guide on insolvency law.[8] The Working Group in this session once again undertook Part I (Key Objectives) and Part Two (Core Provision) for further deliberation and decision.

44. At this session the Working Group considered views and suggestions offered by the members on the structure of the insolvency regime, application and commencement of the insolvency proceedings, treatment of assets on commencement of proceedings, participants and institutions, management of proceedings and reorganization. Disagreements were expressed on the provisions relating to the protection of employees, the future inability of the debtor to pay its debts, assignment of contract, appointment of the insolvency representative and the treatment of creditor claims. There was a general agreement on the need to ensure a consistent approach by Working Group on Insolvency Law and Working Group on Security Interests with respect to the treatment of secured interest in insolvency proceedings.

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[7] For report, see A/CN.9/507.

[8] For report, see A/CN.9/511.

C. Consideration by the Commission at its present Session

45. The Commission at its current session took note with appreciation the reports of the Working Group on the work of its twenty-fourth,[9] twenty-fifth[10] and twenty-sixth[11] sessions and stressed the need for continued cooperation with intergovernmental and non-governmental organizations having expertise and interest in insolvency law.

46. While appreciating the Working Group on the progress accomplished for developing a legislative guide, the Commission emphasized the need for a consistent approach by Working Group on Insolvency Law and Working Group on Security Interests. In this connection, the Commission noted with satisfaction that the Working Groups have already coordinated their work and had agreed on principles for treating issues of common concerns.

IV. SECURITY INTERESTS

A. Background

47. 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.[12] 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.

48. Reflecting on the note of the Secretariat on security interests in its thirty-fourth session (2001),[13] the Commission felt that work should focus on security interests in goods involved in a commercial activity, including inventory. Agreement was also reached to exclude securities and intellectual property from its purview. 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.[14]

B. The Report of the Working Group on Security Interests

49. The Working Group on Security Interests held its first meeting in New York from 20 to 24 May 2002. The Working Group considered Chapter I to V and X of the draft

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9 A/CN.9/504
10 A/CN.9/507
11 A/CN.9/511
12 A/CN.9/475
13 A/CN.9/496
14 For the report of the colloquium, see A/CN.9/WG.VI/WP.3

Guide. A brief overview of the deliberations and decisions of the Working Group are set forth below.

50. The Working Group noted that the Commission, at its thirty-third session (2000), had received general support for the preparation of a legislative guide on secured transactions. It was felt that an effective transactions regime could have a positive impact on the availability of credit at affordable rates.

51. The Working Group further noted that the Commission, while responding to a question, had responded that the work of the Commission should be confined to preparing a guide on security interests with legislative recommendations, which would be more flexible and yet sufficiently useful text. It was also noted that, once the draft Guide had been completed, the Commission could consider the question of preparing a Model law.

(a) *Deliberations and decisions on Chapter I – Introduction*

52. Chapter I introduces the organization and scope of the Guide, terminology used and provides some examples of financing practices. The Working Group agreed that the scope of the regime envisaged in the draft Guide should be described more clearly. It was agreed that the works could first focus on goods. Diverse views were expressed on the question of inclusion or exclusion of consumer transaction from the purview of the Guide. It was observed that the result could be achieved by subjecting consumer transactions to the same rules applicable to commercial transactions, introducing exceptions only where necessary to protect rights of consumers under consumer protection law.

(b) *Deliberations and decisions on Chapter II – Key Objectives*

53. Chapter II highlights the main practical objectives of the legislative Guide. A number of suggestions were made regarding the type of objectives that has be included in the guide, starting from the protection of the interests of the creditor and debtor, balancing between the rights of the creditor and debtor and balance between the various objectives. The Working Group was not able to reach a decision on any point. On the understanding that it might have to revisit the key objectives in the context of its discussion of subsequent chapters, the Working Group requested the Secretariat to revise them taking in to account the suggestion and views expressed.

(c) *Deliberations and decisions on Chapter III – Basic approaches to security*

54. Chapter III provides a basic approach to security. It was stated that right at the beginning of this chapter an indication of the various approaches to the notion of security, the advantages and disadvantages of each approach and the policy options before legislators, should be made clear. This chapter covers aspects relating to:

- Pledge,

- Right of retention on of possession,
- Non-possessory security, security in intangibles,
- Transfer of titles,
- Retention of titles and
- Uniform comprehensive security.

55. The deliberation witnessed different views on the issues considered. After deliberating on the suggestions put forward by the members for consideration, the Working Group requested the Secretariat to revise Chapter III taking into account the views expressed and suggestion made.

(d) *Deliberations and decisions on Chapter IV - Creation*

56. The items considered under this chapter were on the accessory nature of security right, obligation to be secured, assets to be encumbered, proceeds, security agreement and other requirements for the creation of a security right. Though a number of suggestions were made on each of the items, only a few suggestions managed to get wide support. The Working Group noted that the recommendation under the subheading 'type of obligation that could be secured' and 'the assets that could be encumbered' did not deal with issues, such as limits on the amount of the secured obligation or all-assets security rights. It was also noted that the recommendation as to rights in identifiable proceeds reflected a principle of the UN Convention on the Assignment of Receivable in International Trade. On that understanding, these recommendations received wide support.

(e) *Deliberations and decisions on Chapter V - Publicity*

57. There was difference in view regarding the need for a publicity system for security rights in movable goods. One view was that such a publicity system was not necessary, while the prevailing view regarded it as very crucial element of any modern and efficient transaction regime. On the assumption that the publicity system would be part of the regime envisaged in the draft guide, the Working Group proceeded with the rest of the Chapter V.

58. On consensual vs. non-consensual security rights, it was noted that while the focus is on security rights created by agreement, it was intended to cover all potential priority conflicts, including conflict between consensual rights and rights created by law.

59. The Group further deliberated on single registry vs. multiple registries, notice vs. document filing, timing of registration, content of notice, coordination between general encumbrance and asset-specific title registries, registration and enforcement, debtor dispossession as a substitute for registration, third-party notice or control, third-party effect of unpublicized security rights and third-party effects of publicized security rights. Finally the Working Group confirmed the universality of the principle of publicity and decided to delete the second sentence of that paragraph.

(f) *Deliberations and decisions on Chapter X - Insolvency*

60. There was an agreement within the Working Group on the need to ensure cooperation with the Working Group on Insolvency law, with regard to the issues relating to the treatment of security rights in insolvency proceedings.

C. Commission's consideration of the topic at the present session

61. The Commission, at its current session commended the Secretariat for having prepared a first preliminary draft of a legislative guide on secured transaction. The Commission took not with appreciation to the Working Group for the progress of the work and in particular for having considered Chapter I through V and X of the draft Guide. The Commission noted with satisfaction the efforts undertaken by Working Group VI on Security Interest and Working Group V on Insolvency Law towards coordinating their work on a subject of common interests such as treatment of security interest in the case of insolvency proceedings. Stressing the need for coordination, the Commission requested the Secretariat to consider organizing a joint session of the two Working Groups in December 2002.

62. The Commission, after discussion, confirmed the mandate given to the Working Group at its thirty-fourth session to develop an effective legal regime for security interest in goods, including inventory.

V. TRANSPORT LAW

A. Background

64. The Commission, at its twenty-ninth session (1996), had considered a proposal to include in its work programme a review of current practices and laws in the area of international carriage of goods by sea, with a view to establishing uniform rules where no such rules existed and achieving greater uniformity in laws. Since then work has been carried out by the UNCITRAL Secretariat with the cooperation of other international organizations representing various industries.

65. At the thirty-first session (1998), the Commission heard a statement from International Maritime Committee (CMI) welcoming the invitation to cooperate with the UNCITRAL Secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information.

66. At the Commissions thirty-second session (1999), the CMI reported that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved.

67. At the thirty-third session held at New York (2000), the Commission heard the oral report of the Working Group established by the CMI. The same year a transport law colloquium was organized jointly by the Secretariat and the CMI.

68. 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. As to the mandate of the work, the Commission decided that considerations should cover initially port-to-port transport operations (including liability issues). However, the Working Group was given free hand to study the desirability and feasibility of dealing with door-to-door transport operations, or certain aspects of those operations. Depending on the result of the studies, the Working Group could recommend to the Commission an appropriate extension of its mandate. The mandate thus concerns the revision of maritime law and is limited to port-to-port operation.

B. Preparation of the Draft Instrument on Transport Law

69. The Working Group at its ninth session (2002) undertook a preliminary review of the provisions of the draft instrument on transport law.

70. There was general consensus within the Working Group on Transport law that the purpose of its work was to end the multiplicity of the regimes of liability applying to carriage of goods by sea and also to adjust maritime transport laws to better meet the needs and realities of international maritime transport practices. The Working Group commenced its work with a broad exchange of views regarding the general policy reflected in the draft instrument, rather than focusing initially on an article-by-article analysis. In particular, the group focused its discussion on:

- Sphere of application (draft article 3);
- Electronic communication (draft articles 2, 8 and 12);
- Liability of the carriage (draft articles 4, 5 and 6);
- Rights and obligations of the parties to the contract of carriage (draft articles 7, 9 and 10);
- Right of control (draft articles 11);
- Transfer of contractual rights (draft articles 12);
- Judicial exercise of those rights emanating from the contract (draft articles 13 and 14); and
- Freedom of contract (draft article 17)

71. With respect to ‘sphere of application’, the draft instrument will apply whenever a sea leg is involved. The instrument goes beyond maritime transport and port-to-port issues, it extents to include door-to-door issues. Diverse views were expressed regarding the possible application of the draft instrument to door-to-door transport. The Working Group adopted the view that it would be desirable to include with in its scope the door-to-door operations as well and requested the Commission to approve the approach suggested by the Working Group. With respect to the internationality of the carriage, support was

generally expressed to adopting the broadest possible sphere of application for the draft instrument.

72. As regards the 'electronic communications', there was considerable support in favor of the policy on which it is based. A number of suggestions were put forward for consideration as to the type of the regime that is needed. The Working Group took note of the various suggestions for continuation of the discussion at a later stage.

73. As regards the proposed 'liability' regime, it was generally agreed that draft articles pertaining to liability should be read together. The Working Group also deliberated on the liability of the carrier and the period of responsibility, mixed contracts of carriage and forwarding and obligations of the carrier. With respect to the exceptions to the liability, there was no consensus on whether the exceptions should be treated as exonerations from liability or whether they should be presumption only. Nor was consensus achieved as to the specific elements of the list of exceptions.

74. As regards the 'rights and obligations of the parties to the contract of carriage', it was pointed out that the overall aim of this provision is balanced rights and obligations as between the shipper and the carrier. The Working Group further deliberated a variety of issues including time for the payment of freight, exceptions to the payment obligation and the right to retention of the goods by the carrier until such payment has been received. At the end of the deliberation it was widely felt that there is a need of further discussion on all the provisions.

75. As regards the draft provision on 'right to control', the Working Group did not engage in detailed discussion, but expressed confidence that the draft article would constitute a good basis for continuation of the discussion at a future session.

76. As regards the 'judicial exercise of rights emanating from the contract of carriage and jurisdiction' several observations were made, including requests for need of clarification in the draft provisions. On the issue of jurisdiction, it was noted that the draft instrument did not deal with that issue. While some support was expressed for not including in the draft instrument such a provision on jurisdiction and arbitration, some viewed that it is indispensable. Though several suggestions were made in this regard, no conclusion was reached.

77. As regards the 'freedom of contracts', several different positions were taken on the question whether the draft instrument should cover charter parties and similar agreements. After discussion there was general agreement that charter parties and similar agreement such as slot-charter agreements and space-charter agreement should be excluded from the scope of the draft instrument.

C. Commission's consideration of the topic at the present session

78. At its current session, the Commission expressed appreciation for the work that had already been accomplished by the Working Group. The Commission had before it

the report of the ninth session of the Working Group on Transport Law, where the Working Group undertook a preliminary review of the provisions of the draft instrument on transport law. In that session, the Working Group had before it also the comments prepared by ECE and UNCTAD. Due to the absence of sufficient time, the Working Group did not complete its consideration of the draft instrument, which was left for finalization at its tenth session.

79. The Commission further noted the request of the Working Group to approve its approach of extending the scope of the draft instrument on transport law from port-to-port transport operation to door-to-door transport operations. Strong support was expressed within the Commission in favor of extending the scope of draft instrument. While no objection was raised against such an extended scope, it was generally agreed that, for continuation of its deliberation, the Working Group should seek participation from international organizations involved in land transportation.

80. The Commission, after discussion, approved the working assumption that the draft instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.

VI. BRIEF ACCOUNT ON OTHER TOPICS

A. Arbitration

81. On the subject of Arbitration, it may be recalled that the Commission, at its thirty-second session (1999), had a note entitled "Possible future work in the area of international commercial arbitration,"[15] 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 had decided that the priority items for the Working Group should be requirement of written form of the arbitration agreement, enforcement of interim measures of protection and possible enforcement of an award that had been set-aside in the State of Origin. The Working Group on Arbitration commenced its work at its thirty-second session in March 2000.

82. The Commission at its current session took note with appreciation the report of the Working Group at its thirty-sixth[16] session. The Working Group had at this session engaged in the task of requirement of the written form for the arbitration agreement and the issue of interim measures of protection. More specifically, the Working Group has considered the following:

(a) With regard to the requirement of written form for arbitration agreement, the Commission noted that the Working Group had considered the draft model

[15] A/CN.9/460
[16] For the report of the session, see A/CN.9/508

legislative provision revising article 7, paragraph (2) of the Model Law on Arbitration (A/CN.9/WG.11/WP.118, para. 9) and discussed a draft interpretative instrument regarding article 11 (2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As there was no consensus in the Working Group, the Commission considered that it might be desirable to postpone both the matter until its thirty-eight session in 2003.

(b) With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the Model Law (A/CN.9/WG.11/WP.119, para. 74) and the Secretariat has been requested to prepare revised draft provisions, which shall again be considered by the Working Group in future session.

B. Electronic Commerce

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

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

84. At its current session, the Commission took note with appreciation the report of the Working Group on the work done at its thirty-ninth session,[17] regarding the possible international instrument dealing with selected issues on electronic contracting. The Commission, took note of the different view that were expressed within the Working Group concerning the form and scope of its instrument, including proposals that the Working Group's, consideration should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. While reiterating the importance of the project, the Commission requested

[17] A/CN.9/509

the Working Group to devote most of its time at its fortieth session, in October 2002, to a substantive discussion of various issues relating to legal barriers to electronic commerce that has been raised in the Secretariat's initial survey (A/CN.9/WG.IV/WP.94). With respect to the issue of online dispute resolution (ODR), the Commission requested the Secretariat to closely monitor the work under way or currently been considered by other organization, with a view to developing suggestions for future work of UNCITRAL.

C. Privately Financed Infrastructure Projects

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

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

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

88. The Commission at its current session noted with appreciation the report of the Working Group in the work of its fourth session.[18] The Commission requested the Working Group to review the draft model legislative provisions with a view to complete its work at its fifth session, to enable their consideration for adoption by the Commission, as an addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, at its thirty-sixth session in 2003.

D. Enlargement of the Membership of the Commission

89. On the subject of Enlargement of the Membership of the Commission, the Commission took note of the General Assembly decision 56/422 of 12 December 2001, by which the General Assembly decided to defer consideration of the enlargement of the membership of the Commission to its fifty-seventh session.

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[18] A/CN.9/505

90. The general feeling in the Commission was that increase in membership would ensure that the Commission remained representative of all legal traditions and economic systems, assist better implementation of its mandate by drawing on a pool of experts from an increased number of countries and enhance the acceptability of its texts. As regards the enlarged membership, some preference was expressed for a total of 60 members, while reference was made also to 72 Member States. As to the distribution of seats among geographic groups, diverse views were expressed, such as equal and fair representation for regional groups, maintenance of the current proportion among regional groups etc. However, it was agreed that both matters should be left to the Sixth Committee.

C. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

A. INTRODUCTION

1. The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 to promote international cooperation in trade and development and the economic development of developing countries. It is composed of 187 member States. Its institutional set-up comprises the Conference, the Trade and Development Board (TDB) and a number of subsidiary bodies serviced by a permanent Secretariat.

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

B. AN OVERVIEW OF THE WORK OF THE UNCTAD'S COMMISSION.

3. It may be noted that the analytical work of the UNCTAD is largely carried out within the following three subsidiary bodies, viz;-

(a) Commission on Trade in Goods, Services, and Commodities;
(b) Commission on Investment, Technology and Related Financial Issues; and
(c) Commission on Enterprise, Business Facilitation and Development.

4. Besides the mandate conferred upon by the UNCTAD sessions, the work of the Commissions are directed towards examining trade issues that are of special concern to the developing and least-developed countries. In recent years, UNCTAD's work has been streamlined to address WTO related trade and developmental issues like: - capacity building; technical assistance, technology transfer, special and differential treatment, electronic commerce, and impact of WTO Agreements on the developmental requirements of developing countries. The work of the three Commissions is largely carried out in Expert Group Meetings convened to discuss topics identified by the Commission. The outcome of the Expert Group Meeting is in the form of the Chairpersons Summary, which is submitted to the respective Commissions. Upon receipt of this report, the Commission may determine on how to pursue the topic further.

A. COMMISSION ON TRADE IN GOODS AND SERVICES AND COMMODITIES

5. This part of the report aims at highlighting some of the activities carried out within the subsidiary bodies in the year 2002 that may be of interest to the AALCO Member States.

6. It may be recalled that the sixth session of the Commission was held from 4 to 8 February 2002. In pursuance of the mandate of that Session the following expert group meetings were held:

(a) Expert Meeting on Audiovisual Services: Improving Participation of Developing Countries.

7. The Expert Meeting on Audiovisual Services[19] held at Geneva from 13 to 15 November 2002, took the view that audiovisual services because of their important function as a vehicle for transmitting civilizational values, deserved a special place in the development of every country, regardless of its stage and level of economic development. The expert debate covered a range of issues including various aspects of sustainable development (e.g. cultural and social dimensions, economic performance conditions, technology and trade) as well as issues related to ongoing negotiations in various forums.

8. The Expert Meeting discussed the issues to strengthen the audiovisual services sector at the national level, particularly the challenges faced by developing countries in establishing an appropriate regulatory framework. Experts noted that there was particular difficulty in drawing the line between regulations aimed at protecting culture and those aimed at regulating trade flows. While protection as a legitimate objective of public policy was acknowledged, it was also felt that protection should not become regulation in the negative sense of unwarranted protectionism leading to the insulation of markets.

9. As regards international trade in audiovisual services, the experts recognized that export capacities in this sector relied on the domestic capacity to produce and the ability to obtain necessary financial resources as well as access to technology, distribution channels and information networks. While sensing the possibility that the majority of developing countries might have an inherent creative capacity and potential to export these services, the experts, identified issues such as vertical and horizontal integration of major suppliers; anti-competitive practices like dumping; and control of access to distribution channels as some factors restricting entry of developing countries into international markets.

10. Three approaches to addressing audiovisual services in the context of the ongoing GATS negotiations were discussed. Some experts expressed their unwillingness to address audiovisual services in the context of the GATS, especially in the absence of an international instrument on cultural diversity. Another approach, which took into account the sensitivities of this sector, considered that the GATS provided a sufficiently flexible framework for addressing these specificities. The last approach stressed the importance of bringing audiovisual services under the purview of the GATS by inviting countries to undertake specific commitments on a "standstill" basis. Concerns were expressed by experts regarding the impact of the standstill obligation on policy flexibility, especially in developing countries. Experts also underscored the inability of developing countries to

[19] Report of the Expert Meeting on Audiovisual Services, See TD/B/COM.1/56 and TD/B/COM.1/EM.20/3

take into account all the interrelated factors and assess the possible trade implications for their development in the sector concerned and in general.

11. The Expert Group Meeting recommended that UNESCO and UNCTAD work together *inter alia* in the following areas:-

(a) Jointly continuing to analyse the structure and behaviour of the markets for audiovisual services and their interface with culture, trade and development;
(b) Analyzing the opportunities provided to developing countries by regional and preferential trade arrangements for fostering their integration into the world markets for audiovisual services; and
(c) Working together to provide policy advice and technical assistance to developing countries in order to enhance audiovisual services infrastructures at the national level within the Global Alliance for Cultural Diversity in collaboration with other organizations.

12. UNCTAD was invited to continue working in potentially trade-related areas of audiovisual services, *inter alia:*

- Treatment of competition issues in general and in the context of specific areas of audiovisual services;
- The role of co-production and preferential trade agreements, including regional trade agreements;
- Identification of possible modalities and mechanisms for approaching liberalization of audiovisual services while addressing public policy and trade-related concerns; and
- Identifying ways of overcoming the challenges facing developing countries in their access to distribution channels and information networks, taking into consideration new market developments, technology and regulations.

(b) Expert Meeting on Environmental Requirements and International Trade

13. The Expert Meeting held at Geneva from 2 to 4 October 2002 considered possible policies and measures for assisting developing countries in enhancing their capacities to respond to environmental requirements and take advantage of new trading opportunities.

14. It may be recalled that the UNCTAD X Plan of Action called upon UNCTAD to examine "the potential trade and developmental effects and opportunities of environmental measures, taking into account the concerns of developing countries, particularly as regards potential effects on small and medium-sized enterprises (SMEs)"[20]

[20] UNCTAD X plan of Action, paragraph 147, fourth bullet. In addition, paragraph 146 (second bullet) calls for special attention to be paid to "enhancing understanding of the economic and social implications of trade measures for environmental purposes for countries at different levels of development,

The Doha Ministerial Declaration in paragraph 32(i), called upon the WTO Committee on Trade and Environment, to give particular attention to "the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them…". In addition, the preparatory process of UNCTAD XI is expected, among other things, to look at "the different elements that lead to the competitiveness of developing countries – market access and fair trade rules, technology, financing and investment, diversification and productive capacity – and how they all interact".[21]

15. Against this backdrop, the background note titled "Environmental Requirements and International Trade"[22] prepared by the UNCTAD Secretariat for facilitating the deliberations of the Expert Group Meeting examines trade and development effects of environmental requirements on developing countries, paying special attention to the conditions and needs of small and medium-sized enterprises. This report also examines market access and competitiveness issues, potential trading opportunities for products from developing countries and developmental effects. Furthermore, the report looks into some relevant issues of key concern to developing countries in the WTO Doha work programme and proposes to link discussions with the preparatory process for UNCTAD XI.

16. The Report of the Expert Group Meeting is not available with the AALCO Secretariat at the time of writing. Hence the Secretariat is not in a position to offer any details on its outcome.

(c) Expert Meeting on Diversification of Production and Exports in Commodity – Dependent Developing Countries, including Single Commodity Exporters, for Industrialization and Development, taking into account the Special Needs of LDCs.

17. The Expert Meeting[23] held at Geneva from 26 to 28 June 2002 stressed the need for commodity – dependent developing countries (CDDCs) to use the commodity sector as the basis for their development and to diversify their production and export of commodities into areas where they possess comparative advantages and can develop competitive ones.

18. The Experts agreed that some CDDCs, after implementing extensive market and institutional reforms, have found that their expectations that the liberalized trading system would bring greater benefits have not been fully realized. Though the WTO Agreements pose serious challenges, in the opinion of the Experts they also offer CDDC's

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including the effects of environmental requirements on developing countries exports". TD/386, 18 February 2000.

[21] Statement by Mr. Rubens Ricupero to the Commission on Trade in Goods and Services, and Commodities at its sixth session .http://www.unctad.org/sg/statements.en.htm.

[22] TD/B/COM.1/EM.19/2.

[23] Report of the Expert Meeting, See TD/B/COM.1/50 and TD/B/COM.1/EM.18/3

opportunities to diversify out of traditional commodities into dynamic, non-traditional ones as well as the manufacturing and services sectors.

19. To enable this, the Experts reviewed various aspects of CDDC practices and the following are *inter alia*, some of the observations made at the meeting:-

- As regards local markets, the experiences in several CDDCs show that the combination of "traditional" indigenous technology and modern management can lead to success.
- To address the oversupply problems faced by several commodities, measures were suggested to prevent low-quality goods from entering the market.
- With a view to overcome problems of market access and entry, it was felt that networking and action in groups for information sharing and cooperation in design, production, marketing and provision of after-sales services could play a vital role.
- Diversification strategies must be country – specific.
- Quality improvement to meet competition in international markets; and maximum utilization of by – products leading to efficient use of commodities was also suggested.
- Experts underscored the usefulness of regional standards tailored to local specificities (e.g. a tropical climate). However, these regional standards should be benchmarked to international ones to avoid regional isolation.
- An assessment of the impact of preferential treatment for exports was suggested.
- There was a need to look at alternative means of financing diversification programmes by using, for example, special development funds, joint venture capital or partners, revolving funds and schemes.

20. The outcome of these Expert Meetings would be submitted for the consideration of the Seventh Session of the Commission on Trade in Goods and Services and Commodities to be held from 3 to 6 February 2003.

B. COMMISSION ON INVESTMENT, TECHNOLOGY AND RELATED FINANCIAL ISSUES

21. Pursuant to the decision of the Commission taken at its Sixth Session held in January 2002, the following Expert Group Meetings were held.

(a) Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Most Economies, Taking into Account the Trade/Investment Interface, in the National and International Context.

22. The Meeting focused on three main areas; the role of host country policy measures; the role of home country measures; and the right to regulate and safeguards.[24]

23. Experts noted that though inflows of foreign direct investment (FDI) would bring important benefits to the recipient economies, such benefits were not automatic. Some experts even suggested that FDI could have negative effects in such areas as market structure and balance of payments, and could lead to crowding out of domestic enterprises, as well as other social impacts.

24. As regards host country measures, special attention was given to discussing the role of 'incentives' and 'performance requirements'. Experts noted that incidence of performance requirements in both developed and developing countries had declined over time for various reasons and were replaced by anti-dumping and countervailing measures and strategic trade and investment policies.

25. On the issue of home country measures (HCMs) experts noted that this was an often overlooked aspect of FDI's triangular relationship, which involved TNCs, host countries and home countries. More analysis of how HCMs at the national regional and multilateral levels complemented or disrupted one another was called for.

26. In the context of the balance between investors' rights and obligations in international investment and addressing issues related to corporate social responsibility (CSR), the need to distinguish between binding rules and voluntary codes was emphasized.

27. On the right to regulate, the Meeting reviewed different concepts and interpretations in the context of liberalization and globalization. Experts reviewed the various ways in which the issue of the right to regulate had been addressed so far both in the trade area (especially in agreements such as the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT)) and in the investment context, particularly in bilateral investment treaties and in regional agreements such as the North American Free Trade Agreement (NAFTA). Experts agreed that in view of the difference between the impact of investment and that of trade, it was not always possible to transpose concepts and provisions that had been developed in the area of trade to the broader area of investment. In particular, the determination of development priorities should be left to host countries themselves, and the right balance should be struck between protection of investors and promotion of development. Standards for treatment of investors should be applied in such a way as to provide enough policy space for host Governments. In this regard, some experts recommended that consideration be given to the application of exceptions to take into account development concerns and to the adoption of safeguards in case of injury to the domestic enterprise sector (e.g. crowding out, balance-of-payments considerations and modifications of concessions.

[24] Report of the Expert Meeting, See TD/B/COM.2/48 and TD/B/COM.2/EM.12/3

(b) **Expert Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-term Cross Border Investment, particularly Foreign Direct Investment.**

28. The Expert Meeting held at Geneva from 12 to 14 June 2002[25] was structured in accordance with the following three themes:

(a) Common elements in bilateral investment treaties and regional integration agreements;
(b) Different elements in bilateral investment treaties and regional integration agreements; and
(c) Issues related to the development dimension.

29. While formulating international investment agreements (IIAs), the Expert Meeting felt that *inter alia* the following development–related consideration could be borne in mind.

- Every treaty provision could reflect development concerns, be tailored to the needs of the participating parties, and in particular reflect the asymmetries between countries.
- Flexible considerations, and means to address development as enumerated hereunder are important: positive – or negative – list approaches; reservations, exceptions, temporary derogations, transitional arrangements, institutional monitoring mechanisms and peer – review processes.
- Of particular importance is the principle of special and differential treatment and its possible applicability to IIAs through, for example:

  (i) Scope and definition, and possible exclusions from coverage based on the size of the economies involved and other economic considerations;
  (ii) Treatment, and possible exemptions for countries based on the regional economic integration organization (REIO) principle and economic considerations;
  (iii) The permitted use of performance requirements insofar as they are compatible with existing WTO rules;
  (iv) General exceptions in the light of national development objectives, especially for small and medium-sized enterprises;
  (v) Dispute settlement provisions that allow States access to technical assistance to pursue cases, and special funds to finance the legal costs incurred by States in that connection;
  (vi) Coupling of regulations with technical assistance means to achieve standards;

30. In addition, the following salient points were discussed:

[25] Report of the Expert Meeting, See TD/B/COM.2/41 and TD/B/COM.2/EM.11/3

(a) Treaties' possible reflection of sovereign rights to regulate entry and establishment and their relationship to market access and establishment issues;
(b) Treaties possible reflection of the potential tension between liberalization goals and protectionist tendencies;
(c) The relationship between the legal and economic interpretation of issues as a guide to the formulation of specific treaty provisions;
(d) The broader issue of what constitutes development in the context of liberalization in general, and IIAs in particular;
(e) The need to see IIA treaty-making also in the broader context of the evolution of the international economic system, and in particular the problems posed by the heavy debt burden of a number of developing countries, the continuous need for official development assistance and the international financial system.

(c) Intergovernmental Group of Experts on Competition Law and Policy.

31. The Intergovernmental Group of Experts which met at Geneva from 3 to 5 July 2002, agreed on the following conclusions.[26]

32. The Intergovernmental Group requested the UNCTAD Secretariat to prepare, for the fifth session of the Intergovernmental Group of Experts, studies on the implications of closer multilateral cooperation in competition policy for developing and least developed countries' development objectives, in particular:

(a) A report on ways in which possible international agreements on competition might apply to developing countries, including through preferential or differential treatment, with a view to enabling them to introduce and enforce competition law and policy; and
(b) A study of the roles of possible dispute mediation mechanisms and alternative arrangements, including voluntary peer reviews, in competition law and policy;

33. It recommended that the Intergovernmental Group of Experts consider in its consultations at its session in 2003 the following issues for better implementation of the Set:

(a) The interface between competition policy and industrial policy; and
(b) The optional design and implementation of competition law in developing countries, including the desirability of a phased approach.

[26] See Report of the Intergovernmental Working Group of Experts on Competition Law and Policy, TD/B/COM.2/42 and TD/B/COM.2/CLP/32

C. COMMISSION ON ENTERPRISES, BUSINESS FACILITATION AND DEVELOPMENT

34. Pursuant to the mandate of the Commission's sixth session held in February 2002, the following expert group meetings were organized during the year 2002.

(a) Expert Meeting on improving the Competitiveness of SMEs through Enhancing Productive Capacity: Financing Technology.

35. The Expert Meeting was convened in Geneva from 28 to 30 October 2002. Technology development is a critical determinate of the ability of developing country enterprises to compete in global markets. The ability to acquire and master technology and/or innovate requires not only information and a pool of skilled labour but also financing. The Doha Declaration calls for "positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic Development".

36. Against this backdrop, a note titled "Financing Technology for SMEs"[27] prepared by the UNCTAD Secretariat examines the various programmes in the private and public sectors that are being used to finance technology. The main private-sector sources are special bank loans, leasing and venture capital. However, the requirements for developing venture capital markets are quite stringent. Therefore, government incentives may be needed. The main rationale for public or government-supported measures for financing technology is to remedy various market failures faced by SMEs. Whenever governments provide financial or fiscal relief, they should try to ensure that the benefits to the recipient are linked to performance.

37. The background note *inter alia* raises the following issues for consideration by the Expert Group Meeting.

38. The outcome of the Expert Meeting is not included here due to the non-availability of the Report.

(b) Expert Meeting on Electronic Commerce: Strategies for Development

39. The Expert Meeting held at Geneva from 10 to 12 July 2002 discussed national experiences of both developed and developing countries and identified key elements of participatory, comprehensive national e-commerce strategies, their implementation and the impact on developing countries.[28]

40. Experts noted that many developing countries are only beginning to tap the great potential benefits offered by e-commerce and information and communication technology (ICT). While stressing the need for concerted policy actions, the experts felt

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[27] TD/B/COM.3/EM.16/2

[28] Report of the Expert Meeting, TD/B/COM.3/47 and TD/B/COM.3/EM.15/3

that no single set of e-strategies could fit the conditions and requirements of all developing countries.

41. While highlighting the importance of a liberalized economic environment and the need to involve all stakeholders in e-strategies, the Meeting offered the following observations as regards the legal and regulatory aspects of e-strategies.

- Legislation should aim at providing legal security and predictability and ensure that online transactions are legally valid, binding and enforceable.
- Experts emphasized that while States consider their own special needs when adopting new e-commerce legislation, they should take into consideration the international character of e-commerce and the desirability of regional harmonization and compatibility of regulations.
- Experts identified a number of legal issues such as alternative/online dispute resolution, electronic contracting, consumer protection, privacy and data protection, cyber-crime, taxation, customs, jurisdiction, import and distribution, and IPRs including digital rights management.
- Need to achieve harmonization in areas such as taxation, customs duties, data privacy and security was noted.
- Recognizing the importance of electronic signatures to ensure authentication of electronic communications, experts stressed the need for establishing the requisite national legal frameworks.
- Media neutrality was seen as an important principle to be considered by Governments when enacting legislation.

(c) Expert Meeting on Efficient Transport and Trade Facilitation to Improve Participation by Developing Countries in International Trade

42. The Expert Meeting was held at Geneva from 25 to 27 November 2002.

43. The UNCTAD Secretariat's note prepared for this meeting titled "Problems of and Potential for the Application of Current Trade Facilitation Measures" reviews the implementation issues involved in trade facilitation and development dimension issues.[29]

44. Trade facilitation is most often thought of as a simplification or streamling exercise that involves applying standards to procedural requirements of trade monitoring institutions, rather than as an environment building activity designed to help participants in trade and transport operations find solutions that benefit all stake-holders and lay the ground work for long-term growth in trade. The second definition has to do with the development dimension of trade facilitation.

45. As regards the legal framework for multimodel transport, experts recognized that shippers and consignees are often interested in dealing with one party (i.e. the multimodel

[29] TD/B/COM.3/EM.17/2

transport operator) which arranges for the transportation of goods from door-to-door and assumes contractual responsibility throughout.

46. In spite of various attempts to establish a uniform international regime governing liability arising from multimodal transportation, to date no such regime has been established. Thus, the current legal framework consists of a mix of international conventions designed to regulate unimodal carriage (sea, road, rail and air); diverse regional, sub-regional and national laws; and standard term contracts. Therefore, the UNCTAD Secretariat is now conducting a feasibility study to determine whether an international instrument governing liability arising from multimodal transport would be desirable, acceptable and practicable.

D. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

A. UNIDROIT: AN INTRODUCTION

1. The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organization with its seat in Rome. Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. Its purpose is to study needs and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States.

2. Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT has an essentially three-tiered structure, made up of:

- The General Assembly – which is the ultimate decision-making organ of UNIDROIT is made up of one representative from each Member Government. It approves the Work Programme every three years.
- The Governing Council – supervises all policy aspects of the means by which the Institute's statutory objectives are to be attained. It is made up of one *ex-officio*
- Member, the President of the Institute (who is appointed by the Italian Government), and 25 elected members (elected for a period of 5 years).
- The Secretariat – headed by a Secretary-General who is appointed by the Governing Council on the nomination of the President of the Institute.

3. 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 (traditionally chaired by a member of the Council) for the preparation of a preliminary draft convention or such other alternative like model laws, legal guides, etc. A preliminary draft instrument established by a study Group will be laid before the Governing Council for approval and advice as to the most appropriate steps to be taken. 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.

4. UNIDROIT has over the years prepared over 70 studies and drafts. Many of these have resulted in *inter alia*, the following international instruments adopted at

diplomatic conferences convened by Member States of UNIDROIT: 1964 Convention Relating to a Uniform Law on the International Sale of Goods; 1970 International Convention on the Travel Contract, 1988 UNIDROIT Convention on International Financial Leasing; 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; and 2001 Convention on International Interests in Mobile Equipment. In addition, UNIDROIT has published: Principles of International Commercial Contracts (1994); and Guide to International Master Franchise Agreements (1998).

B. UNIDROIT WORK PROGRAMME FOR THE 2002-2004 TRIENNIUM

5. The 2002-2004 Triennium Work Programme as approved by the UNIDROIT General Assembly, December 2001 is as follows:

(a) International interests in mobile equipment.
(b) Principles of international commercial contracts
(c) Fravichising
(d) Principles and rules of transnational civil procedure.
(e) Transactions on transnational
(f) Model Law on Secured Transactions;
(g) Model Law on Leasing; and
(h) Uniform rules applicable to transport

6. At its 80th session (2001) the Governing Council approved the inclusion of the following three items on a reserve list, with a view to future work, provided that external human and financial resources could be found to deal with them:

(i) Liability of the manufacturer within an international context;
(ii) Hotel contracts; and
(iii) Uniform clauses in consumer contracts between enterprises.

C. AN OVERVIEW OF UNIDROIT'S ACTIVITIES RELATED TO ITS CURRENT WORK PROGRAMME

(a) International Interests in Mobile Equipment

7. 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 at a diplomatic Conference, held in Cape Town, South Africa. 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 embrance not only classic security interests but also what is increasingly recognised as their functional equivalent namely the lessor's interest under a leasing agreement. The efficacy of the international interest is conditional upon its registration in an International Registry to be established under the Convention. The latter is intended to be supplemented by separate Protocols for each of the different categories of equipment encompassed by its sphere of application, the first of which is the Aircraft Protocol. Each

Protocol is intended to contain those equipment-specific rules necessary to adapt the rules of the Convention to fit the special pattern of financing in respect of the relevant category

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

9. A preliminary draft Protocol on Matters specific to Railway Rolling Stock is under consideration by a Committee of Governmental Experts, under the joint auspices of UNIDROIT and Intergovernmental Organization for International Carriage by Rail (OTIF). Two sessions of the Committee of Governmental Experts have met so far, and the third session will be held in Berne from 5 to 13 May 2003.

10. A preliminary draft Protocol on Matters specific to Space Property was submitted to the UNIDROIT's Governing Council. The Council, in September 2001, approved the transmission of the preliminary draft to Governments. The draft Protocol would be considered by the first revision of a UNIDROIT Committee of Governmental Experts expected to be convened in Rome in or about April 2003.

(b) Principles of International Commercial Contracts

11. Following the great success met by the UNIDROIT Principles of International Commercial Contracts in both contract and arbitration practice since their publication in 1994,the Governing Council in1997 decided to reconvene a working group for the preparation of Part II covering a number of additional topics which had not been dealt with in the first edition. So far the Working Group has held five sessions. The new chapters on Authority of Agents (Rapporteur: M.J.Bonell), Limitation Periods (Rapporteur: P. Schlechtriem), Assignment of Rights, Transfer of Obligations and Assignment of Contracts (Rapporteur: M. Fontaine), Set-off (Rapporteur: C.Jauffret-Spinosi), and Third Party Rights (Rapporteur: M. Furmston) are in an advanced stage of preparation and expected to be finalized with respect to both the black letter rules and comments in2003.

(c) Franchising

12. Following the publication of the *Guide to International Master Franchise Arrangements,* the Governing Council decided in1998 that the franchising Study Group commerce work on the preparation of a draft model law on disclosure in franchising. This draft was finalized by the Study Group in 2000 and was submitted for consideration by a Committee of governmental experts, which finalized its work in April 2002. The draft will be examined by the Governing Council in September 2002.

(d) Principles and rules of transnational civil procedure

13. The decision to include this item in the Work Programme was taken pursuant to a proposal by the American Law Institute (ALI) to prepare uniform rules of procedure (including, if appropriate, provisional measures) applicable to transnational disputes once

the question of jurisdiction has been settled but before the question of recognition and enforcement of the judgment arises. After a feasibility study prepared by Professor R. Sturner, the Governing Council at its 78th session in1999 decided to set up a joint ALI/UNIDROIT Study Group for the preparation of Principles and Rules of Transnational Civil Procedure. The Group, chaired by Professor R.T. Nhlapo, Member of the Governing Council, and with Professors G. Hazard Jr. and R. Sturner appointed as Co-rapporteurs, has held three sessions. Work is expected to be finished by 2004.

(e) Transactions on transnational and connected capital markets

14. The Governing Council of UNIDROIT, at its 80th session (2001), decided to include a project under the above mentioned preliminary title in the Work programme. Five topics had attracted the widest degree of support. (1) The creation of clear and consistent rules for the taking of securities, especially securities held indirectly through intermediaries in multi-tier holding patterns and evidenced by book entries in the investor's account, as collateral. (2) The creation of standardized "global shares" permitting trade of such shares on more than one (national) stock exchange so as to make foreign capital markets accessible to a wider range of companies with limited means to create genuinely global shares on a case-by-case basis. (3) The development of rules capable of enhancing trading on emerging markets. (4) The development of harmonized or uniform substantive rules applicable to so-called "delocalised" transactions. Such delocalisation may be the consequence of mergers between markets located in different jurisdictions or it may be technologically induced where :Electronic Communications Networks" (ECNs) are used for trading and even initial public offerings of securities. (5) The examination of the desirability and feasibility of rules for world-wide takeover bids. The Secretariat was authorized to set up one or more Study Group(s) depending on the availability of resources. A restricted Study Group on item (1) held its first session in Rome on 9 to 13 September 2002.

(f) Model Law on Secured Transactions

15. The Governing Council of UNIDROIT, at its 72nd session(1993) in response to a reference from the Study Group for the preparation of uniform rules on certain international aspects of security interests in mobile equipment voted the inclusion in the Institute's Work Programme of the preparation of a model law on secured transactions. Preliminary work was carried out by a Restricted Working Group, the members and chairman of which were co-opted from the Sub-committee responsible for the preparation of a first draft of uniform rules on certain international aspects of security interests in mobile equipment. Work on the model law has been temporarily suspended but will be resumed as soon as possible after adoption of the draft Convention on International Interests in Mobile Equipment.

(g) Model Law on Leasing

16. The Governing Council of UNIDROIT at its 78th session (1998) voted the inclusion in the Institute's Work Programme of the preparation of a model law on

leasing, drawing on the expertise already gained by UNIDROIT in this field (the 1988 UNIDROIT Convention on international leasing is currently in force between eight States), with a view to formulating a coherent response to the requirements of those developing countries and countries in economic transition currently engaged upon the reform of their domestic leasing laws with the assistance of both regional and universal development banks.

E. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

I. HAGUE CONFERENCE: AN INTRODUCTION

1. The Hague Conference on Private International Law (hereafter 'Conference') is an intergovernmental organization, the purpose of which is to work for the progressive unification of the rules of private international law. Though the first session of the Hague Conference was convened in 1893, it was only since 1955 that the Hague Conference became a permanent intergovernmental organization. Plenary sessions meet in every four years. The activities of the Permanent Bureau – which is headed by a Secretary-General and has its seat at the Hague, Netherlands.

2. 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 (international judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; recognition of companies; jurisdiction and enforcement of foreign judgments). 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.

3. From 1951 to 1999,the Conference adopted 34 international conventions. Some of the important ones having a bearing on commercial transaction between States include: the Convention on Civil Procedure, Service of Process and Taking of Evidence Abroad, the Convention Abolishing the Required of Legislation for Foreign Public Documents, Convention on the Conflict of Laws Relating to Testamentary Dispositions, Convention dealing with maintenance obligations, the Convention on the Recognition of Divorces and Legal Separations and the Convention on the Protection of Minors Convention on Civil Aspects of Child Abduction and inter-country adoption.

II. WORK PROGRAMME (1996-2002)

4. The work programme for the period 1996-2002 includes issues relating to:

- Jurisdiction and foreign judgments in civil and commercial matters:
- Indirectly held securities;
- Electronic commerce;
- General Affairs and Policy of the Conference;
- 1980 Hague Child Abduction Convention;
- 1993 Hague Inter- country Adoption Convention;
- 1956/58 and 1973 Hague Maintenance Obligations Conventions and New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance.

5. The following pages seek to provide an overview of the activities of the Hague Conference during the year 2002.

(a) Hague Convention on the Law Applicable to certain Rights in Respect of Securities Held with an intermediary

6. On 13 December 2002, the Hague Convention on the Law Applicable to Certain Rights in respect of securities held with an Intermediary (hereinafter "Hague Securities Convention") was adopted and is now open for signature and ratification by the 62 Member States of the Hague Conference, as well as by all other States. For the financial markets, the exposures involved in cross-border securities transactions are extremely large – with securities worth hundreds of billions of dollars, Euros and Yen provided cross-border every day as collateral all around the globe. The new Hague Securities Convention resolves this conflict of laws issue on a global level and makes clear what steps need to be taken in order to assure in advance what law governs securities transaction to the benefit of market participants and the financial system as a whole.

7. The Convention consists of 24 articles placed under the following heads

Chapter – I.	Definitions and Scope of Application
Chapter – II	Determination of the Applicable Law
Chapter – III	General Provisions
Chapter – IV	Transitional Provisions
Chapter – V	Final clauses

8. The Convention defines "security" as any shares, bonds or other financial instruments or assets (other then cash), or any interest therein. An "intermediary" means a person that in the course of a business or other regular activity maintains securities accounts for other or both for others and its own account and is acting in that capacity.

9. It may be noted that collateral providers are able to reduce borrowing costs if collateral takers are willing to accept securities held by the collateral provider as collateral. Collateral takers, however, need to be certain that they have an interest in the securities that is enforceable both against the collateral provider and against third parties. Today, in many jurisdictions, existing conflict of laws rules with respect to proprietary issues, such as perfection and priorities of competing securities interests, are by no means clear. In fact, in some jurisdictions multiple answers are possible resulting in a collateral taker-s need to perfect in a number of jurisdictions.

10. The traditional conflict of laws rule for determining the enforceability of a transfer of pledge of securities is based on the *lex rei sitae* principle. Under this principle, the validity of the disposition is determined by the law of the place where the securities are located. However, there are severe conceptual legal and practical difficulties potentially arising from the application of this approach in the modern context of indirect holding patterns for securities. For example, a holding through various tiers of

intermediaries may not enable the collateral taker to discover where the national central securities depositary actually stores the certificates, if any exist.

11. The approach adopted The Hague Convention is modeled on the "Place of the Relevant Intermediary Approach" ("PRIMA"). The major advantages of PRIMA are that the rule provides a clear and certain answer to the parties to the securities at the time they enter into the securities transaction and that the question of whether the collateral taker receives a perfected interest will be governed by the law of one single jurisdiction even where a portfolio of securities of issuers from different countries is involved.

12. The main issue during the negotiations was to determine how to substantiate the PRIMA principle. Today, most intermediaries do not restrict the maintenance of their securities accounts at a single office. The maintenance of the accounts is dispersed among numerous offices which are located in different States. Against this background, the Hague Securities Convention does not attempt to "localize" the place of the relevant intermediary and instead refers directly to the law chosen by the parties to the account agreement.

13. The first step is to look to the law expressly agreed between the account holder and its direct intermediary to govern the securities account in their account agreement as the determining factor. The choice of law, however, is constrained in that the intermediary must have an office in the chosen state that regularly maintains securities accounts.

14. If the account agreement does not contain such a choice of law clause, but expressly and unambiguously states that the relevant intermediary entered into the account agreement through a particular office, the applicable law is the law of the location of such office, again, provided that if regularly maintains securities accounts.

15. If this test also provides no answer, the Convention looks, as the ultimate fallback, to the law of the place of incorporation or organization of the relevant intermediary.

16. In addition, transitional rules make sure that the Convention determines an appropriate regime for existing securities accounts and transactions so that the current expectations of parties are respected.

17. Finally, in an insolvency procedure, an interest perfected in accordance with the law applicable under the Convention is recognized but is still subject to the forum's insolvency law, such as preference and avoidance rules. Thus, to a large extent, the Convention respects a country's insolvency regime.

(b) Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

18. It may be recalled that the Eighteenth session of the Hague Conference held in October 1996 unanimously decided to include the topic in the agenda with a view to

negotiate a convention. A preliminary draft Convention on the topic was adopted by a Special Commission in October 1999.

19. Part One of the Nineteenth Diplomatic Session held in June 2001 drew up a new version of this interim text. Delegates at this session confirmed their dedication to this project in principle, and decided that Commission I (Commission on General Affairs and Policy) should meet in early 2002 to thoroughly examine the nature and state of the conditions for a successful conclusion of the negotiations.

20. At the meeting of the Commission on General Affairs and Policy held on 22-24 April 2002, it was agreed that the best path forward on the Judgments Project at this point would be to have the Secretariat convene an informal working group and facilitate and conduct a transparent and flexible working process with a view to preparing a text to be submitted to a Special Commission during the first half of 2003. The Special Commission would then be followed by a Diplomatic Conference which would be held, if possible, by the end of 2003. Based on a paper to be prepared by the Permanent Bureau, the starting point for this informal process will be a discussion of a core area of possible grounds of jurisdiction as tentatively identified by the Commission, as well as the existing provisions on recognition and enforcement upon which there is broad agreement. This core area might include choice of court agreements, defendant's forum, counter-claims, branches, submission, trusts and physical injury torts.

21. Accordingly, the first meeting of the informal Working Group was held on 22-25 October 2002. Preliminary Document No.19 titled "Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters" was prepared by the Permanent Bureau and served as a basis for discussion.

22. In accordance with the direction provided by Commission I, the Group discussed the desirability of trying to achieve a single text for referral to a Special Commission, with the belief that a unified endorsement from the group would provide the most effective guidance for government delegations. The work of the group follows a "bottom-up" working method. The first meeting focused on exclusive choice of court clauses in business-to-business (B2B) cases. Possible convention requirements on formal and substantive validity of such clauses were discussed, as well as the possible scope of a rule on choice of court clauses, the relationship with other Conventions, bilateralisation and the applicability or non-applicability of national and/or Convention rules on *lis pendens and forum non conveniens*, the problem of personal versus subject matter jurisdiction and the question of interim relief.[30]

23. The Group agreed that two or three more meetings would probably be necessary: The next meeting of the informal group is scheduled for 6-9 January 2003.

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[30] See Preliminary Document No.20 – Report on the First Meeting of the Informal Working Group on the Judgments Project, October 22-25, 2002.